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PROTHONOTARY'S OFFICE

James J. McNulty  
Acting Prothonotary  
PA Public Utility Commission  
P.O. Box 3265  
North Office Building  
Harrisburg, PA 17105-3265

Re: Application of Consolidated Rail Corporation, Docket No.  
A-00111016

Dear Acting Prothonotary McNulty:

Please find attached an original and nine (9) copies of the Main Brief for filing on behalf of the County of Lancaster in the above captioned proceeding. As indicated by the attached Certificate of Service, the presiding Administrative Law Judge and all parties of record have been served a copy hereof. Per the request of the presiding officer, a copy of this Main Brief on a diskette, WP 5.1, has been provided with his hard copy of this Main Brief.

Should you have any questions or comments, please feel free to contact my office.

Sincerely,

STEVENS & LEE

*Kenneth Zielonis*

Kenneth Zielonis

BTL

/dle

Attachments

cc: The Honorable Terry Kauffman  
Chairman, Lancaster County Commissioners

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Board of Supervisors of Bart :  
Township v. Consolidated Rail :  
Corporation, Pennsylvania : Docket No. C-00913256  
Department of Transportation :  
and County of Lancaster, et. al. :

Application of Consolidated :  
Rail Corporation for the :  
Abolition of 31 Crossings of : Docket No. A-00111016  
the Enola Branch, Harrisburg :  
Division, Lancaster County :

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MAIN BRIEF OF  
THE COUNTY OF LANCASTER

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I. STATEMENT OF THE CASE

On or about September 29, 1993, the Consolidated Rail Corporation, ("Conrail"), filed an Application to abolish thrity-one (31) grade crossings along its Enola Low Grade Line. On May 2, 1994, the Friends of the Atglen-Susquehanna Trail, Inc., ("FAST"), filed a Petition to Intervene. Subsequently, the various municipalities along the Enola Low Grade Line filed Comments stating their respective position regarding this Line.

By an Opinion and Order entered August 31, 1994, FAST's Petition to Intervene was granted. A Prehearing Conference was held on April 12, 1995. A further Prehearing Conference was held on June 14, 1995. A telephone Prehearing Conference was held August 29, 1995. Subsequently, both FAST and Conrail requested alternative dispute resolution of the matter. The parties engaged in unsuccessful mediation discussions.

At the end of mediation, the parties filed written direct testimony in support of their respective positions. Several of the parties continued negotiation discussions which ultimately produced two Stipulations in Settlement for presentation to the presiding Administrative Law Judge, ("ALJ").

On April 4, 1997, the Historic Preservation Trust, ("Trust"), of Lancaster filed a Petition to Intervene. The Trust was granted limited intervention status by ALJ. Interim Order No. 7. One week

prior to hearings in the matter, FAST filed a Motion for Continuance of hearings scheduled for June 11 & 12, 1997. The Motion was denied and the hearings went forth as scheduled.

The record is now closed and consists of various prepared written direct testimony of the parties and a transcript in excess of 1000 pages. The ALJ has directed that the parties file only a Main Brief by close of business June 24, 1997. Lancaster County submits this Main Brief in accordance with that directive.

## II. SUMMARY OF ARGUMENT

This Commission actively encourages settlements. It now has before it two Stipulations in Settlement that are supported by all parties except FAST and the Trust. The Stipulation disposes of all crossing structures by either mandating their removal by a date certain or by abolition in place with permanent maintenance assigned to a municipal entity. The record evidence supports bridge removal for safety reasons. Bridge removal in and of itself does not destroy the potential for creation of a future recreational trail. Indeed, Lancaster County, ("County"), has gone on record in the proceeding as strongly supporting the creation of such a trail along the Enola Low Grade Line.

The requirements of the Natural Historic Preservation Act, ("NHPA"), and the Pennsylvania History Code have been met in this proceeding. In this particular proceeding, the NHPA required the Pennsylvania Historic and Museum Commission, ("PHMC"), to consult with Conrail and the ICC. That consultation has taken place. The ICC did consider the historic significance of the Enola Low Grade Line when it unconditionally permitted Conrail to abandon this Line. Finally, the Pennsylvania History Code requires the PHMC to consult with state agencies regarding historic structures. FAST Witness Barrett provided substantial testimony regarding the historic significance of the Enola Low Grade Line. This testimony can be considered by the Commission in its deliberations. It should be emphasized that neither the NHPA nor the Pennsylvania

History Code mandate or require the Commission to prohibit bridge removal simply because that action will affect a historic structure.

Likewise, the Rails-to-Trails Act does not require a particular result. Nor does it prohibit bridge removal on a permanent basis. This Commission's ultimate statutory duty is to promote the safety of the public even where future trail development is possible. There exists substantial record evidence to conclude that the bridges that are to be removed are safety hazards and no remedial alternative exists except bridge removal. Furthermore, there also exists substantial evidence to conclude that bridge removal does not destroy permanently the ability to create a trail. Indeed, all of the municipal entities presenting testimony in this proceeding do not oppose the concept of future trail development. Indeed, the County has testified that it strongly supports the creation of a future trail and encouraged the Townships to create an intermunicipal agreement preserving a real estate corridor along the Line as a means of achieving that goal. The County also indicated it possesses development funds that will assist in trail development.

The relief requested by FAST, the abolition of all bridges in place and the creation of a trail at each crossing, is not supported by the record and beyond the scope of this Commission's jurisdiction. Safety concerns require removal of some of the

bridges. Even if the Commission possessed authority to order trail development at each and every crossing, no evidence exists to support a factual conclusion that trail development is a near term possibility. FAST currently possesses no funds to undertake the massive effort requirement for trail development. Thus, based upon this factual record, immediate trail development is speculataive.

The Commission should approve this Settlement. It is the product of numerous negotiating sessions and is supported by all parties except FAST and the Trust. It meets the Commission's ultimate duty to promote the public safety at rail/highway crossings. It does not destroy the potential for future trail development. Indeed, the product of this Settlement is an Intermunicipal Agreement that will promote the creation of a future trail. In all respects, the Settlement is in the public interest.

### III. ARGUMENT

#### A. THE REVIEW REQUIREMENTS OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT HAVE BEEN COMPLETED

Section 106 of the National Historic Preservation Act, ("NHPA"), requires federal agencies to perform certain duties whenever they implement a "federal undertaking". 16 U.S.C. §470(f). A federal undertaking occurs whenever a federal agency provides financial assistance, exercises significant oversight over a project or licenses a project under a federal statute. Section 106 of the NHPA requires the federal agency to take into account the impact the federal undertaking will have on any structure that is included, or eligible for inclusion, in the National Register. 16 U.S.C. § 470(f).

##### 1. Section 106 of the NHPA Only Requires A Consultation Process

As the then ICC (now Surface Transportation Board) stated in Ex Parte No. 55 (sub-No. 22A), Implementation of Environmental Laws, 7 I.C.C. 2d 807 (1991), the NHPA applies to abandonment proceedings before the ICC. This section of the NHPA:

...requires the [ICC] to consult with the appropriate state historic preservation officer(s), ("SHPOS"), (and other interested parties) to identify historic properties, determine if they will be adversely

affected, and if so, consider appropriate mitigation.

7 I.C.C. 2d at 826.

Significantly, as applicable to this proceeding, the ICC moved to thwart any party's attempt to delay the ICC's review of an abandonment application through the NHPA review process:

We agree with the AAR that we should not let the NHPA process delay cases beyond the statutory deadlines set by Congress for railroad abandonment cases in 49 U.S.C. § 10904 (i.e., a maximum of 330 days). Both the plain language of § 10904 and its legislative history make clear that Congress intended for railroads to be able to dispose of their property expeditiously, and by a date certain. Therefore, in future cases, any delaying conditions that we impose under the NHPA in rail abandonment cases will not extend beyond the 330 day statutory time period for abandonment proceedings, unless modified or earlier removed.

7 I.C.C. 2d at 827.

The ICC clearly did not intend to permit this historic review process to forever delay abandonment proceedings pending before it. Rather the process is intended to be one of review only.

This review function is made clear in the Implementation of Environmental Law Order of the ICC. There the ICC stated:

Where historic property is involved, our ability to protect it is very limited. Despite the broad scope of the AHCP regulations (which encompass all property in the vicinity), we can impose historic preservation conditions only to the extent the particular property is owned by the applicant carrier and has a sufficient nexus to the proposal under review.... Nor can we deny ICC approval of a transaction solely on the ground that it would adversely affect historic resources. Thus, as a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of non-consensual mitigation available to us.

7 I.C.C. 2d at 829

This type of approach requires a balancing of the various issues. This process, however, did not permit the ICC to elevate environmental concerns above that agency's primary regulatory mission. Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479 (2nd Cir. 1988). Thus, the power of the ICC, in relation to the review of historic structures, is limited and not all encompassing. Its conditioning power is limited to appropriate documentation of historic property. 7 I.C.C. 2d at 830.

The above requirements have been completed in this proceeding and the spirit of Section 106 of the NHPA has been met. Section 10904(c)(3) of the Interstate Commerce Act requires the ICC to act upon a request for abandonment within 330 days of the filing

of the Application. That is an initial decision must finally resolve the matter within 255 days after the filing of the Application and a Certificate, permitting an abandonment, must be issued within 75 days of the Final Decision (255 days + 75 days = 330 days). 49 U.S.C. § 1904(c)(3). The ICC has no authority to waive this statutory requirement. FAST has never provided a cogent counter argument to this statutory requirement. The time has past for statutory review and the matter has been completed.

2. The Reach of the NHPA Is Extremely Limited and Applies Only to Federal Agencies

FAST witness Barret confirmed that Section 106 of the NHPA does not provide a veto power to federal agencies to delay or prohibit a federal undertaking. Tr. 727. This witness also admitted that the Pennsylvania Historic and Museum Commission provided, to the ICC, information and comments on the historic significance of the Enola Low Grade Line in 1989. Tr. 729. This information was the documentation required by the ICC under Ex Parte No. 55A. In December 1989, Ms. Barret submitted a letter indicating that 44 bridges on the Line were not eligible for listing on the National Register of historic places and 33 bridges were considered eligible for placement on the register. Tr. 731. FAST witness Barret agreed that her agency conducted the Section 106 review. Tr. 734. She admitted that her agency had seen extensive information on the project, had commented upon the

project and provided its opinion on the eligibility of certain resources. Tr. 735. The ICC was made aware of the information provided by the PHMC. Tr. 735-736. The PHMC has no power to prohibit removal of any structure along this Line; it only has a mission to encourage preservation. Tr. 753. Ms. Barret admitted that removal of one bridge or even a number of bridges along the Line does not destroy the historic value of the Line. Tr. 756.

The reach of the NHPA is very limited. Several courts have emphasized its limitations. Such limitations include its applicability solely to federal agencies and not to state and local agencies. Village of Los Ranchos De Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990); Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989). (A state agency's actions, however, may be impacted by this statute where there is substantial federal control over the state action); Indiana Coal Council, Inc. et.al. v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991) (U.S. Department of Interior funded, managed, developed, administered and provided enforcement costs for a state mining programs and thus NHPA applied to state actions). Another limitation is the fact that the statute is merely procedural in nature, i.e. it does not dictate a particular outcome or decision by the federal agency. Gettysburg Battlefield Preservation Association, et. al. v. Gettysburg College, et.al., 799 F. Supp. 1571 (M.D. Pa. 1992). Its purpose is merely to inform federal agencies as to the historical significance of certain structures in reaching their decisions. The substantive process is

one of consultation only.

In determining whether there is a federal undertaking within the confines of action purely by a state agency, several courts have applied standards applicable to the reach of the National Environmental Policy Act, ("NEPA"), 42 U.S.C. §4332, et. seq. For example, in Los Ranchos, supra., the Tenth Circuit held that it would apply the analysis of major federal action (which would trigger the NEPA requirements) in its analysis of the applicability of the NHPA to state action. There the court found two factors to be determinative of federal action sufficient to trigger the application of the NHPA: 1) Is there actual federal funding? (as opposed to the ability to seek federal funding) and 2) Is there an ability to influence or control the outcome in material respects? There the Tenth Circuit found neither question to be answered in the affirmative. See, also, Ringsred v. City of Duluth, 828 F. 2d 1305 (8th Cir. 1987). There the Eight Circuit applied a similar NEPA/NHPA analysis and stated the determinative factors as follows: 1) The degree of discretion exercised by the agency over the federal portion of the project; 2) Whether there was direct federal financial aid to the project; and 3) Whether the overall federal involvement is so significant as to turn an essentially state or private project into federal action.

The NHPA is only applicable to the federal agency when it retains the ability to effect the outcome of the action.

Where the federal agency retains no authority to terminate an action or to significantly impact a project, the NHPA is not applicable. Gettysburg Battlefield, supra. In Gettysburg Battlefield, the plaintiffs alleged that the applicable federal agency failed to conduct the required NHPA review prior to transfer of federal land to a private entity. The court emphasized:

. . . in the absence of ongoing federal involvement and control there is no jurisdiction for a federal court to order a federal agency to undertake NHPA review or to enjoin the project of private actors. This is not an otherwise living case and the redress sought is unavailable.

799 F. Supp. at 1582.

Simply put, the NHPA does not provide for an after the fact remedy once the federal agency is no longer involved.

Finally, the NHPA is applicable only when a federal undertaking impacts a historic item that is presently on the National Register or eligible for inclusion on the National Register. The determination of actual inclusion on the National Register is problematic. The issue of "eligible for inclusion" is the more difficult determination. In Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta, 497 F.Supp. 504 (N.D. Ala., 1980), the District Court ruled that the NHPA did not apply to the demolition of a building

as it had not been nominated to the National Register nor had any federal or state agency determined it was eligible for nomination. There is no evidence in the record that any bridge along the Enola Low Grade line has been placed upon the National Register.

3. No NHPA Remedy Remains at the ICC or  
Surface Transportation Board

The NHPA is applicable to the ICC since it is a federal agency which "licensed" this project at the federal level. That is, it issues decisions authorizing abandonment of rail lines by railroads. Indeed, in an order issued by the ICC in the proceeding involving Conrail's abandonment of this line (ICC Docket No. AB-167)(Sub.-No. 1095x), it acknowledged the general applicability of the NHPA to abandonment proceedings. Nevertheless, the NHPA is only a consultation process.

As indicated earlier, the PHMC provided information regarding the historical significance of the structures on this line. The ICC authorized Conrail to abandon the Enola Low Grade Line by decision effective April 19, 1993. The ICC implicitly dealt with this issue in its April 19, 1993 Order by concluding that abandonment would have no adverse impact on the quality of the human environment. Since the ICC has granted abandonment, and thus no longer possesses the power to influence the federal licensing process, no remedy remains under the NHPA. Gettysburg Battlefield, supra. See, also Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995)

(ICC's jurisdiction terminates once abandonment is granted and consummated by the rail carrier.) Here the ICC granted unconditional abandonment effective April 19, 1993.<sup>1</sup>

4. The NHPA Has No Application to a Commission Abolition Proceeding

Moreover, the ICC's order granting abandonment could not have impacted the historical integrity of the crossing structures. Only this Commission possesses the jurisdiction to determine the ultimate resolution and disposition of each crossing structure. At the Commission level, no federal agency is involved. Thus there is no federal ability to influence the abolition proceeding now pending before this Commission. It is only the abolition proceeding before this Commission which could result in a modification to the historical integrity of each structure. Only this Commission has the power to order removal, not the ICC.

This Commission abolition proceeding is distinct from the the ICC proceeding involving abandonment of the rail line. CSX Transportation Co. Inc. v. Pa. P.U.C., 125 Pa. Commonwealth Ct. 528, 558 A.2d 902 (1989). The former involves a review of the condition of a crossing and the safety of the public. CSX, supra. The latter involves a balancing of economic interests. Id. Since

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<sup>1</sup>In addition, a party must appeal an ICC decision within sixty (60) days of the ICC decision. 28 U.S.C. § 2344. Failure to do so means the ICC's decision is final and unappealable. No party took an appeal from the ICC's April 19, 1993 Order.

this Commission "licenses" this project through a Certificate of Public Convenience authorizing the abolition of public rail/highway crossings, there is no federal license to be issued. Moreover, there is no evidence to suggest that any federal money will be spent on bridge removal after Commission approval of the proposed stipulations. Thus there is no separate NHPA analysis other than that required by the ICC.

5. Conclusion as to the Application of the NHPA

There no longer exists any NHPA remedy at the ICC. The decision granting abandonment was unconditioned. Further, no party ever appealed the decision, therefore the ICC has lost jurisdiction to act. The courts have indicated once an agency loses the power to act, the NHPA is no longer applicable. Finally, the NHPA would not be applicable to this proceeding. There is no direct federal involvement through either licensing or federal funds.

B. REQUIREMENTS OF THE PENNSYLVANIA HISTORY CODE, IF APPLICABLE TO THIS PROCEEDING, HAVE BEEN MET

FAST also raises an issue regarding compliance with the Commonwealth's History Code, 37 Pa. C.S. §101, et. seq. The History Code is implemented by the Pennsylvania Historical and Museum Commission, ("PHMC"). Section 301 of the History Code

provides for the powers of this agency. 37 Pa. C.S. §301. As pertinent to this proceeding, this agency has the power to "[i]nitiate, encourage, support and coordinate and carry out historic preservation efforts in this Commonwealth". 37 Pa. C.S. §301(3).

Contained within the History Code is the Historic Preservation Act. 37 Pa. C.S. §501. This Act also provides the PHMC with additional powers and duties. Specifically, it provides the PHMC with the ability to "[a]dvice public officials regarding the planning and implementation of undertakings affecting historic resources" and "[c]oordinate and comment upon activities of public officials affecting historic resources and preservation activities". 37 Pa. C.S. §504(7) and (10).<sup>2</sup>

Another section of this Act also requires cooperation between public officials and the PHMC as follows:

1. General rule.-Commonwealth agencies and political subdivisions shall cooperate with the Commission in the preservation, protection and investigation of archaeological resources and to that end shall:

a. Notify all potential permittees, contractors or other persons whose activities may affect

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<sup>2</sup>Public Officials are defined as "[o]fficers, agents and employees of the Federal Government, Commonwealth of Pennsylvania, and any of its political subdivisions" while "Historic Resource" is defined as "[a]ny building structure, object, district, place, site or area significant in the history, architecture, maritime heritage, archaeology or culture of this Commonwealth, its communities or the nation". 37 Pa. C.S. §103.

archaeological sites that the estimated cost of archaeological surveys or archaeological field investigations is required to be included within their bid or application for a permit.

b. Notify the commission before undertaking any Commonwealth or Commonwealth-assisted permitted or contracted projects that may affect archaeological sites.

c. Notify the commission when they become aware of any undertaking in connection with any Commonwealth or Commonwealth-assisted permitted or contracted project, activity or program which affects or may affect an archaeological site, and provide the commission with information concerning the project, program or activity.

37 Pa. C.S. §507(a). Neither archaeological resources nor archaeological sites are defined by the History Code.

It would appear that the History Code and the Historical Preservation Act are similar in effect to the NHPA. That is, these state statutes are procedural in nature and do not dictate a particular outcome. Furthermore, they arguably are applicable to a PUC proceeding if the term "permit" is given an expansive reading as "license" is in the NHPA. The Commission's Certificate of Public Convenience and necessity could be a "permit" under these statutes. There is, however, no case law interpreting the applicability of this statute in that specific instance.

There is, however, case law indicating that, like the NHPA, the provisions quoted above are merely advisory in nature and not binding on other Commonwealth agencies. In O'Connor, et. al.

v. Pa. P.U.C., 136 Pa. Commonwealth Ct. 119, 582 A.2d 427 (1990),<sup>3</sup> the Commonwealth Court held that any opinion rendered by the PHMC was advisory. The PHMC has no authority to adjudicate disputes. The History Code does not require the Commission to accept its conclusion. The court further held that the Pa. P.U.C. did not err in considering, but rejecting, the PHMC's opinions expressed through testimony in the matter.

In testimony submitted in this Pa. P.U.C. proceeding, the PHMC indicates that it opened an Environmental Review file regarding the abandonment of this line. Further, the PHMC found that thirty-two bridges on the Enola Low Grade Line were eligible for inclusion on the National Register of Historic Places. The PHMC also found that there were thirty-six known or potential archeological sites near some of the bridges. On September 4, 1991 the PHMC found there would be an adverse effect on the sites, as a result of abandonment. Finally, the PHMC's testimony provides its opinion regarding the adverse impact of the demolition of the historically significant bridges on this line. Thus it appears that there has been full compliance with the Commonwealth's History Code. The PHMC has the ability to influence the Commission's decision just as any other party possesses that ability. FAST witness Barrett indicated that her testimony was indicative of the PHMC's advisory role. Tr. 779. She indicated that there was

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<sup>3</sup>This proceeding was in the context of a Commission Certificate of Public Convenience authorizing an electric utility to site an electric substation in a particular location.

absolutely no reason why the Commission could not consider that advisory testimony.

C. **THE REQUIREMENTS OF THE RAILS-TO-TRAILS ACT  
HAVE BEEN MET IN THIS PROCEEDING**

Your Honor has requested argument regarding the applicability of the Rail-to-Trails Act, ("Trail Act"), to this proceeding and whether this proceeding has met those requirements. Lancaster County argues that the requirements of the Trail Act have been met.

1. **The Trail Act Does Not Preempt the Commission's Obligation to Promote the Safety of the Public at Rail/Highway Crossings**

The Trail Act requires the Commission to coordinate trail development with Commission abolition proceedings. Specifically, the Act requires:

§ 5620. Coordination with the Pennsylvania Public Utility Commission.

(a) Method of coordination--Whenever the Pennsylvania Public Utility Commission receives or considers any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission shall notify the Department of Environmental Resources. The department shall evaluate the proposed abandonment or removal in order to determine the impact of such action upon the development, expansion and existing use of public recreational trails and may participate

in the proceeding before the commission concerning such matter.

(b) Actions by the commission--Before taking final action on any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission 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.

It is clear that the Trail Act modifies the Commission's procedural process in Commission abolition proceedings. It requires the Commission to notify the Department of Environmental Resources (now Department of Conservation and Natural Resources). That has been accomplished here; DCNR has participated in this proceeding and supports the two Stipulations in this proceeding.

Additionally, the Commission must consider the impact of bridge removal upon future trail development or expansion. 32 P.S. § 5620(b). Significantly, the Trail Act does not modify, in any manner, the Commission's ultimate obligation in rail/highway crossing proceedings:

...to effectuate the prevention of accidents and the promotion of the safety of the public.

66 Pa. C.S. § 2702(b).

There is nothing in the Trail Act which preempts this Legislatively imposed requirement. Nor is there anything in the Trail Act which indicates that trail development takes precedence over the promotion of the safety of the public.

Commonwealth Court has construed the Trail Act on two occasions. In Pennsylvania Game Commission v. Pa. P.U.C., \_\_\_\_ Pa. Commonwealth Ct. \_\_\_\_, 651 A.2d 596 (1995), the Court was faced with the issue of whether the Commission complied with the requirements of the Trail Act. There the Court concluded that the Commission did consider evidence regarding trail development. The Court concluded that substantial evidence supported the Commission's determination, particularly the determination that trail development would not be hindered by bridge removal. Significantly, the Court did not conclude that the Trail Act required the Commission to ignore its statutory duty under § 2702 of the Code. 66 Pa. C.S. § 2702. Removal of a bridge structure under § 2702 of the Code is not incompatible with the Trail Act.

Here, only seven bridges along the line are to be removed immediately as part of Commission approval of these two Stipulations. The Commission must review this proceeding in light of the prospect of that limited bridge removal.

2. There are specific safety concerns requiring removal of a limited number of bridges.

The bridges which are subject to immediate removal as a result of this proceeding are as follows:

1. Crossing No. 4, White Oak Rd.
2. Crossing No. 10, Pumping Station Rd.
3. Crossing No. 15, Oak Bottom Rd.
4. Crossing No. 16, U.S. Route 222
5. Crossing No. 17, Fairview Rd.
6. Crossing No. 21, Hollow Rd.
7. Crossing No. 26, Sigman Rd.

Only four (4) of these bridges have been identified as historically significant by the Pennsylvania Historical and Museum Commission. That is, these four (4) bridges are eligible for inclusion on the National Register of historic places. They are Crossing No. 10, Pumping Station Rd.; Crossing No. 15, Oak Bottom Rd.; Crossing No. 16, U.S. Route 222; and Crossing No. 21, Hollow Rd. (West). Tr. 791. All of these structures are stone arch bridges, thus their historic significance.

The following analysis reveals the safety concerns regarding the seven (7) bridges that are subject to immediate removal under the Stipulations. Those concerns are as follows:

1. Crossing No. 4, White Oak Rd.

Crossing No. 4 is a steel girder bridge over S.R. 2021. PennDOT St. No. 1 at 8. S.R. 2021 is a two lane asphalt paved highway in and through the crossing. Id. at 9. The physical condition of the approaches are fair to poor. Id. S.R. 2021 is a local access highway with an average daily traffic count of 589 vehicles. Id. Twenty-nine percent (29%) of these vehicles are trucks. Id. The projected future average daily traffic count is 890 vehicles. Id.

As a state road, this crossing has a higher usage than its surrounding structures. Crossing No. 3 has an estimated traffic count of less than 50 vehicles (Sadsbury Twp. St. No. 1 at 7) and Crossing No. 5 has an unknown traffic count (Bart Twp. St. No. 1 at 3). PennDOT witness Cassell testified that the structure is not adequate to accommodate highway traffic. PennDOT St. No. 1 at 10. It has a minimum vertical clearance of only 13'11" at the edge of the paved roadway.

The proper vertical clearance for this type of structure is 14'6". Tr. 851. Thus, this structure has insufficient vertical clearance to meet this design criteria. Tr. 852. Removal of this bridge is the only viable option. No other party has stepped forward to promote another alternative. Tr. 853. As noted above, this bridge has not been declared eligible for inclusion on the

National Register.

2. Crossing No. 10, Pumping Station Rd.

This is a stone masonry arch over S.R. 2015. PennDOT St. No. 1 at 17. S.R. 2015 is a two lane asphalt paved highway through the crossing area. Id. at 18. The roadway width is only 16 feet. Id. This state road is classified as a collector highway with an average daily traffic count of 238 vehicles. Id. Nine percent (9%) of these vehicles are trucks. Id. The projected future average daily traffic count is 360 vehicles. Id. PennDOT has indicated that this structure is not adequate to accommodate traffic. Id. at 79. There is a horizontal clearance of only 29.5 feet between the sides of the existing arch. Id. The vertical clearance is only 12'4". Id. Bridge removal is the only option for this stone arch bridge. No other remedial work can be accomplished because of its concrete nature. Tr. 852-853.

3. Crossing No. 15, Oak Bottom Rd.

Oak Bottom Rd., T-482, is a paved roadway between and through the crossing area. Providence Twp. St. No. 1 at 9. The roadway width is only 20 feet in width and in average condition. Id. The roadway width is only 16 feet in width at the crossing site. Id. Vertical clearance is limited to only 11'8". Id. Oak Bottom Rd. serves an existing residential development of

approximately 6-8 homes. Id. This development generates thirty (30) trips per day.

The existing structure cannot adequately handle emergency response vehicles. Id. at 10. These emergency vehicles cannot traverse under the bridge because of its inadequate clearance. Id. Specifically, this development receives fire protection from Quarryville Borough. Id. The equipment provided by Quarryville cannot traverse the crossing. Id. New ambulances also cannot negotiate the low clearance at this structure. Tr. 660. The roadway already is depressed to provide the substandard 11'8" underclearance. Conrail St. No. 1, Crossing No. 15, (unmarked page number 49). Moreover, the clearance is at the center of the arch. Id. Since the arch slopes, the vertical clearances are necessarily lower as one moves down the arch. Again, since this is a stone arch bridge, no other remedial work can be accomplished except bridge removal.<sup>4</sup> Thus safety concerns require bridge removal.

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<sup>4</sup>FAST witness Nettke suggested the roadway could be lowered. Tr. 1087. As indicated above, the roadway is currently depressed. There is no evidence that further lowering could be successfully accomplished and still maintain the structural integrity of the bridge. FAST also proposed construction of a roadway approach up and around the structure. FAST did not consider, however, whether sufficient land existed for this type of construction. Tr. 661. Further, the FAST proposal included a locking gate at the new roadway ramp across the right-of-way. Tr. 441. Obviously, this will not alleviate the emergency vehicle concern and indeed would impede emergency vehicle access to the housing development on the other side. Id. Thus, for safety reasons, this bridge must be removed.

4. Crossing No. 16, U.S. Route 222

The bridge structure at Crossing No. 16 is a stone masonry arch over S.R. 0222. PennDOT St. No. 1 at 32. S.R. 0222 is a two lane, concrete, paved highway through the crossing structure. Id. The roadway width is only 24 feet. Id. The south approach has a 90% curve. Id. S.R. 0222 is classified as a collector highway with an average daily traffic count of 8,627 vehicles. Id. Eight percent (8%) of these vehicles are trucks. Id. It is projected that the future average daily traffic count will grow to 13,020 vehicles by the year 2015. Id. There have been thirteen (13) reportable accidents at this crossing. Id. at 33. Six (6) of those accidents involving a vehicle striking a fixed object, i.e., the bridge structure. Id.

This bridge has clearance problems. The vertical clearance is a substandard ten (10) feet. Id. PennDOT has testified that this arch does not provide adequate horizontal and vertical clearance to provide safe passage for vehicles. Id. Thus, truck traffic has a problem moving through the arch. Tr. 461. A tractor trailer has two options when approaching this crossing. To safely traverse the crossing, the driver must either straddle the yellow centerline or stop and wait for oncoming traffic. Tr. 666. Both of these options create safety hazards and the potential for accidents. Id. Indeed accidents have occurred at this site. Id. Trucks also have become stuck at this site. Id.

Safety concerns mandate bridge removal. Again, as a stone arch, the only possible remedial work is bridge removal.

5. Crossing No. 17, Fairview Rd.

S.R. 3016 traverses through Crossing No. 17, Fairview Road. PennDOT St. No. 1 at 36. S.R. 3016 is a two lane, asphalt paved highway through the crossing area. Id. at 37. The horizontal alignment through the crossing is on a reverse curve and the vertical alignment is on a crest vertical curve. Id. Each highway approach has a sharp horizontal curve at each end of the bridge structure. Id. at 38. PennDOT testified that both the horizontal and vertical alignments are very poor and dangerous for vehicular traffic. Id. It is PennDOT's further opinion that the sight distances are not adequate for both the horizontal and vertical alignments. Id. Thus, the highway user has a difficult time traversing the bridge. Tr. 462. There are load limitations upon this bridge such that Providence Township must receive a special permit so that its snowplow can traverse the crossing. Tr. 659.

To correct this condition, PennDOT will remove the current structure. PennDOT St. No. 1 at 39. As part of this project, the roadway will be realigned so that the roadway approaches shall cross the right-of-way at a tangent. Id.

6. Crossing No. 21, Hollow Rd.

Crossing No. 21 is a stone arch culvert. Conrail St. No. 1 at unmarked page 72. The roadway approaching the crossing is twenty-two (22) feet in width, including the shoulders. Providence Twp. St. No. 1 at 20. The roadway width through the crossing structure is only twenty (20) feet in width. Id. The roadway also curves through the bridge. Id. This creates a sight distance problem from each approach. Id. PUC Rail Staff Exhibit Nos. 25 and 26 clearly show the sight distance problem. The Solonco School District has expressed serious concerns regarding the restricted sight distance. Providence Twp. St. No. 1 at 21. This school district also has expressed a concern regarding the inability of school buses to traverse safely the crossing area. Id. and Tr. 463. Other large vehicles, such as fuel oil and milk delivery trucks also are unable to traverse the crossing in a safe manner. Id. This is due to the restricted sight distance. Id. School busses must cross the center line of the road, or go through the center of the arch, in order to traverse this crossing. Tr. 660. Bridge removal would allow a correction of this alignment problem and improve sight distances. Tr. 667.

7. Crossing No. 26, Sigman Rd.

Sigman Road (T-500) crosses underneath Crossing No. 26. Sigman Road is a paved roadway. Providence Twp. St. No. 1 at 28.

The roadway approach width, including shoulders, is only eighteen (18) feet. Id. The roadway width through the crossing area itself is reduced to sixteen (16) feet. Id. There is a curve at the southern approach to the bridge structure. Id. Vertical clearance is a substandard 11'3". Id. This bridge structure is also deteriorated. The east abutment and a low stone wall located immediately adjacent to the paved roadway present limitations of horizontal clearance for vehicles approaching the structure. Conrail St. No. 1 at unmarked page 93.

This bridge structure has deteriorated to such an extent that the understructure of the bridge is hanging by one rivet. Tr. 661. School busses cannot traverse underneath the structure. Id. A stream that passes underneath the bridge constricts the roadway even further to fifteen (15) feet in width at the crossing area. Tr. 667. To alleviate the horizontal clearance problem, bridge removal is the only viable option.

Thus it is clear that there are many specific safety concerns at the above identified bridges. Those safety concerns range from inadequate vertical and horizontal clearances; severe sight distances; severely skewed approaches and deteriorating bridge members. These safety concerns create hazards for the traveling public, particularly school busses and emergency vehicles.

Even FAST recognizes the safety issues surrounding many of the bridges along this line. FAST is aware that bridges may need to be removed because the structure is in poor condition or because the current placement of the structure creates a hazard to the traveling public. Tr. 410. FAST recognizes that many of the bridges have substandard clearances below fourteen feet. Tr. 411. FAST recognized that the many safety problems included poor turning radiuses, 90 degree elbows on some approaches, fire and emergency equipment access problems and inadequate clearances for the truck traffic in the area. Tr. 413.

FAST crafted its trail development plan with the knowledge of these safety concerns and deficiencies. FAST recognized that certain of the bridges would have to be removed and factored that assumption into trail development. Id. FAST knew trail development may require either an at-grade crossing or a pedestrian bridge. Id. FAST's analysis considered the historic value of this entire line. Tr. 419.

3. Conclusion as to the Application of the Rails-to-Trails Act to this Proceeding

The Rails-to-Trails Act does not permit the Commission to elevate trail development over the safety of the public. Only seven bridges are to be removed under the two Stipulations. These bridges must be removed for safety reasons.

The remaining bridges are to be abolished in place with maintenance responsibility assigned to a municipal corporation.

Bridge removal, however, does not destroy the opportunity for future trail development. Indeed, the County has indicated a desire to preserve a real estate corridor along the Line. County St. No. 1 at 6. It encouraged the municipalities along the Line to create an intermunicipal agreement to accomplish that goal. Id. at 6-7.

Apparently, its encouragement has resulted in achievement of that goal. See for example, Tr. 664. This was a key ingredient, in the Court's opinion, that was missing from the previous positions of the parties. County St. No. 1 at 6. The final execution of this intermunicipal agreement will assist in the implementation of one of the County's main goals - preservation of the County's natural resources and the provision of outdoor recreation opportunities. Id. at 7. It also assists in the implementation of the County's Regional Open Space Plan. Id. It assists in the creation of a County Greenway Project in this area. Id. at 7-8. The two Stipulations, in conjunction with the intermunicipal agreement, are compatible with the County's goals. Id. at 9.

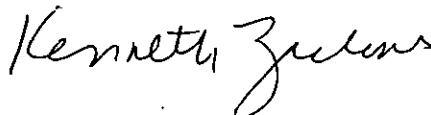
All the Townships indicated they do not oppose future development of a trail. Tr. 635, 689 and 700. For example,

Bart Township Witness Marvin indicated that the work proposed at Lamparter Road took into account future trail development. Tr. 623-626. Additionally, Providence Township Witness Duvall indicated his Township stepped forward to retain the S.R. 272 tunnels because of their historical nature. Tr. 659. Obviously their retention assists in future trail development. Thus, it is clear that the parties to the Stipulations and the County took into account future trail development as a basis for these Stipulations.

IV. CONCLUSION

WHEREFORE, for all of the above reasons, Lancaster County requests Your Honor and this Commission to approve the Stipulation of Settlement between West Sadsbury Township, Sadsbury Township, Eden Township, Bart Township, Providence Township, Martic Township and Conestoga Township and Conrail, and the Stipulation of Settlement between Consolidated Rail Corporation and the Commonwealth of Pennsylvania, Department of Transportation.

Respectfully submitted,



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Dated: June 24, 1997

Attorneys for Lancaster County

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated :  
Rail Corporation for the :  
Abolition of 31 Crossings of : Docket No. A-00111016  
the Enola Branch, Harrisburg :  
Division, Lancaster County :

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1997, I have served true and correct copies on the foregoing document upon the persons set forth below by First Class Mail, Postage Prepaid or by hand-delivery or by facsimile transmission, in accordance with 52 Pa. Code Section 1.54:

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FOLDER

June 24, 1997

HAND DELIVERED

Robert F. Frazier, Esquire  
Prothonotary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, PA 17105-3265

RE: Conrail Enola Branch - PUC  
Docket No. A-00111016  
Our File No. 12607  
Conrail File No. MPAC-486

Dear Mr. Frazier:

I enclose an original and nine (9) copies of the Brief of Consolidated Rail Corporation for filing in the above matter.

In accordance with the accompanying Certificate of Service we have provided copies of the Brief to all active parties of record.

Sincerely yours,

*Jeannette Chelgren*  
Jeannette Chelgren  
Legal Assistant to  
David C. Eaton, Esquire

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/jc  
Enclosures  
cc: All Parties of Record  
ALJ Louis G. Cocheres  
Scott K. Wasserkrug, Esquire

BTL

ORIGINAL

30.

**ORIGINAL**

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

**DOCUMENT  
FOLDER**

Application of Consolidated :  
Rail Corporation for the :  
abolition of thirty-one :  
crossings of the Enola Branch, :  
Harrisburg Division, Lancaster :  
County :  
:

Docket No. A-00111016

**BRIEF OF CONSOLIDATED RAIL CORPORATION**

**DOCKETED**

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**I. FACTUAL BACKGROUND**

Consolidated Rail Corporation ("Conrail") was created by Congress in the early 1970s to assume ownership of the "rail properties" of various bankrupt northeast railroads. See 45 U.S.C. §§ 701, 743. It came into existence as a Pennsylvania corporation in early 1976 and received conveyances of railroad properties of former railroads as of April 1, 1976. (See Conrail Exhibit 2 for example.)

What is material here, however, is that Conrail thus acquired the Pennsylvania Railroad's freight route from Harrisburg east which departed from the former passenger line at the western end of the Rockville Bridge and proceeded down the western side of the Susquehanna to the Enola freight classification yard and thence down the west shore of the Susquehanna River through Cumberland and York Counties and then across the Susquehanna River to a point near

Safe Harbor. It followed down the eastern shore of the Susquehanna River a short distance and then turned eastwardly through Lancaster and Chester Counties to join the passenger line at Parkesburg, Chester County. Because Conrail had acquired both the Pennsylvania freight route and the Reading Company freight route, a choice had to be made between the two and the Reading route was chosen as Conrail's principal line. The old "Enola Branch" (also identified in the Lancaster County area as the Atglen to Susquehanna Line) was thus unneeded and a decision was made to abandon it.

Formal "Notice of Exemption" abandoning the line was filed with the Interstate Commerce Commission in 1989. The notice was accompanied by an environmental report. The ICC found that abandonment of the line "will not significantly affect the quality of the human environment." However, it stayed abandonment (1) pending an opportunity for Lancaster County to resolve whether it wished to acquire the line pursuant to the National Trails System Act, 16 U.S.C. § 1247; and (2) pending an opportunity for comment by the State Historic Preservation Officer. See Exhibits "A" and "L" to Hearing Motion by Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"), filed February 5, 1996, copies of which are attached hereto as Appendices "A" and "B". The stay imposed by the ICC was dissolved in April of 1993. See Exhibit "B" to Hearing Motion by FAST filed February 5, 1996, a copy of which is attached hereto as Appendix "C". It is clear from the evidence before the Commission

that the State Historic Preservation Officer sought information from Conrail in late 1989 and that the requested information consisting of a listing of crossing structures and maps locating the crossing structures were produced promptly thereafter. See Exhibit "C" to Hearing Motion by FAST, filed February 5, 1996; Barrett prepared testimony, page 10. There has been no further activity since 1989, with the exception that there has been correspondence from the Pennsylvania Historic and Museum Commission and the Historic Preservation Officer to the effect that the project "has been" reviewed by the Bureau for Historic Preservation. See Exhibits "D" - "K" to Hearing Motion by FAST, filed February 5, 1996; N.T. 733-734.

The instant proceeding before the Commission was instituted by application of Conrail for abolition of thirty-one listed crossings of the Enola Branch dated September 24, 1993. Not listed were two crossings located in Bart Township, Lamparter Road at Mile Post 8.78 and Mount Pleasant Road at Mile Post 9.76, which had been abolished by proceedings at C-00913256 and C-00913258, respectively. Of the crossings for which abolition has been sought in these proceedings, several of those have previously been abolished, including that at Crossing No. 8, Hollow Road, and Crossing No. 29, Colemanville Road, where crossing structures have been removed. Other crossings have been the subject of prior PUC proceedings and a number of crossings have therefore been excluded

from these proceedings by Commission Order entered March 7, 1995,  
as follows:

Crossing No. 11 -	Hess Road (abolished)
Crossing No. 20 -	Sawmill Road (T-435)
Crossing No. 22 -	Sawmill Road (T-496)
Crossing No. 25 -	Rawlinsville Road (abolished)
Crossing No. 29 -	Colemanville Road (abolished)
Crossing No. 30 -	River Hill Road (abolished)

It is also true that a number of the structures carrying highways across the railroad bed have heretofore been demolished and replaced by modern, concrete structures. That has been the case at Crossings 7, Georgetown Road; 11, Hess Road; 12, State Street; 18, Cinder Road; 19, Rawlinsville Road; 20, Sawmill Road (T-435); and 22, Sawmill Road (T-496). (See Conrail Exhibit 5).

Activity on Conrail's application began in April of 1994 with on-site inspections on April 19, 20 and 21. A variety of status conferences and hearings thereafter followed throughout 1995, 1996, and 1997, extending from April 13, 1995, through March 3, 1997, culminating in the extended hearings of June 11 and 12, 1997. Those formal conferences and hearings were supplemented, however, by meetings scheduled throughout the summer and fall of 1995 by mediators appointed by the Commission. (N.T. 453).

The Enola Branch (hereinafter intended to designate that portion of the Atglen to Susquehanna Line extending from the

Chester County line in the east through Brenner Hollow Road in Conestoga Township in the west, approximately one mile east or south of Safe Harbor) is a line of former railroad that had become redundant for Conrail's purposes. Consequently it was in Conrail's corporate interest to dispose of that line and of its obligation for maintenance of structures along that line. To that end the Notice of Abandonment was filed with the ICC about October 2, 1989 and application to abolish crossings was filed with the Commission about September 24, 1993.

It became apparent early on that FAST was much interested in acquiring the line for trail purposes, a development that Conrail welcomed, provided maintenance of the various crossing structures could be transferred to FAST or others as a part of the process. Moreover, while demolition of the crossing structures might have met Conrail's needs, FAST was interested in the line only if the structures remained. It was also recognized that many of the structures had some historic or aesthetic values which mitigated against demolition if some party could be found that was willing to maintain them.

FAST, as neither a municipal body nor state government nor public utility, was not subject to jurisdiction of the Commission and it was apparent that the Commission could not order that crossings be abolished with structures in place and assign

maintenance responsibilities to FAST. Extensive efforts were made to interest PennDOT and local municipalities in assuming a secondary obligation of maintenance in support of FAST, but PennDOT was not interested in assuming that burden nor were the municipalities unless they also acquired title to the property and thus control over it.

Ultimately, in August 1995 Conrail and FAST both sought the appointment of mediators to assist in reaching some agreement as to the disposition of crossings. The mediators scheduled group meetings at the offices of various of the Townships throughout the late summer and into the fall of 1995, at the conclusion of which substantial agreement had been reached between Conrail and the various municipalities that each would acquire title to the former rail line lying within its municipal boundaries, that each would accept a sum of money in consideration of their assuming future responsibility for maintenance or ultimate demolition of various structures and that certain structures, which the municipalities declined to maintain into the future, would be removed. Agreement was reached with PennDOT as well for removal of certain structures designated by it, maintenance of certain other structures involving State highways by the municipalities involved and some nominal repair and upgrading by PennDOT at various crossings involving State highways. The agreement at that time was on general

principles and was subject to a determination prior to conveyance that there were no environmental problems along the line.

The necessary Phase I environmental investigation was delayed due to weather but was ultimately completed by an investigator engaged and selected by Conrail and approved by the municipalities. That investigator found no environmental problems, but declined to be responsible to the municipalities for that conclusion. As a consequence, a second environmental investigation was undertaken, again at Conrail's expense, by a second firm. While the second firm identified no specific environmental problem, it posed questions about possible contamination as a consequence of a variety of train derailments extending from 1942 through 1987. The Borough of Quarryville was unwilling to assume whatever environmental risks existed and declined to go further with the agreed settlement. Providence Township, however, has been willing to accept that risk with conveyance to it of the former rail bed within Quarryville and its assumption of the responsibility for maintenance of crossing structures within the Borough of Quarryville.

Agreements between Conrail and PennDOT and Conrail and the various Townships involved have been reduced to written form and have been approved and executed by the interested parties and copies of those agreements have been submitted of record [Conrail

Exhibits 6a and 6b]. The mediation process, among other things, identified crossing structures which the highway authorities involved insisted be removed, citing in each instance safety considerations for highway traffic. Those structures and the road authorities involved are as follows:

Crossing No. 4	White Oak Road	-PennDOT
Crossing No. 10	Pumping Station Road	- PennDOT
Crossing No. 15	Oak Bottom Road	- Providence Township
Crossing No. 16	U.S. Route 222	- PennDOT
Crossing No. 17	Fairview Road	- PennDOT
Crossing No. 21	Hollow Road (W)	- Providence Township
Crossing No. 26	Sigman Road	- Providence Township

The future of the crossing structure at Crossing No. 27, PA Route 324, is uncertain. PennDOT views the crossing structure as creating an unsafe condition for highway traffic and Conrail has agreed to pay to Martic Township a sum of money in consideration of its demolition. However, PennDOT also plans to realign the highway so as to by-pass the present crossing to provide a grade crossing over the Enola Branch and, in that case, it is the option of Martic Township whether to remove the structure or simply barricade it to prevent its use by vandals. Of the structures to be removed, two are through girder bridges on stone abutments (White Oak Road and Sigman Road), four are stone arch bridges (Pumping Station Road, Oak Bottom Road, Route 222 and Hollow Road (W)), and one is a steel truss bridge (Fairview Road). The latter bridge is in poor condition and its removal will allow the removal of earth embankments leading up to the elevated bridge and realignment of

the highway at grade. The through girder bridges involve height clearance problems and, in the case of Sigman Road, horizontal clearance problems as well. The Route 222 bridge involves both height and width clearance problems and is a substantial and dangerous impediment to tractor trailer traffic seeking to enter and leave Quarryville. The others involve either sight distance or clearance problems or both.

At hearing the agreements reached among Conrail and PennDOT and the various Townships were opposed by two interests. FAST opposes the destruction of crossing structures on the ground that that will impede use of the corridor for a hiking trail. Historical preservation interests represented both by the Lancaster County Trust for Historic Preservation and, implicitly, by the State Historic Preservation Office whose testimony was presented through Brenda Barrett, the Historic Preservation Officer, nominally in behalf of FAST, also opposed the agreements. Both interests necessarily contend that their interests are superior to and thus supersede the interests of the highway authorities in eliminating structures which they deem create safety hazards. On that issue, Conrail is little more than a stakeholder, unable to assert its independent judgment as to the suitability of crossing structures for retention and unable to press, as a superior decision, the retention of structures as historic as against the

hazards presented by those structures as seen by the parties whom they most closely affect.

## II. QUESTION PRESENTED

Shall Conrail be permitted to abolish crossings and dispose of crossing structures in accordance with agreements reached with PennDOT and the municipalities involved?

## III. ARGUMENT

The parties to this proceeding who oppose the abolition of crossings have not demonstrated a clear understanding of the function of the Commission and the rights of Conrail and the various municipalities. The legislature has delegated to the Commission exclusive authority with respect to the disposition of the crossings of public utilities and public highways. 66 Pa.C.S. § 2702(a). More specifically, the Commission is vested with exclusive power, among other things, to prescribe the manner in which rail crossings are to be abolished and the manner and condition in or under which such crossings shall be maintained, operated and protected. 66 Pa.C.S. § 2702(b). The Commission is further exclusively empowered, upon notice and after hearings, to

order a rail crossing to be abolished "upon such reasonable terms and conditions as shall be prescribed by the Commission." 66 Pa.C.S. § 2702(c).

The Commission is empowered to impose costs in highway-rail crossing cases, but is not limited to any fixed rate. It may take into account all relevant factors with a fundamental requirement that its order be just and reasonable. *Commonwealth Department of Transportation v. Pennsylvania PUC*, 79 Pa.Cmwlth. 266, 469 A.2d 1149 (1983). Where a railroad has abandoned service on its line and has effectively abandoned the rail line (though not the real estate), it has an incentive to seek to be relieved of the continuing burden of maintenance of crossing structures. Failure to do so may result in the imposition of future costs for maintenance of those structures even though no rail line is present. *CSX Transportation, Inc. v. Pennsylvania PUC*, 125 Pa.Cmwlth. 528, 558 A.2d 902, appeal denied, 523 Pa. 651, 567 A.2d 654 (1989). The fundamental duty of the Commission in exercising its powers is to require that crossings be maintained, operated and protected to effectuate the prevention of accidents and the promotion of the safety of the public. 66 Pa.C.S. § 2702(b). Section 2704(a) of the Public Utility Code empowers the Commission to direct that costs of abolition of a crossing be borne by the public utilities or municipal corporations concerned, or by the

Commonwealth, in proportions to be determined by the Commission.  
66 Pa.C.S. § 2704(a).

It is against that legal background that Conrail has sought abolition of crossing on the Enola Branch. One approach where crossing structures are involved is that proposed by Mr. Oliver, engineer for the PUC Staff, who testified essentially in each case involving a bridge which formerly carried the railroad over public roads that, since there was no railroad, the bridge ought to be removed. See Oliver Prepared Testimony and testimony at pages 946-48. That seems to adopt something of a scorched earth policy which ignores any value of a structure other than for its utilitarian purpose of carrying a railroad, even for the purpose of carrying a trail or utility facility other than a railroad track. On the other hand, the proponents of retention of crossing structures, FAST and the Historic Preservation Trust of Lancaster County, press for the retention of all structures without regard for legitimate concerns of safety.

There are proceedings, apparently still pending before the Commission, involving crossing above-grade and below-grade and at-grade of Montour Railroad Company in eleven municipalities in Allegheny and Washington Counties, carried at Docket I-820060. There have been a number of observations published in that proceeding including a motion of Chairman Rolka of April 28, 1993,

promoting the retention of railroad structures in the absence of agreement by PennDOT and the municipalities to maintain those structures into the future. In that motion, Chairman Rolka proposed to impose maintenance costs on DER. However, in a subsequent motion dated April 6, 1994, Chairman Rolka recognized that the bridges thus saved had substandard vertical and horizontal clearances and, in the absence of assumption of responsibility for maintenance by a party with expertise in highway engineering, should be removed. The Commonwealth Court appears to have settled the issue in its opinion in *Montour Trail Council v. Pennsylvania PUC* when it observed that the PUC had conceded that it was in error in ordering DER to be secondarily liable for maintaining crossings. *Montour Trail Council v. Pennsylvania PUC*, 663 A.2d 285 (Pa.Cmwlth. 1995). See also *Montour Trail Council v. Pennsylvania PUC*, \_\_\_ Pa. \_\_\_, 690 A.2d 703 (1997).

Another factor that may be raised is the effect of legislation relating to rails to trails matters. In the matter of *County of Armstrong v. Pennsylvania PUC*, 400 D.C. 1994, Pa.Cmwlth. (unreported) (filed February 1, 1995), the Court had before it for approval the abolition of 33 crossings on Conrail's former Allegheny secondary track. All but one crossing was abolished and as to that one, the Commission had ultimately abolished the

crossing and directed removal of the structure. The Commonwealth Court remanded to consider implications of the National Trails Act Amendments, 16 U.S.C. § 1247(d) on the removal of that crossing notwithstanding evidence that clearances were a problem. The National Trails Act Amendments provide for an opportunity for governmental entities to acquire disused railroad beds and, where a political subdivision asserts its rights under the Act, limiting features of the Act become relevant. The section referred to requires that the ICC:

[I]mpose such terms and conditions as a requirement of any transfer or conveyance for use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

The National Trails Act Amendments are inapplicable here where Lancaster County failed to act under the Trails Act and its last request for extension was denied by Order of the Commission on April 14, 1993. A copy that Order is attached hereto as Appendix "B." The ordering paragraphs of that Order are as follows:

1. The request of Lancaster to extend the negotiating period under the NITU [Notice of Interim Trail Use or Abandonment] is denied.
2. The trail use condition imposed in the February 22, 1990 decision is vacated and Conrail may abandon the line.

3. This decision is effective on its service date.

The Pennsylvania Rails to Trails Act, 32 P.S. § 5611, et seq, may also be said to apply. Section 5620 provides as follows:

§ 5620. Coordination with the Pennsylvania Public Utility Commission.

(a) Method of coordination--Whenever the Pennsylvania Public Utility Commission receives or considers any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission shall notify the Department of Environmental Resources. The department shall evaluate the proposed abandonment or removal in order to determine the impact of such action upon the development, expansion and existing use of public recreational trails and may participate in the proceeding before the commission concerning such matter.

(b) Actions by the commission--Before taking final action on any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission 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.

The Recommended Decision of ALJ Larry Gesoff in the Matter of Application of Cambria and Indiana Railroad Company for approval of certain crossings, Docket No. A-00111716, discusses the issue at pages 24 and 25 as follows:

Section 5620 does not require the Commission to abandon its legislative mandate under 66

Pa.C.S. §2702 to take such action as is necessary to prevent accidents and to promote public safety. Pennsylvania Game Commission v. Pa.P.U.C., 651 A.2d 596 (Pa.Cmwlth. 1994). Section 5620 adds a factor for the Commission to consider in fulfilling that duty. It does not require the Commission to leave structures in place if trail use is contemplated. It merely requires the Commission to evaluate alternatives which will minimize the adverse impacts on development and use of recreational trails. If after evaluating alternatives, the Commission concludes that it is necessary to remove structures to prevent accidents or promote public safety, it can order those structures removed. Removal of the structures is not, therefore, inconsistent with the Rails-to-Trails Act. Montour Trail Council v. Pa.P.U.C., 663 A.2d 285 (Pa.Cmwlth. 1995).

Conrail submits that the consensus reached through prolonged meetings and negotiations with other parties concerned is that solution most suitable as a compromise among the various interests represented. It has the merit of saving most of the structures on the Enola Branch and of providing some assurance of future maintenance of those structures by responsible parties. It allows Conrail to divest itself of unwanted real estate and maintenance responsibilities and it allows for removal of structures deemed hazardous by those responsible for highway safety, the municipalities and PennDOT. It preserves the usefulness of the former rail bed for potential trail use or utility corridor. For those reasons, Conrail submits that the agreements reached and submitted to the ALJ in the form of Stipulations, should be

confirmed and their terms should be adopted in the form of an Order by the Commission.

One further subject requires comment and that is the status of the process of review of the historic significance of structures on the Enola Branch. Following submission by Conrail of its Notice of Abandonment, the Interstate Commerce Commission, on February 14, 1990, imposed a stay order on two grounds, one, to allow Lancaster County additional time in which to consider acquisition of the property for trail purposes, and the other imposing "the requirement that Conrail 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, 16 U.S.C. § 470." That stay seems to have been dissolved by the ICC Order of April 14, service date April 19, 1993, which states:

Since Conrail now opposes the extension [requested by Lancaster County], and is unwilling to negotiate further, the Commission is required to deny Lancaster's request and allow the abandonment authority to become effective. This action will not significantly effect either the quality of the human environment or the conservation of energy resources. (Emphasis added.)

It is ordered:

1. . . .

2. The trail use condition imposed in the February 22, 1990 decision is vacated and Conrail may abandon the line.

3. . . .

Even if there be some question as to whether the foregoing Order lifted the stay relating to historic preservation, that stay has dissolved by operation of law.

Conrail has contended (1) that the Order of April 14, 1993 expressly dissolved the stay; (2) factually that the process had been completed by the State Historic Preservation Office in the 1989-90 period and (3) that the stay dissolved automatically by virtue of the provisions of an ICC ex parte order of July 19, 1991, in which the Commission stated, 375 ICC Reports at 827. (See Conrail Exhibit 7):

To expedite the history review process, we will continue to set reasonable time limits for our consultation with its SHPO [State Historic Preservation Officers] and the Advisory Council in individual cases. We will also terminate (or move to the next stage of) the process where a SHPO or the Advisory Council declines to participate in a timely manner or 'sleeps on its rights'.

We agree with AAR [American Association of Railroads] that we should not let the NHPA [National Historic Preservation Administration] process delay cases beyond the statutory deadlines set by Congress for railroad abandonment cases in 49 U.S.C. § 10904 (i.e. a maximum of 330 days). Both the plain language of § 10904 and its legislative history make clear that Congress intended for railroads to be able to dispose of their property expeditiously, and by a date certain. . . . Therefore, in the future any delaying conditions that we impose under NHPA in rail abandonment cases will not extend beyond the 330 day statutory time period for abandonment

proceedings, unless modified or earlier removed.

The policy thus set forth is entirely consistent with the view of the Commission expressed at pages 828-29 of its Opinion:

Where historic property is involved, our ability to protect it is very limited. Despite the broad scope of the ACHP regulations (which encompass all property in the vicinity), we can impose historic preservation conditions only to the extent the particular property is owned by the applicant carrier and has a sufficient nexus to the proposal under review. Moreover, even where the property is subject to our conditioning authority, we do not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the Deed, as a condition to obtaining abandonment or acquisition authority. Nor can we deny ICC approval of a transaction solely on the ground that it will adversely affect historic resources. Thus, as a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of non-consensual mitigation available to us.

Since the adoption of that Order and the proceedings before the ICC relative to the Enola Branch, the ICC has been dissolved and the Surface Transportation Board has been created. In *Conrail v. Surface Transportation Board*, 93 F.3d 793 (1996) the Court considered the relationship between the ICC and the STB, referring particularly to the ICC Termination Act of 1995, Pub.L.No. 104-88,

Sec. 201, 109 Stat. 803, 932-34 (1995) and its savings provision which provides:

This Act shall not effect suits commenced before the date of the enactment of this Act. . . . In all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.

The opinion of Judge Buckley for the court continues at page 795:

The 4-R Act and the Staggers Rail Act created the following guidelines for abandonment proceedings: The Commission determined, within specified time limits following the filing of an application to abandon any part of a railroad line, whether the public convenience and necessity permitted the proposed abandonment. See generally 49 U.S.C. §§ 10903, 10904.

Also, as to the issue of abandonment, it is quite apparent that a *de facto* abandonment has occurred since the entry of the Commission's 1993 Order. *Conrail v. Surface Transportation Board* continues at page 798:

The ICC has acknowledged that a line may be abandoned even if the track remains in place. In *Consolidated Rail Corp.--Petition for Declaratory Order*, 1 I.C.C.2d 284 (1984), the ICC noted that the railroad had "agreed to forego dismantling" certain lines that had previously been abandoned and that these were "no longer railroad lines recognized by the ICC for jurisdictional purposes" even though Conrail had agreed to resume service over them on a "noncommon carrier" basis. *Id.* At 284. In a more recent decision, the ICC has specifically referred to salvage as "post-abandonment . . . work on the line." *Fox*

*Valley & W. Ltd.--Abandonment Exemption--  
Kewaunee County, WI, 1994 WL 487579 at \*1  
(decision served Sept. 12, 1994) (emphasis  
added). Furthermore, in Hayfield [476 U.S. at  
633-34, 104 S.Ct. At 2617-18 (1984)], the  
United States (a respondent in this case)  
advised the Supreme Court that "[t]ypically, a  
carrier that abandons a rail line simply  
leaves in place the track and other permanent  
facilities that had been used in providing  
service."*

That section of the opinion concludes:

In determining whether a railroad has abandoned the line, one must focus on the railroad's objective intent. Conrail's overt acts made clear beyond cavil that it intended to abandon the line. Conrail having abandoned the line, the Commission lost jurisdiction over it.

It is clear from the record here that the State Historic Preservation Office was consulted in the abandonment process and actively participated in identifying structures on the Enola Branch which were eligible for inclusion on the National Register of Historic Places. There is no contention that Conrail was not fully cooperative with the requirements of the State Historic Preservation Officer and it is abundantly clear that whatever process the State Historic Preservation Office engaged in had terminated by the Spring of 1990 with a subsequent six to seven year hiatus with no action whatever undertaken. Surely this is a case where the portion of the ICC opinion to the effect that it will terminate the process "where a SHPO or the Advisory Council

declines to participate in a timely manner" or "sleeps on rights" applies. Moreover, track and even ballast on the Enola Branch has been removed. Abandonment has occurred and the STB has no further jurisdiction.

Brenda Barrett, State Historic Preservation Officer, testified to the activities of her office relative to the Enola Branch and she was ultimately asked by the writer [NT 746-47]:

What is your own personal understanding of what more is required of Conrail before it can convey the property which is under review here, under consideration here, and before structures along that property can be removed for the purpose of enhancing public safety?

She then explained her belief that the next required step in the process was for either the federal agency or the agency that the federal agency delegated responsibility to to assess effect (presumably the State Historic Preservation Office in this case). She would expect that then to be followed up with a memorandum of agreement relative to disposition of the historic properties. While her comments were not wholly descriptive of what additional steps need be undertaken in her view, she was clear in stating that she would expect a recording of resources stating [NT 747, line 21]:

But the documentation that has been submitted to us is not a recording of the resources.

She further stated [NT 751] that the process was:  
. . . incomplete because I have no evidence that the Surface Transportation Board or the applicant have come to us to concur on effect as required by the regulations, have come to us to consult on adverse effect, and have come to us to sign a memorandum of agreement that memorializes the actions they are going to be taking to close out the project or close out the Section 106 process.

Finally, Ms. Barrett contended that the 106 process was incomplete because no one had come to her Board to ask them to concur on effect of the action proposed by Conrail or sign a memorandum of agreement and she continued with some reference to her view that the Public Utility Commission and the Pennsylvania Department of Transportation and her own agency had responsibilities under the History Code of Pennsylvania relative to historic preservation.

The mandatory provisions of the National Historic Preservation Act relate to federal projects and federal actions. They impact in this case only because the action of the ICC and the Surface Transportation Board ("STB") are implicated in the process in their review capacities. Conrail is not subject to the requirements of the National Historic Preservation Act; only the ICC and its successor, the STB are.

As a part of its review process, the ICC referred the matter to the State Historic Preservation Officer for the purpose of advising it as to any further action she viewed as required. In that procedure, the State Historic Preservation Officer was governed by the standards of the National Historic Preservation Act and not, in that function, by the Pennsylvania History Code. In any event, the State Historic Preservation Officer, to whom the project was referred for comment, has evidently offered no comment to the STB over the intervening seven years [NT 748] and it is apparent that, but for the present proceedings, nothing further would have been done for another seven years. The ICC was required by the National Historic Preservation Act to take into consideration the historic value of the properties involved in the abandonment of the Enola Branch and it fulfilled its obligation by reference to the State Historic Preservation Officer. The ICC and its successor, the STB, had no further obligation. Nothing further having been done for a period well in excess of 330 days, the process is at an end.

The foregoing having been said, Conrail is sensitive to the unease that the Administrative Law Judge and perhaps the Commission may feel in ordering actions inconsistent with the 1990 Stay Order of the ICC. While Conrail does not concede for a moment that that Order remains in effect, it is going forward with the State Historic Preservation Officer to see whether her concerns can be

met within the time constraints of the present proceeding. A request has been made to the Historic Preservation Officer for advice as to whether further steps she believes are required and, if those are reasonable in Conrail's view, Conrail will attempt to comply in order that there ultimately be no issue as to compliance with the ICC Stay Order. That process will undoubtedly take a period of time in excess of that within which the Administrative Law Judge and quite possibly the Commission may order action, but it is unlikely that the issue will remain unresolved beyond that point when Conrail will be required to act under the Orders of the Commission. If so, other remedies are available to those offended.

#### **IV. CONCLUSION:**

The interests of the Commonwealth, through the Department of Transportation, and of the municipalities through which the Enola Branch passes, have been well represented in these proceedings. Conrail is entitled to be relieved of its obligation of maintenance of structures for which it has no continuing need and that obligation can be relieved only in two ways, either by removal of the structures themselves or by reassigning maintenance obligations for those structures to others. The agreements that have been negotiated among the parties after great difficulty have resulted in a plan which would preserve most of the structures on the Enola


Branch with responsibility for future maintenance to be assumed by the municipalities in which they lie.

These agreements are at a considerable expense to Conrail in light of the subsidies which it has agreed to pay to the various municipalities to assist them in their maintenance responsibilities. Sniping by those who have no ownership interest or financial responsibility for the line and its improvements cannot change those fundamental facts. We may concede that the former rail line would make a commendable trail and we may likewise concede that the line itself and many of the structures on it retain historic and aesthetic values which ought to be preserved. However, that preservation is not a financial responsibility which Conrail is prepared to assume nor are FAST nor the National Rails to Trails Conservancy nor the Historic Preservation Trust of Lancaster County. The agreements that have been reached are a reasonable compromise of all the interests that are involved. Conrail respectfully submits that the agreements which have been reached should be confirmed and the substance of those agreements

recast as an Order of the Commission as the best and fairest solution to the issues which have been raised in these proceedings.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL

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Date: June 24, 1997

FEB 22 1990

## INTERSTATE COMMERCE COMMISSION

## DECISION

Docket No. AB-167 (Sub-No. 1095X)

CONSOLIDATED RAIL CORPORATION--ABANDONMENT EXEMPTION--  
LANCASTER AND CHESTER COUNTIES, PA

Decided: February 14, 1990

We are: (1) rescinding a stay previously imposed in this proceeding; (2) denying a separate stay request; (3) revoking the notice of exemption to the extent necessary to permit negotiations for trail use/rail banking; (4) imposing public use, salvage, and historic preservation conditions; and (5) establishing a procedural schedule for the submission of an offer of financial assistance.

Consolidated Rail Corporation (Conrail) filed a notice of exemption under 49 CFR 1152, Subpart F - Exempt Abandonments, to abandon approximately 66.5 miles of track called the Enola line in Lancaster and Chester Counties, PA. The line extends between the clearance point of the switch to Green Giant in Parkersburg, near milepost 1.1, and its connection to the Port Road Branch at CP "Port" in Manor Township, near milepost 33.7 (approximately 32.6 miles), and between its connection to Amtrak at CP "Park" in Parkersburg, near milepost 0.0, and its connection to the Port Road Branch at CP "Port" in Manor Township, near milepost 33.9 (approximately 33.9 miles). A notice of exemption was published in the Federal Register on October 23, 1989 (54 Fed. Reg. 43207). The exemption was scheduled to become effective on November 22, 1989, but its effective date was extended to December 1, 1989, due to the filing of a formal expression of intent to file an offer of financial assistance (OFA) by Southeastern Pennsylvania Transportation Authority (SEPTA) on November 2, 1989.<sup>1</sup>

On November 2, 1989, Lancaster County (Lancaster or County) filed a request<sup>2</sup> for a public use condition under 49 CFR 1152.28 and a statement of willingness to assume financial responsibility for the right-of-way pursuant to the Commission's regulations at 49 CFR 1152.29 (Trails Act rules). On November 13, 1989, the Department of Defense (DOD) filed a petition for reconsideration of the notice of exemption arguing that it may be void ab initio since, contrary to Conrail's assertions, it may not be possible

<sup>1</sup> By letter filed November 20, 1989, Conrail requested an extension of time, until December 5, 1989, to respond to SEPTA's oral request that it provide the OFA information required by 49 CFR 1152.27(a). Conrail acknowledged that its request would automatically toll the time period for submitting an OFA. In light of the December 1, 1989, stay decision, discussed infra, which held i. abeyance the OFA process, there was no need to act on this extension request. By letters received January 16, 1990, and January 29, 1990, Conrail supplied certain information requested by SEPTA. SEPTA has not responded.

<sup>2</sup> While this was termed a petition for reconsideration by the County's Solicitor, it acknowledged that the County took no position on the propriety of discontinuance of current rail service.

EXHIBIT

A

to reroute certain traffic essential to the national defense over other lines. On November 14, 1989, Lancaster also filed a petition to stay the exemption pending a complete environmental analysis pursuant to section 102 of the National Environmental Policy Act (NEPA). On November 20, 1989 Conrail filed a response to Lancaster's November 14th pleading.

In our decision served December 1, 1989, we found that the petition for reconsideration filed by DOD warranted a stay pending further review. We noted that, since a stay was being imposed, there was no need to consider Lancaster's stay request at that time. On December 4, 1989, DOD requested withdrawal of its petition for reconsideration. It has determined that an alternative line exists to reroute its traffic. In light of this, we lift the stay imposed in our earlier decision, and will now address the issues raised by Lancaster County in its stay request.

#### DISCUSSION AND CONCLUSIONS

Although Lancaster requests a stay, it fails to address the criteria necessary to justify that remedy. We must deny its request. We will, nonetheless, discuss the environmental issues it raises as grounds for a stay.<sup>3</sup>

Lancaster's pleading is, in effect, a petition for reconsideration of the Section of Energy and Environment's (SEE) November 1, 1989, Environmental Assessment (EA). In that document, SEE agreed with Conrail's conclusion, pursuant to 49 CFR 1105.7(c), that abandonment of this line will not significantly affect the quality of the human environment.

Lancaster principally argues two points: (1) that the EA did not address the possibility of retaining the line as an alternate route for future increases in the demand for rail service; and (2) that the alternate route currently used by Conrail (the Reading line) is not as efficient as the Enola line.

First, it is purely speculative to project what will happen in the future if the need for rail service in fact does increase, and if such increase will actually result in a lack of capacity on Conrail's Reading line. Lancaster has not provided us with any data regarding potential growth in this area, nor with any basis to expect substantial increases in rail service which might cause a capacity problem. Nor is SEE aware, through its contacts

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<sup>3</sup>The standards governing the disposition of a petition for stay are: (1) whether petitioners have a strong likelihood of prevailing on the merits of their appeal; (2) whether petitioners will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) (Holiday Tours).

Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989), states that protestants need not address the Holiday Tours criteria in seeking a stay on environmental grounds. However, that reference was in the context of stay requests made in those proceedings where an informed opinion on environmental issues cannot be made prior to the effective date of the notice of exemption. Here, the environmental assessment was completed on November 1, 1989, some 2 weeks before Lancaster's stay request and over 3 weeks prior to the effective date of the exemption. Thus, to justify a stay, Lancaster must satisfy the criteria of Holiday Tours.

with pertinent federal, state, and local officials, of any plans for economic development in this southeastern Pennsylvania region that might substantially increase the demand for rail service along Conrail's current route. We are required under the National Environmental Policy Act to evaluate only the reasonably foreseeable results of our actions. We conclude there is no reason to believe that future rail traffic will increase beyond Conrail's ability to handle such traffic after abandonment of the Enola Branch.

Second, we note that Conrail's decision to reroute its overhead traffic was a management decision not subject to our review. Management is given considerable discretion in reaching these decisions since the efficiency or inefficiency of a railroad's rerouting decisions must necessarily take into account the carrier's operations over its entire system, and include economic as well as environmental considerations. Lancaster has offered no support for its contentions that routings over the subject line are more energy efficient, safer, and less noisy than any other routing. As Conrail notes, the efficiency of a line is determined by more than grade, curves, and highway crossings.<sup>4</sup> Traffic density is also a major component of a rail line's efficiency. The alternate Reading line, Conrail claims, is thus more efficient to use as a through route than the Enola line because, unlike that line, it generates local traffic.

Lancaster has also filed a statement of its willingness to assume financial responsibility for the right-of-way pursuant to 49 CFR 1152.29 and a request for a public use condition to enable it to negotiate with Conrail for use as a recreational trail of those portions of the line located in Lancaster County. Conrail has indicated its willingness to negotiate with the County for the potential sale of the right-of-way for public use purposes. We find that the provisions of 16 U.S.C. 1247(d) are applicable and that all of the criteria for imposing trail use/rail banking under 49 CFR 1152.29 have been met. Accordingly, we will revoke the notice of exemption to the extent necessary to implement trail use/rail banking, and will issue a Notice of Interim Trail Use (NITU) under 49 CFR 1152.29.

The parties may negotiate a trail use/rail banking agreement during the 180-day period prescribed below. If no agreement is reached within 180 days, Conrail may fully abandon the line. See 49 CFR 1152.29(d)(1). At any time during the 180-day period, Conrail is free to notify the Commission that it is no longer willing to negotiate with Lancaster County, and the NITU will convert into a notice of abandonment. Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As noted, SEPTA filed a notice of intent to file an OFA and has requested certain financial information from Conrail. Conrail states that it recently provided the requested information to SEPTA. It is not, however, clear from the record that Conrail has provided all the information required by section 1152.27(a). In light of this uncertainty, we will first direct SEPTA to notify Conrail and the Commission by February 27, 1990, whether they seek additional information under section 1157.27(a). If SEPTA seeks additional information, Conrail must notify it and the Commission by March 5, 1990, how long it needs to produce the information (up to a maximum of 60 days), which will then be the due date for the information. The offer will be due within 30 days after either: (a) SEPTA waives the information request; or (b) if SEPTA seeks additional information, the date

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<sup>4</sup> Conrail also observes that Lancaster does not question the fact that the line handles no local or overhead traffic.

Conrail produces that information.

We note that operation of the trail use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10905. See 49 CFR 1152.27(e)(2) and (f). If the line is to be sold under the financial assistance procedures, the petition for abandonment exemption would be dismissed and trail use would be precluded. Alternatively, if a sale under the financial assistance procedures does not occur, it will be possible to proceed under the trail use procedures.

Conrail previously filed an environmental report with its notice of exemption. As discussed earlier, SEE has examined Conrail's environmental report, verified the data it contains, and analyzed the probable effect of the proposed action on the quality of the human environment. SEE notes that the Pennsylvania Historical and Museum Commission has not yet completed its review of the 83 bridges located on the line that may be potentially eligible for inclusion in the National Register of Historic Places. Accordingly, we will impose a condition that Conrail 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, 16 U.S.C. 470.

SEE has also concluded that the involved right-of-way may be suitable for alternative public use. In Rail Abandonments - Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986), we found that parties seeking trail use may invoke the public use provisions of section 10906 as an alternative. To justify imposition of a public use condition, a party must show: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for imposition of the time period. See 49 CFR 1152.28(a)(2). Lancaster County's request meets these requirements, and, thus, a public use condition will be imposed. We note that a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes including trail use.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The stay imposed in our earlier decision in this proceeding is lifted.
2. The notice of exemption is revoked to the extent necessary to implement interim trail use/rail banking as set forth below.
3. This decision is subject to the following conditions:  
(1) the requirement that Consolidated Rail Corporation (Conrail) must keep intact all the right-of-way underlying the track, including bridges and culverts, for a period of 180 days from the effective date of this decision to enable any State or local government agency to negotiate the acquisition of the right-of-way for public use; (2) the requirement that Conrail 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, 16 U.S.C. 470; and (3) the requirement that Conrail comply with the terms and conditions for implementing interim trail use/rail banking set forth below. If an interim trail use/rail banking agreement is executed prior to

the 180-day period noted above, the public use condition will expire to the extent the trails use/rail banking agreement covers the line.

4. Subject to the conditions set forth above, Conrail may discontinue service, cancel tariffs for this line on not less than 10-days' notice to the Commission, and salvage track and material consistent with interim trail use/rail banking. Tariff cancellations must refer to this notice by date and docket number.

5. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of any liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any and all taxes that may be levied or assessed against the right-of-way.

6. Interim trail use/rail banking is subject to the future restoration of rail service and subject to the user continuing to meet the financial obligations for the right-of-way.

7. If the user intends to terminate trail use, it must send the Commission a copy of this notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by the 180th day after publication of this notice, interim trail use may be implemented. If no agreement is reached by the 180th day, Conrail may fully abandon the line.

9. Southeastern Pennsylvania Transportation Authority and Conrail must comply with the procedural schedule set forth above for the submission of an offer of financial assistance. As noted above, the operation of the trail use procedures could be delayed or foreclosed by this financial assistance process pursuant to 49 U.S.C. 10905. See 49 CFR 1152.27(e)(2) and (f).

10. Offers of financial assistance and related correspondence to the Commission must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Rail Section, AB-OFA."

11. This decision is effective on February 22, 1990.

By the Commission, Chairman Gradison, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett.

(SEAL)

Noreta R. McGee  
Secretary

INTERSTATE COMMERCE COMMISSION  
Washington, DC 20423

SERVICE DATE

NOV 01 1989

ENVIRONMENTAL ASSESSMENT

AB-167 (SUB-NO. 1095X)

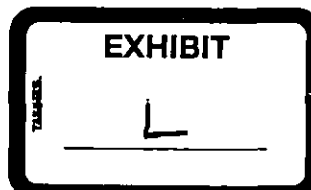
CONSOLIDATED RAIL CORPORATION-  
ABANDONMENT EXEMPTION-LANCASTER AND CHESTER COUNTIES, PA

In the above-entitled proceeding, Consolidated Rail Corporation (Conrail) has filed a notice of exemption seeking to exempt from the provisions of 49 U.S.C. 10903-10904, the abandonment of two-parallel lines of railroad located between Parkesburg and Post, a distance of 32.6 and 33.9 miles, respectively in Lancaster and Chester Counties, PA. A map depicting the rail line in relation to the area served is appended to this report. After the abandonment authorization becomes effective, the railroad will be able to salvage track, ties and other railroad appurtenances and to dispose of the right-of-way.

The railroad has submitted an environmental report that essentially concludes that the quality of the human environment will not be affected significantly as a result of abandonment or any post-abandonment activities, including salvage and disposition of the right-of-way. We have investigated the record in this proceeding. We have also contacted individuals and agencies that are closer to the situs of the railroad's planned abandonment in an effort to verify the railroad's report and to gain a better understanding of the affected environment. Contacts have included the U.S. Fish and Wildlife Service, the Pennsylvania Historical and Museum Commission, Lancaster County Planning Commission, and the Pennsylvania Department of Environmental Resources as well as other state and local agencies.

The Pennsylvania Department of Environmental Resources (PDNR) is preparing a response to Conrail's proposed abandonment which will include all input from Pennsylvania agencies which are participating in the response process. PDNR is currently incorporating these comments and has indicated that the responses will arrive at the ICC within the environmental assessment commenting period. Due to this delay in receiving comments from the interested agencies it may be necessary to incorporate appropriate conditions, if any, in the near future.

The Pennsylvania Historical and Museum Commission has not yet completed its review of the 83 bridges found on the line that may be potentially eligible for inclusion in the National Register of



Historic Places.<sup>1</sup> Therefore, Conrail shall 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, 16 U.S.C. 470.

The U.S. Fish and Wildlife Service has indicated that there are no threatened or endangered species which will be affected by the proposed abandonment.

Although some interest has been shown in reuse of the subject rail right-of-way for alternate public use we have not, as yet, received a request for a public use condition or interim trail use. It is our understanding that PDNR's comments may request these conditions.

Based on information gleaned from all sources to date, we agree with the railroad's conclusion that, as currently proposed, abandonment of the Conrail's rail line will not significantly affect the quality of the human environment.

Following abandonment and salvage of the rail line, the right-of-way may be suitable for other public use. See e.g. Glosemeyer v. Missouri-Kansas-Texas R. Co., 685 F. Supp 1108 (E.D. Mo. 1988). We have made no attempt to determine whether and to what extent any other persons may hold property interests within the right-of-way. See e.g. National Wildlife Federation v. I.C.C., 850 F.2d 694 (D.C. Cir. 1988) and [1976] U.S. Code Cong. & Ad. News 131.

A request for a notice of interim trail use must be filed with the Commission and served on the railroad before the abandonment becomes effective. See Illinois Commerce Commission v. Interstate Commerce Commission, No. 86-1687 (D.C. Cir. filed May 24, 1988). [slip opinion at 31]. Such request must comply with the Commission's rules for use of rights-of-way as trails. See 49 C.F.R. 1152.29. A request containing the requisite four-part showing (49 C.F.R. 1152.28) for imposition of a public use condition must be filed with the Commission and served on the railroad within 20 days of Federal Register publication of the railroad's notice.

This document was prepared by John O'Connell, staff environmental protection specialist, who is solely responsible for the development of factual matters presented herein. Harold Johnson, staff attorney, has reviewed this document for conformance with environmental laws, policies, and procedures, as well as the integration of those authorities, in the context of the action under review, with prevailing ICC policies and procedures. All questions concerning purely factual matters should be addressed to

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<sup>1</sup> This is based on a phone conversation of October 25, 1989 with the Pennsylvania SHPO. A letter addressing the bridges' eligibility should arrive at the Commission the first week of November.

John O'Connell at (202) 275-6842. All questions concerning the interpretation of statutes and other issues involving environmental or ICC regulations, policies or procedures should be addressed to Harold Johnson at (202) 275-6874. Questions involving an admixture of fact and law should be referred to Harold Johnson.

Comments and/or questions regarding this document are welcome.

Date made available to the public: October 27, 1989

Comment due date: November 13, 1989

DO

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-167 (Sub-No. 1095X)

CONSOLIDATED RAIL CORPORATION--ABANDONMENT EXEMPTION--  
LANCASTER AND CHESTER COUNTIES, PA

Decided: April 14, 1993

SERVICE DATE

APR 19 1993

By decision served December 28, 1992, Lancaster County (Lancaster) received an extension of the negotiating period within which to reach an agreement with Consolidated Rail Corporation (Conrail) pursuant to a February 22, 1990, Notice of Interim Trail Use or Abandonment (NITU).<sup>1</sup> Lancaster was to conclude the negotiations and reach a sale agreement by April 15, 1993. By pleading filed March 26, 1993, Lancaster now requests a further extension of time within which to negotiate a Trails Act agreement with Conrail.<sup>2</sup> Conrail notified the Commission, by letter filed April 7, 1993, that it opposes any further extension of the negotiating period. On April 13, 1993, the National Association of Reversionary Property Owners filed a protest to the extension request.

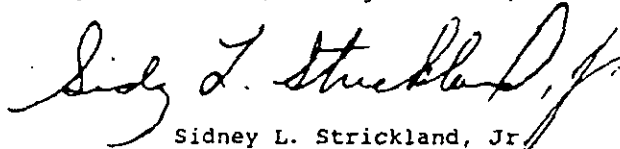
The Commission's Trails Act authority is very limited: the trails use program is voluntary and consensual, and does not permit the Commission to require forced sales. Rail Abandonments--Use of Rights-of-Way As Trails, 2 I.C.C.2d 591 (1986); aff'd Conn. Trust for Historic Preservation v. ICC, 841 F.2d 479 (2d Cir. 1988). Since Conrail now opposes the extension, and is unwilling to negotiate further, the Commission is required to deny Lancaster's request and allow the abandonment authority to become effective.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request by Lancaster to extend the negotiating period under the NITU is denied.
2. The trail use condition imposed in the February 22, 1990 decision is vacated and Conrail may abandon the line.
3. This decision is effective on its service date.

By the Commission, Joseph H. Dettmar, Acting Director,  
Office of Proceedings.



Sidney L. Strickland, Jr.  
Secretary

(SEAL)

<sup>1</sup> Conrail filed a Notice of Exemption under 49 CFR 1152, Subpart F - Exempt Abandonments, to abandon approximately 66.5 miles of rail line in Lancaster and Chester Counties, PA. The February 22, 1990, decision imposed trail use/rail banking and public use conditions pursuant to 16 U.S.C. 1247 (Trails Act). Extensions have previously been granted by decisions served January 6, 1992, March 11, 1992, and July 24, 1991.

<sup>2</sup> United States Senators Arlen Specter and Harris Wofford and Congressman George W. Gekas have filed letters supporting Lancaster's extension request.

EXHIBIT

B

We affirm the finding in the December 28, 1992, decision that Lancaster has shown good cause for a grant of the extension. Lancaster has explained that the consultants' studies are almost completed, and that it will then need only a few months to assess the studies and negotiate with Conrail. Lancaster expects that an agreement for sale is imminent. It has thus shown good faith efforts to complete the negotiating process.

NARPO has not shown specific harm to the abutting property owners of reversionary interests that outweighs the policy mandated by Congress in the Trails Act of providing an opportunity for an agreement for interim trail use and preserving the corridor for future reactivation of rail service. Thus, we will deny NARPO's petitions.

We note, however, that we have granted numerous extensions to Lancaster, and that this proceeding has continued for over 3 years. We admonish Lancaster that any request for a further extension beyond April 15, 1993, will not be viewed favorably, absent the most compelling circumstances.

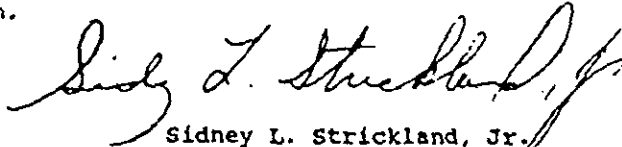
This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NARPO's petition is denied.
2. This decision is effective on March 5, 1993.

By the Commission, Chairman McDonald, Vice Chairman Simmons, Commissioners Phillips, Philbin, and Walden. Chairman McDonald commented with a separate expression. Commissioner Walden, joined by Commissioner Philbin, concurred in the result with a separate expression.

(SEAL)

  
Sidney L. Strickland, Jr.  
Secretary

-----  
COMMISSIONER McDONALD, commenting:

I voted to grant the extension in December 1992, however, by April 15, 1993, in my view, the parties will have had sufficient time to negotiate a Trails Act agreement.

-----  
COMMISSIONER WALDEN, joined by COMMISSIONER PHILBIN, concurring  
in the result:

In my view, the Commission has given the parties enough time to conclude a Trails Act agreement, and this proceeding should be brought to an end without further protraction. With reluctance, I join the Commission's grant of an extension of time until April 15, 1993, and its denial of the petition for reconsideration. However, I would have also required the parties to notify the Commission in writing by that date that a Trails Act agreement has been negotiated and concluded. I would have provided that failure to so notify the Commission by April 15 would result in the Commission's automatic revocation of the Notice of Interim Trail Use and immediate issuance of the certificate of abandonment.

The Commission's regulation, 49 CFR 1152.29(g), provides that a notice of interim trail use "may permit the parties to negotiate for a period . . . not to exceed 180 days, at the end of which, the CITU or NITU will convert into a certificate, decision, or notice permitting abandonment." The notice of interim trail use was issued on February 22, 1990. We now have allowed the parties over three years, or six times the regulatory limit, to conclude an agreement. I join the Commission's decision only because it appears that an agreement is imminent. The Commission's four decisions in this proceeding granting extensions of time, and similar extensions granted in other cases (noted in the text), treat the rule ("not to exceed 180 days") as if it did not exist.<sup>1</sup>

While there may be good cause in a particular case to extend the negotiating period for a reasonable time, and I concede that the purposes of the Trails Act are likely served by a Trails Act agreement (even if tardily reached), surely there is a point where the Commission's role should end and our finite resources are devoted to other matters where the parties reasonably expect and deserve our expeditious attention.<sup>2</sup> If the Commission believes that the 180-day period is generally too short, we should move promptly to revise our rules, subject to notice-and-comment procedure. I do not know what generally constitutes a reasonable time to conclude a Trails Act agreement, but I am prepared now to conclude that in this proceeding, any time beyond April 15, 1993 would be unreasonable and should not be tolerated by the Commission.

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<sup>1</sup> The 180-day time period does not emanate from the Trails Act and is not otherwise required by statute. Instead, this figure appears to have been borrowed from the statutory timeframe for public use conditions. 49 U.S.C. 10906. Also, I note that the "not to exceed" language in 49 CFR 1152.29(g) is stricter than the language used in 49 CFR 1152.29(d) (NITU permits railroad to "fully abandon the line if no agreement is reached 180 days after it is issued[.]"). The stricter timeframe applies where a CITU or NITU is not originally issued, but issued following a reopening of the proceeding on joint motion of the railroad and trail use proponent.

<sup>2</sup> In other situations, as noted in the Commission's decision, specific harm shown to the abutting property owners of reversionary interests may provide a sufficient countervailing interest in terminating the negotiation period.



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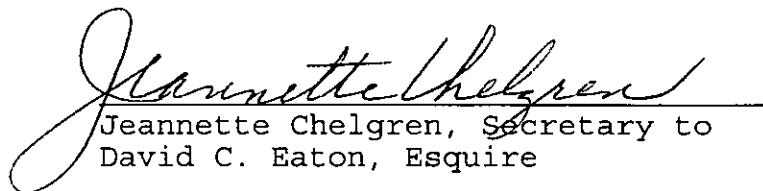
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Jeannette Chelgren, Secretary to  
David C. Eaton, Esquire

Dated: June 24, 1997

MEM

Joyce A. Nettke  
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June 24, 1997

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DOCUMENT  
FOLDER

Re: Application of Consolidated Rail Corporation for the abolition of thirty-one crossings of the Enola Branch, LC:201323, MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg Division, Lancaster County, Pennsylvania - Docket No. A-00111016 and consolidated case C-00913256

To the Secretary:

Please find enclosed nine copies of the Brief of Friends of the Atglen-Susquehanna Trail, Inc. ("FAST") in the above-referenced case. The original is being served in hand by messenger to Administrative Law Judge Louis G. Cocheres.

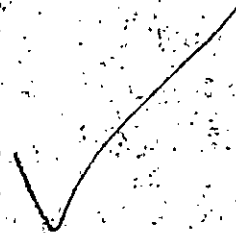
Thank you for your attention to this matter.

Sincerely,

Joyce A. Nettke,  
Attorney at Law

JN

cc: Louis G. Cocheres, ALJ



ORIGINAL

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

002736  
Re: Application of Consolidated Rail Corporation for the abolition of thirty-one crossings of the Enola Branch, LC:201323, MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg Division, Lancaster County, Pennsylvania - Docket No. A-00111016 and consolidated case Docket No. C-00913256

BRIEF OF FRIENDS OF THE ATGLEN-SUSQUEHANNA TRAIL, INC. ("FAST")

I. STATEMENT OF QUESTIONS INVOLVED

A. Whether the parties responsible to do so have complied with federal and state historic preservation law requirements.

FAST answers in the negative.

B. Whether Conrail has met its burden to show that its proposed crossing solutions adequately provide for safety in and around the crossings.

FAST answers in the negative.

II. STATEMENT OF THE CASE

Consolidated Rail Corporation ("Conrail") has applied for abolition of 31 crossings on the twenty-three mile "Enola low-grade" line ("the Line") across Lancaster County, asking this Commission to approve Stipulations between Conrail and six local municipalities ("the Townships") and between Conrail and the Pennsylvania Department of Transportation ("PADOT") (Exhibits A and B respectively, to Conrail Statement 1, hereinafter "Township Stipulation" and "PADOT Stipulation".) In the consolidated case Bart Township seeks revocation of a previous Order re the Lamparter Road highway-over-rail crossing.

From summer, 1993 through mid-September, 1995, Conrail was negotiating to convey the Line to a non-profit 501(c)(3) trail group, Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"). (FAST Statement 5, at 3). This Commission granted FAST's petition

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to intervene in the instant case, filed April 24, 1994.

FAST gathered nearly one million dollars of funding to develop a rail-trail ("the Trail") on the Line (Id.) and hired a trail designer who prepared a Master Park Plan (FAST Exhibit B). The Trail is a high-priority greenway in Lancaster County's Comprehensive Plan (NT 576). (FAST also intervened in the consolidated case; the Order Bart seeks to revoke approved a Stipulation to accommodate the Trail).

By mid-September, 1995, Conrail was proposing to donate the Line to FAST, with a 1.2 million dollar endowment which FAST planned to invest in a trust fund for bridge maintenance (NT 1094). FAST's negotiations with Conrail were thwarted when the Townships moved to take over the line themselves (FAST Statement 6, at 2). Conrail now proposes to convey the Line to the Townships, along with one and one-half million dollars.

The National Historic Preservation Act, 16 U.S.C. Section 470 et seq. as amended 1992 ("NHPA") and regulations, 36 CFR 800 et seq., (known as the "Section 106 process" or "Section 106" or "106") require Conrail to document and mitigate adverse effects of its rail line abandonment. Conrail admits it is subject to 106 but contends it has completed its obligations. In April, 1996, the Administrative Law Judge ("ALJ") directed Conrail to inquire of the State Historical and Museum Commission whether Conrail has completed 106. Brenda Barrett, for PHMC, answered in the negative (Barrett B). FAST filed a Hearing Motion and a Supplemental Hearing Motion raising the 106 issue. FAST contends the PUC cannot make any Order paving the way for transfer of the Line or

demolition of bridge(s) while Section 106 is incomplete.

One day of hearings was held in November, 1995. After that, several hearing dates were scheduled but continued due to Conrail and the Townships requesting more time to get their agreement together. The ALJ held two days of further hearings on June 11 and June 12, 1997.

### III. SUMMARY OF ARGUMENT

The entire line and contributing structures are eligible for the National Register of Historic places. Conrail has not met its obligations under federal and state historic preservation law, nor have Conrail and the state actors carried out their Pennsylvania History Code responsibilities. Transfer of the line and/or demolition of one or more bridges would be an "adverse effect" within the meaning of the National Historic Preservation Act. The Commission is preempted by federal law from making any Order that would pave the way, as in the proposed Stipulations, for transfer of the line and/or demolition of one or more bridges until the 106 process is complete. Conrail cannot evade its responsibility to complete the 106 process by transferring the line to local Township owners.

Conrail has not met its burden to show that public safety in and around the crossings will be protected by the solutions offered in the stipulations. The proposed solutions do not accommodate the proposed Trail. Despite the historic value of the line and bridges, and notwithstanding the effect upon a future Trail, the Townships, according to the Stipulation, can demolish any bridge they choose at any time they choose, beginning immediately after

they take ownership. As to the largest bridge on the line, the Townships have no maintenance plan for the huge Martic Forge trestle except to fence it off, leaving an attractive nuisance.

In the consolidated case, Bart Township has not met its burden to show the material change of fact or law needed to vacate the previous Order.

If the Commission rejects the argument that federal Section 106 preempts the ALJ from entering an Order, alternatively, FAST asks the Commission to reject the Stipulations and assign bridge maintenance to the County. Conrail should be ordered to pay for any work currently identified as necessary to make the bridges safe. The Commission should order a bridge removed only after making a finding that no alternative exists to address safety both of highway and trail users. The ALJ should make specific finding as to alternatives that were considered and why they are rejected.

#### IV. ARGUMENT

##### A. THE PARTIES RESPONSIBLE TO DO SO HAVE NOT COMPLIED WITH FEDERAL AND STATE HISTORIC PRESERVATION LAW REQUIREMENTS

1. Conrail has not completed the National Historic Preservation Act "Section 106" process.

The Line is a resource of national historic significance. See Barrett, FAST Statement 3. Ms. Barrett, an attorney, is Director of the Bureau for Historic Preservation of the Pennsylvania Historical and Museum Commission ("PHMC") (Barrett-A). Charles A. Flink, expert on greenway and trail design, who created the Master Park Plan for the Line, and works on trail projects all over the United States, considers the corridor "to be one of the most

significant transportation corridors in the United States intact" (NT 419). PHMC has recognized the value of the line by awarding a one hundred thousand dollar grant for rehabilitation of the Martic Forge Bridge for trail use. (NT 810). PHMC believes a trail is the best use of the Line (FAST Statement 3, at 13-14.)

When the ALJ considers safety in and around the crossings, the entire resource must be looked at as an entity when taking historic preservation considerations into account. The entire Line is eligible for the National Register of Historic Places. (Exhibit D to FAST Hearing Motion filed February 20, 1996.) Barrett explained that for NHPA purposes there is no distinction between eligibility for the National Register and actual listing (NT 769).

A railroad abandonment proceeding is subject to the requirements of Section 106 (NT 728-729). Conrail admits it must comply with 106 regarding its abandonment application (NT 528.)

The 106 process is a series of steps to mitigate adverse effects upon a historic resource. 36 CFR 800 et seq . First is the duty to identify potential adverse effects. 36 CFR 4. Transfer, sale or lease of the Line and/or demolition of any bridge are adverse effects. 36 CFR 800.9(b). Barrett explained Conrail had a duty to consult with interested parties (NT 732). These must (emphasis added) be invited to join. 800 CFR 5(1). They might include adjacent landowners, local government representatives and others with an interest in the undertaking 800 CFR 5(1). The public must be given the opportunity to comment 800 CFR 5(3). These potential "interested parties" are not necessarily included in this PUC case. NHPA and the Pennsylvania History Code require

the interested parties to take into account the effect on historic resources in their decisions, (NT 765), for example, "ways to make a bridge crossing, a rail crossing and a road crossing safer without destroying the historic resources." (NT 765.) The goal of the process is a Memorandum of Agreement to mitigate adverse effects 800 CFR 4. This process would include the land and numerous stream bridges outside the jurisdiction of this Commission. This process, therefore, ought to be conducted separately and should have been conducted prior to submission by Conrail of stipulations which include adverse effects upon these resources. Conrail has already gone well ahead of this process in formulating the subject stipulations. Moreover, Barrett explained the process needs to be completed for the entire line and not individual bridges (NT 807).

The burden is on the applicant to carry the process forward, and not upon PHMC (NT 732). Conrail has not completed the process for this resource. (Barrett B). Conrail counsel asked her repeatedly if she could find that Conrail had completed its obligations and repeatedly she explained that Conrail has not. Conrail argued that because it has submitted certain documents to PHMC its obligation was complete but Barrett explained "documentation means the actual historic documentation of a resource; that is, archivally stable photographs, drawings." (NT 778). Documentation is the final step after all alternatives have been considered and the historic resource will be lost. Barrett's testimony showed overwhelmingly that the 106 process is not complete.

2. The Commission is preempted from entering an Order which would pave the way for an "adverse effect" within the meaning of

The National Historic Preservation Act so long as the "106 process is incomplete.

In its Order served February 22, 1990, the Interstate Commerce Commission ("ICC") placed a trail use condition on Conrail's abandonment of the Line, along with a condition that "Conrail take no steps to alter the historic integrity of the bridges on the line until completion of the section 106 process..." (Order at Exhibit A to FAST's hearing Motion, of Feb 20, 1996.) FAST also raised these issues in this case by Supplemental Hearing Motion filed May 8, 1996. Conrail has offered no showing that the latter condition has ever been vacated.

The PUC lacks authority to approve or require demolition of historic structures until 106 is complete, under principles of federal preemption, as to do so would conflict with the ICC's condition. See Chicago and North Western Transp.Co v. Kalo Brick & Tile Co., 450 U.S. 311 (1981), (state law is preempted when it conflicts with the ICC's exclusive and plenary authority over railroad abandonments.) The Supreme Court has noted that states can normally regulate post-abandonment consistent with ICC abandonment authorization "unless the Commission (ICC) attaches postabandonment conditions to a certificate of abandonment..." Hayfield Northern R. v. Chicago and N.W. Transp., 467 U.S. 622, 633 (1984). Any Order of this condition prior to completion of Section 106 would conflict with the ICC's post-abandonment condition, and would be preempted under the Supremacy Clause of the U.S. Constitution.

3. The requirements of the Pennsylvania History Code have not

been met by the State agencies in the instant case.

The Commonwealth has its own historic preservation law which bears upon this case along with the federal law and regulations. This "Pennsylvania History Code" is set forth at 37 Pa C.S. Chapter 5. Barrett's testimony also makes clear that the state actors in this case have a duty to comply with the Pennsylvania History Code. These parties are required to seek the advice of PHMC, 37 PA C.S. Section 508(2) "on possible alternatives to demolition, alternation or transfer of property under their ownership or control." (NT 724). Crossing abandonment proceedings are not exempt. (NT 770). PHMC has not been contacted by PADOT about the Enola Line and structures (NT 771). PHMC has not been asked to comment upon the proposed Stipulations now before the ALJ (NT 771). (NT 947-949). Barrett's testimony makes clear the responsible parties have not carried out their duties under the state historic preservation law.

(Please see also in this regard the Petition of the Historic Preservation Trust of Lancaster County filed in the instant case).

B. CONRAIL HAS NOT MET ITS BURDEN TO SHOW THAT ITS PROPOSED CROSSING SOLUTIONS ADEQUATELY PROVIDE FOR SAFETY IN AND AROUND THE CROSSINGS.

1. The Stipulations do not adequately provide for safety at the crossings.

By offering the two stipulations, Conrail is asking the Commission to find that they adequately address safety in and around the crossings. The Pennsylvania Rails to Trails Act ("Trails Act") (pertinent part at 32 P.S. Section 5620) mandate to the Commission to consider the effects of its crossing decisions

upon the development, expansion and existing use of recreational trails, is also strongly applicable to this case.

The record shows the decisions to keep or remove bridges to be arbitrary rather than well-grounded in engineering criteria addressing safety considerations. The record does not contain adequate justification for most of the bridge removals contemplated. The Stipulations reflect merely a package deal, addressing Conrail's and the Townships' business and financial goals (NT 527; NT 692). Counsel for the Townships summed this up succinctly: "The stipulation under examination here is an agreement among many parties with many different points of view about what the disposition of the structure is, and Mr. Heebner (for Conrail) did not make an independent determination of the safe or unsafe condition of any particular crossing that forms the basis of whether or not it should come out. It was a negotiated result among a number of parties." (NT 503). Then, after the Commission no longer has jurisdiction, all of the bridges are at risk of removal with no justification at all. (Township Stipulation Paragraph 12.5).

Roger Heebner, engineer spoke on behalf of Conrail (Conrail Statement 1), the proponent herein. Mr. Heebner, says "the railroad recognized from the beginning that they were not in the best position to determine what crossings could or could not be removed" (NT 454). He did not know when Conrail last inspected the bridges (NT 471). No longer an employee of Conrail, he does not have current information on the Line himself (NT 490), and had not recently reviewed the information possessed by Conrail (NT 491).

While Heebner admits that there is a check-list of criteria and Bridge Inspection reports within Conrail's Maintenance of Way Department, they have not been placed in the record (NT 523-524). Speaking for Conrail, Heebner knew of no traffic counts, accident reports or lawsuit reports concerning the crossings (NT 488). He did not know whether or not there were trespassers who go onto the bridges (NT 472-473). Conrail asks the Commission to approve its solutions without offering any reasons that Conrail has itself determined. Instead, Heebner states that the solutions offered are based on "concerns" of the Townships (NT 477). He did not verify these concerns (NT 477-478), and made no showing that anyone else from Conrail verified them. He stated reasonably enough that Conrail is not privy to all the information the municipalities have (NT 487). However, the Townships as co-offerors of the Stipulation have not provided hard evidence themselves. See testimony of Supervisor Duvall for Providence Township. Although his Statement 1 discusses traffic at Crossings 15 and 21 slated to be removed, Duvall testified Providence has done no traffic counts at any relevant crossing (NT 655); has not compiled any accident reports (NT 655) and although it could acquire such records from the state police it did not do so for the relevant crossings (NT 656).

Providence is also taking over the bridges within neighboring Quarryville Borough (NT 646). Clearly, Providence did not seek any such data from Quarryville (NT 646-652). Providence gave no information to answer the Commission questions about condition, traffic, or work needed at the Quarryville crossings Numbers 13 and

14 where it proposes to take over maintenance responsibility for bridges (Prov. Statement 1.)

Neither Conrail nor any of the Townships have offered any engineering studies into the record to show why bridges should be removed. The Township Stipulation does not address specific plans for repair, maintenance or rehabilitation currently needed at any of the bridges that they propose shall remain in place.

The ALJ did not get much help from his PUC engineer. David Oliver did not offer serious recommendations or individualized evaluations of the crossings and no in-depth information about the work involved for his proposed solution - which was tear down the bridges and slope the embankments 2:1. See, in general, Commission Staff Statement No. 1). He could not testify as to any costs or realistic scope of work involved in removing the bridges (NT 976), even though, for example at Route 272, these structures are massive. He did not take into account historic preservation considerations (NT 947-949). Given the recommendations throughout for 2:1 slopes he clearly did not consider Trail use. FAST submits the ALJ should disregard the Staff recommendations for all of the foregoing reasons.

FAST was the only party which submitted a comprehensive package of solutions for the crossings including engineering data (Wilson-B), conceptual drawings and proposals to upgrade the entire crossing areas and structures to make them safe for both the motoring public and trail use, along with costs, and offered alternatives to demolition. (See Master Park Plan, FAST Exhibit B).

With regard to bridges to be demolished, the decisions offered in the Stipulations are arbitrary, and moreover, the record does not show any real consideration of alternatives to demolition. For example, Bushong Road in Eden Township, Crossing No. 9 has a vertical clearance from the roadway to the bottom of the girders of only 10'8"; Conrail states "it may be that this bridge should be raised to a vertical clearance to better accommodate local traffic" but "proposes no work to be done to this structure to provide for a safe highway." (Conrail Statement 1, Answer to Question 7.) This bridge is in poor condition (Master Park Plan, Exhibit B, page 36). FAST's Master Park Plan proposes removing this bridge and creating an at-grade crossing (Id). Township intends to keep this bridge according to the Township Stipulation, but Eden has submitted nothing into the record showing current condition of the bridge or intended improvements at the crossing.

In contrast, the steel girder bridge at Sigman Road, Providence Township, crossing No. 26 is 11'3" vertical clearance, and Conrail asserts although the bridge is somewhat deteriorated, it is satisfactory for non-rail use. (Answer to question 7, Crossing No. 26). Nevertheless, without any consideration of alternatives like jacking the bridge, or piping the stream to improve clearances, Conrail will demolish this usable structure. FAST proposed to upgrading of the structure and crossing area for public use. (FAST Exhibit B, Master Park Plan).

At Hollow Road, Providence Township, crossing No. 21, a stone-arch historic bridge, in good condition and able to function

indefinitely (Conrail Statement Answer to Question 7) the Stipulation proposes to demolish the bridge, realign the road and slope embankments 2:1. Consistent with FAST bridge improvement summary (Master Park Plan; Wilson Exhibit B), a better solution to save the historic bridge and safely accommodate public use would be to realign the road as proposed, regrade and lower the roadway, place appropriate signage (for example, Yield to on-coming traffic or a stop sign), and keep the bridge.

The record also shows that the PADOT Stipulation does not consider alternatives to demolition. Clearly PADOT does not want to assume any future maintenance responsibility for any railroad structure, and has based its removal/retention decisions solely on whether another entity will agree to take that responsibility. Two examples of this thinking are found at White Oak Road and Pumping Station Road, where alternatives exist to demolition but were not considered.

At White Oak Road in Sadsbury Township, Crossing No. 4, Conrail says it may be feasible to raise the bridge for greater vertical clearance, (Conrail Statement 1, Answer to Question 7) but instead will tear it down because PADOT will not take future maintenance, or consider alternatives to demolition (PADOT Statement 1, at 11). FAST's engineer submitted cost estimates and details for jacking steel girder bridges (Wilson, FAST Exhibit B).

At Pumping Station Road, Eden Township, Crossing No. 10, a historic stone arch structure in good condition, will be demolished without consideration of other feasible alternatives such as regrading and lowering the roadway to increase underclearance.

FAST engineer submitted a Summary of Bridge Improvement work items and cost estimates to reuse the bridge for the Trail (Wilson, FAST Exhibit B). In contrast, PADOT stipulation allows the bridge at Church Street in Quarryville, Crossing No. 13, to remain because another party will take responsibility.

Assuming arguendo, that for some rail lines where there are no historic preservation conditions and no proposed Trail supported by all major parties, unlike the instant case, this policy based solely on financial concerns and trade-offs is appropriate, it is not permissible in this case. To make these decisions purely for the business reasons considered, precludes any serious consideration of the alternatives that will make the bridges safe and usable for future public use. It negates the procedures required by the historic preservation laws that require identification and mitigation of adverse effects, with destruction of the resource only as a last resort. It refutes the intent of the Trails Act to consider alternatives.

At Route 324 in Martic Township, Crossing No. 27, the consensus, including FAST, was that road alignment and poor sight distance present safety problems. PADOT, Conrail the Townships, FAST and the County have all proposed the preferable solution of creating an at-grade crossing by realigning the road east of the crossing structure to alleviate these safety problems. The proposal in the Stipulations is very speculative. (Paragraph 7.3) Site condition improvements will hinge solely on future funding for the project, which is extremely uncertain according to the Stipulation. The Commission is asked to give up jurisdiction

having no definite future configuration of this crossing. If funding for realignment does not come through, the fallback plan totally disregards the safety of future trail users who would have to cross at-grade over a sharp turn with minimal sight distance. FAST has offered a solution that would provide for retention of this historic structure, assurance of safety for the motoring public and future trail users, and reuse of the bridge. See drawing at Master Park Plan, Fast Exhibit B, page 33). The Commission could be assured of a safe configuration of this crossing by ordering PADOT to realign the road with retention of the bridge, as part of its Order in this case. Lancaster County has offered to contribute funding toward realignment (NT 566-571).

At State highway 222, in Providence Township, Crossing No. 16, the highway has average daily traffic of over 8,000 vehicles (PADOT Statement 1, at 32). The structure is in good condition, no provisions or considerations by PADOT or Conrail to provide for safe crossing of this busy highway by Trail users if the structure is removed, are provided in the Stipulations. Instead, the Stipulations propose a 2:1 grade severing the rail line at mid-point and leaving the crossing totally unusable for a Trail. FAST has proposed construction of a pedestrian bridge if the tunnel is demolished, to allow for a safe crossing over this busy highway by Trail users (Master Park Plan, FAST Exhibit B, page 36.) FAST was awarded ISTEA enhancement funding through PADOT for this project (FAST Statement 6, at 2). PADOT recognized the need for the pedestrian bridge, by approving the project (NT 840-841). Lancaster County has also recognized the need for a pedestrian

bridge at 222 and has offered to contribute funding (NT 566-567).

It is undisputed that all of the bridges are at risk of demolition under Paragraph 12.5 of the Township Stipulation, providing that "maintain" can be read to mean removal of any bridge at the option of a Township after a final Order of the Commission. Conrail interprets this vaguely to mean "if maintenance can no longer be performed" (NT 511). The two Townships taking the Martic Forge bridge interpret this clause to permit demolition if necessary and "desirable" (Township 8, Martic Ordinance at Section 5(c)). The record does not state under what circumstances these two townships would find removal desirable. Given the historic and recreational value of this bridge, plus the size of the undertaking involved to remove it, this lack of definition is cause for concern. Read together with Supervisor Wiker's lack of plans for the structure, the Commission actually has before it no adequate proposal for this structure from Conrail and the Townships.

2. Safety at the huge Martic Forge trestle is not protected in the Stipulations.

The Stipulation giving responsibility for the 130 foot high, 600-foot long Martic Forge bridge to the Townships contains no repair, rehabilitation, maintenance or inspection plans for this structure. The only work intended is to fence off the structure. Supervisor Wiker of Conestoga offered no engineering studies, no plans for repair or rehabilitation, no current information concerning public safety at the crossing, no cost estimates of future maintenance, and no emergency procedures should an emergency arise. He offered no justification for keeping the bridge, except

that he did not want "someone else to control property within the Township" and the "major consideration" of money from Conrail - Conestoga and Martic Township to share in \$450,000 (NT 692). Mr. Wiker admitted this is a big responsibility for township taxpayers (NT 692). As with the other bridges, the Townships are free to demolish this bridge immediately after the conditions in the stipulation have been met, without regard for the historic value and trail use. FAST has submitted plans for restoration of the bridge to make it safe for public use (Master Park Plan, FAST Exhibit B, 10 and 23; Wilson-B). Flink stated he has seen other structures of comparable size incorporated into a trail (FAST Statement 2, at 7). PHMC has awarded a grant of \$100,000 toward the Martic-Forge rehabilitation which remains available. The County has also offered funding for this project (NT 566-567).

3. Bart Township has not met its burden to show that the prior Order for the Lamparter Road crossing should be vacated.

Bart has not shown the material changes of fact or law sufficient to justify vacating the Order approving the installation of a pedestrian culvert at Lamparter Road. (See 52 Pa. Code Section 5.571(b)). Bart states as justification for vacating the Order:

"At the time of 1993 Stipulation Bart Township and the other parties to the Stipulation, were under the factual impression that FAST would acquire the Enola Branch Line from Conrail and operate it as a recreational trail. ... Bart Township in entering into the earlier Stipulation, relied upon the representations of FAST that it would be the recipient of the real property associated with this property." (Bart Township Statement 1, at 10). The record

throughout those proceedings reflects that the County, not FAST contemplated ownership of the line at the time period involved. The Stipulation to put in the culvert was signed March 5, 1993. In fact Lancaster County was negotiating with Conrail to acquire the line during March of 1993. (Conrail Statement 1, Answer to Question 2). The Commission in its discussion of the history of the case noted that FAST, as intervenor, "identified itself as a "grass roots group of Lancaster County citizens organized to promote, publicize, assist, and encourage" the conversion of Conrail's Enola Branch line to a public recreational trail." Tentative decision adopted June 10, 1997.) Bart's current intent to own the line does not negate the need to consider the proposed trail when reconfiguring this crossing. Nowhere has Bart submitted expert evidence to support Supervisor Marvin's personal opinion that excluding the pedestrian crossing and ramping of the fill could safely accommodate trail use at a constructed at-grade intersection with motor vehicles. (NT 623). Bart has not offered sufficient justification for vacating the prior Order and substituting the Township's Stipulation at paragraph 3.6 which makes no provision for trail/highway crossing.

4. The Commission should reject the stipulations and order solutions that essentially preserve the bridges for public use.

The Commission has noted that both legislators and courts are increasingly inclined to support preserving rail corridors for public recreational use. Application of CSX, Docket No. A-00109302, Opinion and Order entered September 12, 1995. I n October, 1996, Governor Ridge announced a new administration

policy: " Trail corridors and their users contribute to the economic well-being of Pennsylvania tourism and outdoor recreation industries. It is time to recognize our trails as valued resources. If the railroad structures remain intact, our system of greenways will be enhanced, the considerable financial investment made to construct these bridges and tunnels will be protected, our rich railroad heritage will be preserved, and the recreation and tourism economy of the Commonwealth will be bolstered." (Late Filed Exhibit Sexton 2).

Preserving trail structures facilitates building an accessible trail (Americans with Disabilities Act standards). (NT 422-423).

Preserving bridges provides emergency vehicles continuous access to the entire corridor. (NT 429).

Preserving grade-separated crossings preserves community character and the historic character of the trail, "preservation of individual structures along the Low Grade line is crucial to the preservation of the entire rail line as a continuous unbroken element" (Master Park Plan, FAST Exhibit B, at 4).

The line was uniquely constructed with all grade-separated crossings so there was no contact between freight trains and cars (no at-grade crossings) for efficiency and safety. Today the same safety concept applies for trail users (pedestrians, equestrians and cyclists) with motor vehicles. Fast submits that retention of grade-separated crossings is the safest option for trail users and the motoring public.

##### 5. RECOMMENDATIONS

If the Commission does enter an order, it should disapprove

and reject both Stipulations. Instead of lump sum payments to the townships, Conrail should pay to upgrade the structures so they will be safe for public use as proposed in the Master Park Plan and make improvements at the crossings. The County should be assigned future maintenance responsibilities of the rail crossing structures that remain. The County has a larger taxpayer base than the Townships, and County residents will derive the greatest benefit from the development of this regional rails-to-trails greenway. The County has funding programs for community parks and greenways, access to funding for transportation projects, planning staff and staff engineers, and has offered to contribute funding for work at Route 222, 324 and the Martic Forge Bridge. The County has already investigated whether FAST's grants and funds for the trail can be transferred to another sponsoring agency. The County has designated this trail as a high priority greenway in its Parks and Open Space Plan. (County Statement 1; Palmoski Testimony). The Townships, in contrast, have taken no initiative to consider a trail in the crossing proposals, to seek funding for trail development or improvements at structures to make them safe for public use, and have submitted no plans for required maintenance to preserve the historic value of the structures.

#### V. CONCLUSION

For all of the foregoing reasons, the Commission should reject the Stipulations and adopt the recommendations of FAST.

Respectfully submitted

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

MEM

IN REPLY PLEASE  
REFER TO OUR FILE

June 24, 1997

John G. Alford, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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RE: Application of Consolidated  
Rail Corporation for the  
abolition of thirty-one  
crossings of the Enola  
Branch Harrisburg Division,  
Lancaster County.

Docket Nos.  
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  
FOLDER

Dear Secretary Alford:

Enclosed herewith, please find the original and nine copies  
of the Pennsylvania Public Utility Commission, Bureau of  
Transportation and Safety's Brief in the above-captioned matter.

Copies have been served on the parties as stated on the  
Certificate of Service attached.

Very truly yours,

*David A. Salapa*  
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Assistant Counsel

Enclosures

ORIGINAL

25

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated  
Rail Corporation for the  
abolition of thirty-one  
crossings of the Enola Branch,  
Harrisburg Division, Lancaster  
County.

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.

Docket Nos.  
A-00111016

C-00913256

**DOCKETED**  
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BRIEF OF THE BUREAU OF TRANSPORTATION AND SAFETY OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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## PROCEDURAL HISTORY

This matter began when Consolidated Rail Corporation (Conrail) filed an application on September 29, 1993 with the Pennsylvania Public Utility Commission (Commission) for approval of the abolition of 31 rail-highway crossings along its Enola Branch along its Enola Branch located in Lancaster County. The Commission docketed the proceeding at A-00111016.

An engineer from the Commission's Bureau of Transportation and Safety conducted a field meeting at the sites of the various crossings on April 19, 20 and 21, 1994. On May 2, 1994, the Friends of the Atglen-Susquehanna Trail (FAST) filed a petition to intervene in the proceeding. Fast's petition alleged that it wished to convert Conrail's Enola Branch into a recreational trail and requested leave to intervene in order to bring before the Commission information regarding the impact of the Commission's action upon the proposed trail. The Commission issued an Order on August 31, 1994 granting FAST's petition to intervene.

On March 7, 1995, the Commission issued an Order abolishing six of the crossings in Conrail's application. Ordering Paragraph No. 5 directed that twenty-four of the crossings be scheduled for hearing on their disposition. Specifically, Paragraph No. 5 of the Commission's March 7, 1995

Order directed that Crossing Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 26, 27, 28 and 31 be scheduled for hearing. The Commission's Order also stated that one of the crossings contained in Conrail's application had been abolished in a proceeding at Docket No. C-00913255.

On August 10, 1995, Bart Township filed a motion with the Commission requesting that the case docketed at C-00913256 be consolidated with the proceeding at A-00111016. By letter dated August 21, 1995, Conrail requested that the matter be submitted to the Commission's alternative dispute resolution process. By letter dated August 23, 1995, FAST joined in Conrail's request. By Order dated September 14, 1995, Administrative Law Judge (ALJ) Louis G. Cocheres granted Bart Township's request for consolidation. The Order also required that the parties file written direct testimony in the proceeding on or before October 13, 1995.

After protracted negotiations, Conrail reached a settlement with the Pennsylvania Department of Transportation (PennDot) regarding the disposition of the structures involving state highways and an agreement with the various municipalities regarding the disposition of structures. FAST objected to the stipulations and ALJ Cocheres scheduled hearings on June 11 and 12, 1997 regarding the stipulation and any objections to it. At

the conclusion of the hearing on June 12, 1997, ALJ Cocheres directed that main briefs be filed in the matter by June 24, 1997. This is the Bureau of Transportation and Safety's main brief.

## SUMMARY OF ARGUMENT

The Commission has the authority to abolish rail-highway crossings upon such terms and conditions as it deems reasonable, taking into consideration all relevant factors. In determining the manner in which a crossing is to be abolished, the Commission should order the method of abolition which best prevents accidents and promotes public safety. In cases where conversion of the railroad right-of-way to a trail is at issue, the Commission must follow the Rails-to-Trails Act and consider the impact of its actions upon development and use of recreational trails. However, the Rails-to-Trails Act does not require the Commission to leave the structures in place if the trail use is contemplated.

The Commission is not bound by the determinations of the Pennsylvania Historic and Museum Commission (PHMC) but rather can consider its advice in cases where PHMC intervenes. In this case, a witness for FAST is also an employee of PHMC. The Commission can consider this witnesses' testimony regarding historic preservation but is not bound by it.

Several parties have raised issues regarding compliance with the National Historic Preservation Act (NHPA) with regard to historic preservation of the Enola Branch and the structures

contained on it. The Bureau of Transportation and Safety believes that the NHPA considerations are of marginal relevance in this proceeding since NHPA only concerns actions by federal agencies or actions involving federal funding. The Commission is not a federal agency and, therefore, can not enforce the provisions of the NHPA. The Bureau of Transportation and Safety believes that the responsibility for enforcing the provisions of the NHPA in this case, lies with the Interstate Commerce Commission (ICC) in granting Conrail's application to abandon the Enola Branch. Since the ICC did not place any historical preservation conditions as part of its Order authorizing Conrail to abandon the Enola Branch, the Bureau believes that NHPA was complied with and the historic review completed.

Assuming that the ICC did not comply with the provisions of NHPA, there is nothing that the Commission nor any of the parties can do to force the ICC or its successor the Surface Transportation Board (STB) to finish the NHPA process. Once the ICC authorizes abandonment and the railroad takes steps to effectuate that abandonment which demonstrates an intent to abandon, the ICC's, now STB's, jurisdiction over the matter terminates. If a federal agency no longer has an ongoing proceeding, it can not impose NHPA requirements.

Some parties have contended that PennDot has obligation to follow NHPA schedule requirements. There is no indication that PennDot currently has any proceeding pending before the Federal Highway Administration (FHWA) regarding any project along the Enola Branch nor is there any indication in any of the evidence presented that PennDot contemplates using federal funds for any of the projects along the Enola Branch. Therefore, PennDot is under no requirement to comply with NHPA.

With regard to disposition of the crossings, the Bureau of Transportation and Safety does not oppose the stipulations between Conrail and PennDot and Conrail and the Townships regarding disposition of the highway over rail crossings at Crossing Nos. 7, 12, 17, 18 and 19. The Bureau does have some concern about the proposed disposition of the highway over rail crossing structure at Crossing No. 2 since it appears that the structure will soon have to be removed and either replaced with fill or the road barricaded at both ends of their structure. The Bureau agrees with the stipulation with regard to removal of the rail structures over the highways at Crossing Nos. 4, 10, 15, 16, 21, 26 and 27. However, the Bureau believes that the remaining rail structures over the highways at Crossing Nos. 1, 3, 5, 6, 9, 13, 14, 23, 24, 28 and 31, should all be removed. Removal of the structures at these crossings will eliminate conditions which create hazards at those crossings. The Bureau believes that

safety considerations outweigh any adverse affect on potential trail use since at this point, trail use is speculative. Alternatively, removal of the structures will not have an adverse impact on potential use of the railroad right-of-way as a recreational trail, since the embankments can either be graded back at the crossings so as to allow the right-of-way to intersect the roadway at-grade or a pedestrian bridge can be constructed once the railroad bridges are removed.

## ISSUES PRESENTED

- I. Does the Public Utility Commission have jurisdiction in this case to determine the manner in which the rail-highway crossings should be abolished in order to reach a determination which promotes safety?
- II. Is there a legal impediment to the Commission issuing an order in this case due to lack of compliance with the National Historic Preservation Act where the review process under the Act has been completed or alternatively where the Interstate Commerce Commission or Surface Transportation Board no longer has authority over Conrail's abandonment of the Enola Branch?
- III. Should the Commission modify the stipulation between Conrail and PennDot and Conrail and the Townships so as to direct removal of all rail over highway structures?

## ARGUMENT

**I. THE PUBLIC UTILITY COMMISSION HAS JURISDICTION IN THIS CASE TO DETERMINE THE MANNER IN WHICH THE RAIL-HIGHWAY CROSSINGS SHOULD BE ABOLISHED AND REACH A DETERMINATION WHICH PROMOTES PUBLIC SAFETY, PREVENTS ACCIDENTS AND IS JUST AND REASONABLE.**

The Commission has exclusive authority, pursuant to 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future, to prevent accidents and promote the safety of the public. SEPTA v. Pa. P.U.C. 140 Pa. Commw. Ct. 270, 592 A.2d 797 (1991) With respect to the abolition of crossings, the Commission is empowered, pursuant to 66 Pa. C.S. §2702(b), to determine and prescribe the manner in which such crossings may be abolished. The Commission also is empowered, pursuant to 66 Pa. C.S. §2702(c), to order the abolition of crossings upon such reasonable terms and conditions as it prescribes.

Additionally, the Commission, pursuant to 66 Pa. C.S. §2704(a) has the exclusive authority to assess the costs of any work it orders upon the concerned parties to this proceeding in such proper proportions as the Commission may determine. The Commission also determines what parties are concerned within the meaning of 66 Pa. C.S. §§ 2704(a) and 2702(c). County of Chester

v. Pa. P.U.C., 47 Pa. Commw. Ct. 366, 408 A.2d 552 (1979). In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. East Rockhill Township v. Pa. P.U.C., 115 Pa. Commw. Ct 228, 540 A.2d 600 (1988); Municipality of Monroeville v. Pa, P.U.C., 143 Pa. Commw. Ct. 668, 600 A.2d 655 (1991); Greene Twp. v. Pa. P.U.C., 668 A. 2d 615 (Pa. Commw. Ct. 1995)

In this case, Conrail asserts in its testimony that it received permission to abandon the Enola Branch by ICC Order served on April 19, 1993 at Docket No. AB-167 (Sub. No. 1095X). (Conrail's Statement No. 1) Subsequently, Conrail has entered into a stipulation with the various Townships where the crossing are located and with the PennDot regarding disposition of the structures at the crossings and conveyance of the railroad right-of-way to the Townships. The actions by Conrail, the various Townships and PennDot regarding conveyance of the right-of-way do not affect the Commission's jurisdiction over the crossings. The Commission retains jurisdiction over the crossings until they are abolished by Commission order. CSX Transportation Inc. v. Pa. P.U.C. 125 Pa. Commw. Ct. 528, 558 A.2d 902 (1989), alloc. denied 657 A.2d 654 (1989).

To rule otherwise would allow a railroad to circumvent its responsibilities pursuant to 66 Pa. C.S. §§ 2702 and 2704 by obtaining authority to abandon the rail line from the ICC, now the STB, then sell the property without filing an application with the Commission to abolish the crossing. In CSX Transportation, Commonwealth Court recognized this possibility and found that the Commission retained jurisdiction over crossings until they are abolished by Commission order. As noted by Commonwealth Court in CSX Transportation, the Commission's responsibility for rail-highway crossings is safety while the ICC's, now STB, responsibility in rail-line abandonment's is their economic impact.

The Rails-to-Trails Act, 32 P.S. §5611, et seq. adds another factor which the Commission can consider in rail-highway crossing abolitions. The section which applies to Commission proceedings reads as follows:

§ 5620. Coordination with the Pennsylvania Public Utility Commission.

(a) Method of coordination--Whenever the Pennsylvania Public Utility Commission receives or considers any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission shall notify the Department of Environmental Resources. The department shall evaluate the proposed abandonment or removal in order to determine the impact of such action upon the development, expansion and existing use of public recreational trails and may participate in the proceeding before the commission concerning such matter.

(b) Actions by the commission--Before taking final action on any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission 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. (Emphasis added.)

32 P.S. §5620.

The language of 32 P.S. §5620 requires that the Commission consider the impact of an action regarding removal of a bridge or tunnel and evaluate alternatives which will minimize the adverse impacts of Commission actions upon development and use of recreational trails. However, the Act does not require the Commission to abandon its mandate under 66 Pa. C.S. §2702 to take such action as is necessary to prevent accidents and to promote public safety. Pennsylvania Game Commission v. Pa. P.U.C., 651 A.2d 596 (Pa. Commw. Ct. 1994), alloc. denied 544 Pa. 649, 664 A.2d 977 (1995). The legislature did not change the Commission's mandate to prevent accidents and promote safety but merely added another factor for the Commission to consider in fulfilling that mandate.

Neither does the Act mandate that the Commission leave structures in place if trail use is contemplated. The Commission need only evaluate alternatives which will minimize the adverse

impacts on development and use of recreational trails. If after evaluating alternatives, the Commission concludes that it is necessary to remove structures to prevent accidents or promote public safety, it can order those structures removed. Removal of the structures is not, therefore, inconsistent with the Rails-to-Trails Act. Montour Trail Council v. Pa. P.U.C., 663 A.2d 285 (Pa. Commw. Ct. 1995), vacated and remanded 690 A.2d 703 (1997).

In this case, the Department of Conservation and Natural Resources (DCNR) has participated in this proceeding pursuant to 32 P.S. §5620, has evaluated the various crossings with regard to trail use and concurs with the stipulations between Conrail and PennDot and Conrail and the various Townships. Apparently, DCNR has concluded that removal of the structures as set forth in the stipulation is consistent with the goals of the Rails-to-Trails Act.

Finally, several parties in this case have raised the issue regarding the Commission's obligation to consider historic preservation of the structures at the various crossings. The Commission's obligation with regard to historic preservation and its relationship with the PHMC are set forth at 37 Pa. C.S. §508 as follows:

508. Interagency cooperation  
Commonwealth agencies shall:

1) Consult the commission before demolishing, altering or transferring any property under their ownership or control that is or may be of historical, architectural or archaeological significance.

2) Seek the advice of the commission on possible alternatives to the demolition, alteration or transfer of property under their ownership or control that is on or may be eligible for the Pennsylvania Register of Historic Places.

3) Initiate 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 listed on or are eligible for the Pennsylvania Register of Historic Places.

4) 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 this Commonwealth. However, nothing in this title shall be construed as conferring on the commission the authority to delay, deny, condition or limit or cause to be delayed, denied, conditioned or limited any permits which would otherwise be issued by a Commonwealth agency beyond those time frames specified in Section 507 (relating to cooperation by public officials with the commission), unless the applicant agrees in writing to such condition, limit or time extension. An applicant is prohibited from utilizing a permit or license in any manner that would impair or interfere with the performance of an archeological survey or field investigation until the expiration of the time frames in Section 507 or until receiving written notification from the commission that its archeological survey or investigation is completed, whichever is sooner. Commonwealth agencies likewise are, in the absence of specific statutory language in their enabling or regulatory statutes, prohibited from stopping the processing or denying a permit solely because of the possible or actual presence of archeological resources.

5) Submit the procedures and policies described in paragraphs (3) and (4) to the commission for review and comment.

The statute at 37 Pa. C.S. §508(a) of the History Code, applies to agencies which "own" or "control" property. Although the History Code does not define either word, it is evident that the PUC does not "own" the property at the rail-highway crossings over which it exercises jurisdiction pursuant to 66 Pa. C.S.A. 2702 and 2704.

In Goldsborough v. Com. of Pa. Dept. of Education, 133 Pa. Commw. Ct. 487, 576 A.2d 1172 (1990), aff'd. 528 Pa. 588, 599 A.2d 645 (1990), petitioners sought review of the plan of a local school district to demolish and reconstruct portions of a school building which the PHMC had advised would have an adverse effect on an historical property in Pennsylvania. The plan was approved by the Department of Education, which claimed that it neither owned or controlled the school building and was, therefore, not subject to provisions of the History Code.

The Commonwealth Court affirmed the action of the Department of Education because the school district was not a Commonwealth agency and the Department of Education did not control the building in question. The Court stated:

In the present context, the word "control" means the direct and substantial control over a particular piece of property. "Control" in the context of the statute implies the physical ability to manage and direct the day to day operations of the property. "Control" is the ability to make use of the properties' facilities for the agencies' own needs. It is akin to the powers exercised by an owner of a property, but without actual

ownership, such as that involved in a lease or license arrangement." at 1174. Goldsborough, 576 A.2d 1172, 1174 (1990).

Pursuant to 66 Pa. C.S. §2702 and §2704, the Commission can order crossings abolished, impose conditions on that abolition and direct parties to perform work and bear costs. However, this exercise of jurisdiction does not give the Commission control over the property at rail-highway crossings as contemplated by 37 Pa. C.S. §508(a). As set forth in Goldsborough, Commonwealth agencies' exercise of jurisdiction does not equate to control for purposes of 37 Pa. C.S. §508(a).

Despite PHMC's lack of authority over the Commission, PHMC may still participate in Commission proceedings. However, PHMC's opinions regarding historic preservation expressed in Commission hearings are not controlling on the Commission's decision in a particular case. In O'Connor v. Pa. P.U.C., 136 Pa. Commw. 119, 582 A.2d 427 (1990), the Commonwealth Court ruled that the Commission did not err by concluding that the PHMC's opinions regarding historic preservation should be considered but were not binding upon the Commission. The Court founds that the PHMC serves only an advisory function in the Commission's hearing process.

The PHMC can provide important and relevant information in rail-highway crossing cases where it participates as a party. In this case, PHMC did not intervene as a party but an employee of PHMC, Brenda Barrett, did testify on behalf of FAST. Ms. Barrett indicated that the Commission could consider her testimony as the position of PHMC. However, as set forth in O'Connor, Ms Barrett's testimony regarding historic preservation is advisory only and her opinions are not controlling on the Commission's decision in this case.

II. **THERE IS NO LEGAL IMPEDIMENT TO THE COMMISSION ISSUING AN ORDER IN THIS CASE DUE TO LACK OF COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT WHERE THE REVIEW PROCESS UNDER THE ACT HAS BEEN COMPLETED OR ALTERNATIVELY WHERE THE INTERSTATE COMMERCE COMMISSION OR SURFACE TRANSPORTATION BOARD NO LONGER HAS AUTHORITY OVER CONRAIL'S ABANDONMENT OF THE ENOLA BRANCH.**

Several parties to this proceeding have claimed that the Commission can not or should not issue an order in this matter until the historic preservation review process is completed pursuant to the provisions of the National Historic Preservation Act (NHPA). The requirements for this review process are set forth at 16 U.S.C. §470(f). Various parties to this proceeding have referred to it as the Section 106 process. The Commission has no authority to enforce the provisions of the NHPA since the Act only requires a federal agency to undertake a historic preservation review in a federal or federally assisted undertaking. In this case, the Commission is not a federal agency nor is it presiding over a proposed federal or federally assisted undertaking. The parties asserting non-compliance with NHPA appear to recognize this and instead focus their argument on Conrail's application to abandon the Enola Branch which was filed with the ICC.

As set forth earlier in this brief, the ICC, now STB, is concerned with the economic impact of abandoning rail-lines. The Commonwealth Court in CSX v. Pa. P.U.C., 125 Pa. Commw. Ct.

528, 558 A.2d 902 (1989) alloc. denied 657 A.2d 654 (1989) set forth the difference in jurisdiction between the ICC, now STB, and the Commission. The Bureau will not reiterate those differences at length here. It is sufficient to note that even after the STB has authorized abandonment of a rail-line, the Commission continues to retain jurisdiction over the rail-highway crossings on that rail line.

As a federal agency, the ICC, now STB, must comply with the provisions of the NHPA as set forth at 16 U.S.C. §470(f). Berkshire Scenic Railway Museum, Inc. v. Interstate Commerce Commission, 52 F.3d 378 (1st. Cir. 1995). As a federal agency having jurisdiction over a federal undertaking, it must take into account the effect of the undertaking on districts, sites, buildings, structures or objects that are included on the National Register of Historic Places. However, numerous Courts have noted that the NHPA is procedural in nature and that compliance with the statute does not dictate a particular outcome. Gettysburg Battlefield Preservation Association v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992). Furthermore, once federal involvement in a particular undertaking terminates or there is no federal involvement in an undertaking from the beginning, the federal courts have no jurisdiction to order a federal agency to undertake NHPA review or to enjoin a project of private individuals. Gettysburg Battlefield

Preservation Association v. Gettysburg College, 799 F. Supp. 1571 (M.D. Pa. 1992); Village of Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990).

In this case, FAST's witness, Brenda Barrett, asserts that the review process pursuant to 16 U.S.C. §470(f) has not been completed. (N.T. 739) The Bureau contends that this is incorrect and is based in part on Ms. Barrett's lack of knowledge as to functions of the ICC, now STB. (N.T. 739, 790) Ms. Barrett indicates that it is the responsibility of the federal agency, in this case the ICC or STB, to enforce the provisions of the NHPA. (N.T. 748, 763, 788, 798, 814)

Contrary to the testimony of Ms. Barrett, the Bureau contends that as a matter of law, Conrail has complied with the provisions of the NHPA in its submissions to the ICC. Testimony in this matter is clear that the ICC had imposed conditions on Conrail in its February 14, 1990 Order requiring it to comply with the NHPA review process. However, it is equally clear that in its final Order of April 14, 1993, the ICC granted Conrail unconditional authority to abandon the Enola Branch. There are no provisions in the April 14, 1993 Order which indicate that Conrail must take any further steps in order to complete compliance with the NHPA review process. Furthermore, the Order itself does not indicate that the ICC itself conditioned the

finality of its Order on further actions to be taken by that agency.

The ICC's final Order of April 19, 1993 is consistent with the policy announced by the ICC in Ex Parte (No. 55 Sub. No. 22A) (Conrail Exhibit No. 7). The purpose of that decision was to implement environmental and historic preservation laws in ICC proceedings. In particular, portions of the Order from Pages 826-834 set forth how the ICC will implement the provisions of NHPA. In particular, at Page 827, the ICC noted that it was going to expedite the historic review process under NHPA and noted in Footnote 40 that in the past it had imposed conditions that continued until the NHPA process was terminated with the result that the NHPA review continued years after the ICC had approved the underlying transaction. This constitutes evidence of the ICC's intent that NHPA review should not extend beyond the time that the underlying transaction for review was approved. The ICC further noted on Pages 828 and 829 that it had no authority to deny its approval of a transaction solely on the grounds that it would adversely affect historic resources. It further noted on Page 830 that in most cases, the ICC would be limited to requiring documentation of historic resources. Finally, at Page 833 the ICC indicated that the NHPA does not give state historic preservation officers veto power over ICC actions. As long as the state historic preservation officer is

consulted in the process of identifying historic properties, assessing affects and determining appropriate mitigation and the ICC considers the state historic preservation officer's comments, NHPA is satisfied.

In this case, when Conrail submitted its abandonment application to the ICC, the ICC by its Order dated February 14, 1990 initiated the information gathering process on historic resources pursuant to NHPA. There is no indication in subsequent orders of the ICC that it required any additional information or that it had not completed its review under NHPA. The ICC issued its Order dated April 14, 1993 unconditionally authorizing Conrail to abandon the Enola Branch. Consistent with the policies set forth in Ex Parte 55 (Sub No. 22A), the ICC did not attach any historic preservation conditions to that Order and the NHPA process terminated with the issuance of the April 14, 1993 Order. If any party to the ICC proceeding was dissatisfied with the contents of the April 14, 1993 Order, those parties could have appealed the ICC's decision. In fact, no party appealed that decision.

Therefore, the ICC complied with the provisions of the NHPA in gathering information from Conrail and considering it prior to issuing its Order. Whatever concerns the ICC may have had regarding historic preservation of the Enola Branch, none of

those concerns is expressed in the final Order of the ICC issued April 14, 1993. Given the fact that the ICC had determined to expedite its historic review process and not have the NHPA process continue after approval of the underlying transaction, it is logical to conclude that the ICC terminated the NHPA process with the issuance of the April 14, 1993 Order with no historic preservation conditions imposed on Conrail.

Even if the parties who contend that the NHPA review process was not properly completed by the ICC as correct, at this point the ICC's, now STB's, jurisdiction over the abandonment has terminated and the STB can not reopen the proceeding to finish the NHPA review process. The Courts are clear that once the ICC or STB issues an order authorizing abandonment and the railroad abandons the line, the ICC's or STB's jurisdiction terminates. Bert v. Surface Transportation Board, 90 F.3d 580 (D.C. Cir. 1996); Fritsch v. Interstate Commerce Commission, 59 F.3d 248 (D.C. Cir. 1995); Consolidated Rail Corporation v. Surface Transportation Board, 93 F.3d 793 (D.C. Cir. 1996). The railroad's acts after the ICC or STB issues an abandonment order are evidence of its intent to abandon.

In this case, Conrail has removed the rails, ties and other track material from the right-of-way. Furthermore, as part of the stipulation with the Townships, Conrail has agreed to

convey the right-of-way to various municipalities. These facts evidence Conrail's intent to permanently abandon the Enola Branch. Conrail's abandonment of the Enola Branch pursuant to the ICC's Order terminates the STB's jurisdiction over the abandonment proceeding. The STB can not now reassert its jurisdiction in order to conclude historic preservation review under NHPA.

Finally, FAST implies that PennDot has some obligation to comply with NHPA. However, as set forth above NHPA requires federal agencies to undertake historic preservation review in a federal or federally assisted undertaking.

In this case, there is nothing in the stipulation between Conrail and PennDot or Conrail and the Townships to indicate that PennDot is going to initiate a federally assisted undertaking. There is nothing in the stipulations or testimony present that PennDot plans to use federal funds for any purpose. In the absence of the use of federal funds through the Federal Highway Administration (FHWA), the Department is not required to comply with NHPA. Los Ranchos de Albuquerque v. Barnhart, 906 F.2d 1477 (10th Cir. 1990).

If PennDot contemplated using federal funds through FHWA, it is PennDot's responsibility to comply with the NHPA

review process as required by FHWA. The NHPA review process is separate from and outside the scope of the Commission's authority over rail-highway crossings. After FHWA completes the historic review process, NHPA does not prohibit replacement or destruction of historic structures as part of a FHWA assisted project.

Citizens for the Scenic Severn River Bridge, Inc. v. Skinner, 802 F. Supp. 1325 (D. Md. 1991).

**III. THE STIPULATION BETWEEN CONRAIL AND PENNDOT AND CONRAIL AND THE TOWNSHIPS SHOULD BE MODIFIED SO AS TO DIRECT REMOVAL OF ALL RAIL OVER HIGHWAY STRUCTURES.**

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The stipulations between Conrail and PennDot and Conrail and the Townships sets forth the disposition of the structures at the crossings which are the subject of this proceeding. The Bureau of Transportation and Safety does not oppose that portion of the stipulation regarding the highway over rail structures at Crossing Nos. 7, 12, 17, 18 and 19.

The Bureau believes that the stipulation with regard to these crossings is consistent with the testimony presented by the Bureau of Transportation and Safety. The Bureau has some reservations regarding the stipulation's disposition of Crossing No. 2. The stipulation states that Sadsbury Township will continue maintain the structure pursuant to the prior Commission Order entered April 30, 1981 at Docket No. C-80021865. While this only confirms the maintenance responsibility assigned by the previous Commission Order, it also leaves in place a structure that is sub-standard with regard to pavement width and shoulder width and which has a maximum allowable load of ten tons. At some point in the future, the condition of the structure will worsen to the point where it will have to be removed and either replaced with earth fill or barricaded where the roadway ends on

both sides. The Bureau believes that the Commission should order the structure removed now.

The Bureau also agrees with the stipulation with regard to the disposition of the rail structures over the highways at Crossing Nos. 4, 10, 15, 16, 21, 26 and 27 since the stipulations call for the removal of the structures so as to allow roadway improvements. There is ample evidence in the record presented both by the Bureau and other parties to indicate that these crossings have numerous deficiencies including inadequate vertical and horizontal clearances and inadequate sight distance. In particular, removal of the structures will allow access for emergency vehicles at Crossing No. 15, improve access for commercial vehicles at Crossing No. 16 and eliminate the need for school buses to straddle the middle of the roadway at Crossing No. 21.

However, the Bureau disagrees with the stipulation's proposed disposition of the remaining rail structures over the highway and believes that the remainder of these structures should be removed as well. As set forth in the Bureau's testimony and exhibits, there are numerous deficiencies at these crossings with regard to roadway width, should width, sight distance, vertical and horizontal clearance and horizontal curvature. The only permanent way to eliminate these problems is

removing the structures so that roadway improvements can be made at each of these crossings.

While the Bureau recognizes the Commission's obligations under the Rails-to-Trails Act, it believes that at this point trail use along the Enola Branch is speculative. While FAST advocates constructing a trail, FAST is not taking title to the Enola Branch right-of-way, nor apparently is it seeking permission from any of the Townships acquiring the right-of-way to develop a trail nor does it have the funds necessary to develop a trail. While the Townships and County all indicate that they favor a trail or greenway or at least the concept of a trail or greenway, none of these entities has set forth any concrete proposal or time table for constructing such a trail. In addition, DCNR while supporting the stipulations between Conrail and PennDot and Conrail and the Townships as consistent with the Rails-to-Trails Act, has no plans to construct or maintain a trail. While neither the Townships, the County or DCNR are obligated to present a concrete plan for a trail to the Commission as part of the crossing abolition process, the lack of any concrete proposal other than FAST's and the lack of any timetable submitted by any party for the construction of a trail calls into question when, if ever, a trail will be constructed. Apparently, a number of years may pass before a trail is constructed. Thomas Sexton of the Pennsylvania Rails-to-Trails

Conservancy indicated in his testimony that trail development may take years.

Even assuming trail use is not speculative, removal of all the railroad structures is consistent with trail use. The County's witness has indicated that removal of some of the structures as set forth in the stipulation is consistent with its land use plan in that the right-of-way is being preserved as a continuous parcel of real estate. Apparently, removal of the structures, in the County's opinion, does not impair the use of the right-of-way as a greenway or trail.

Given the lack of specificity as to when a trail is to be developed along the Enola Branch, the Bureau questions how much weight the Commission should give to potential trail development. Set forth earlier in this brief, the Commission's mandate in rail-highway crossing cases is to promote safety and prevent accidents. The Bureau believes that the stipulations fail to fulfill that mandate.

It is apparent that the stipulation is at least in part an economic decision made by the Townships, PennDot and Conrail in order to limit their exposure for costs of removal or maintenance of these various rail over highway structures.

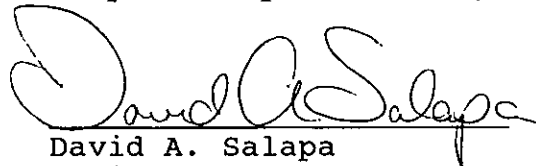
PennDot's witness, Mr. Cassell, indicated that with regard to Crossing Nos. 23 and 24, the Department would have advocated removing these structures but for Providence Township agreeing to maintain them. It is understandable that Conrail, PennDot and the Townships have an economic interest in attempting to limit their financial exposure, the Commission's obligation is different. The Commission's obligation is to order the work necessary in order to promote safety and prevent accidents.

Leaving some of the rail structures in place only will defer their removal to a future date. As FAST's witness, Mr. Wilson indicated, no structure has an infinite life span. At some point, whether it is ten, twenty, thirty or even fifty years from now, these structures will deteriorate to the point where it will not be possible to maintain them. The structures will have to be removed in order to keep them from falling down. The Bureau believes the Commission should order this removal now.

**CONCLUSION**

The Bureau of Transportation and Safety agrees with the stipulation with regard to disposition of the highway over rail structures as consistent with its testimony. However, the Bureau of Transportation and Safety believes that all of the railroad over highway structures should be removed. At this point, trail use is not entitled to great weight in the Commission's decision making process. The Commission's primary responsibility is to promote safety and prevent accidents. Removal of all of the rail over highway structures will accomplish this.

Respectfully submitted,



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Dated: June 24, 1997

CERTIFICATE OF SERVICE

I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below:

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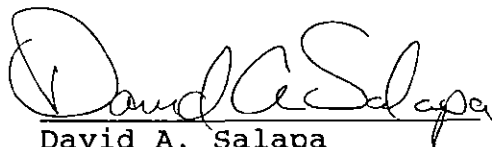
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June 24, 1997

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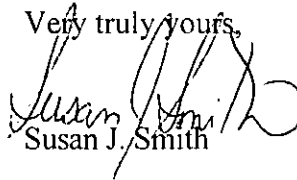
**RE: Application of Consolidated Rail Corporation for the Abolition of 31 Crossings of the Enola Branch, LC: 201323, MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg Division, Lancaster County; BRIEF OF BART, CONESTOGA, MARTIC, PROVIDENCE AND SADBURY TOWNSHIPS**

Dear Mr. McNulty:

Enclosed for filing with the Commission are the original and nine (9) copies of the Brief of Bart, Conestoga, Martic, Providence and Sadsbury Townships in the above-captioned matter.

As indicated on the attached Certificate of Service, copies of the Brief have been served upon all parties of record.

Should you have any questions or concerns regarding the forgoing, please direct them to me.

Very truly yours,  
  
Susan J. Smith

SJS/klb

Enclosure

cc: Frank Peiffer  
Ray Marvin  
Gerald Duvall  
John Wiker  
Nicholas Yoder

ORIGINAL

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Consolidated Rail Corporation for the :  
Abolition of 31 Crossings of the Enola Branch, LC 201323, :  
MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg, : Docket No. A-00111016  
Division, Lancaster County :

Board of Supervisors of Bart Township v. :  
Consolidated Rail Corporation, Pennsylvania Department :  
of Transportation and Lancaster County, et al. Alleges :  
unsafe bridge carrying Township Road T-774 (Lamparter :  
Road) over and above the tracks of Conrail. Bart : Docket No. C-00913256  
Township requests Respondents immediately make :  
repairs. Respondents are: Consolidated Rail Corporation, :  
Pennsylvania Department of Transportation and County :  
of Lancaster. :

**DOCKETED**  
JUN 26 1997

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**MAIN BRIEF OF BART, CONESTOGA, MARTIC  
PROVIDENCE, AND SADBURY TOWNSHIPS**

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DATED: June 24, 1997

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**A. STATEMENT OF THE CASE**

On September 24, 1993, Consolidated Rail Corporation ("Conrail") filed an application with the Pennsylvania Public Utility Commission ("Commission") to abolish the rail-highway crossings of the former Enola Branch. Thereafter, the parties entered into Commission-sponsored alternative dispute resolution ("ADR") sessions with mediators Charles Hilmer and James Carmines. The mediation and subsequent negotiations among the parties resulted in two (2) Stipulations of Settlement, one between Conrail and the Pennsylvania Department of Transportation ("PennDOT") and one between Conrail and the municipalities through which the former Enola Branch runs in Lancaster County ("the Townships").<sup>1</sup>

The Stipulations of Settlement<sup>2</sup> represent a comprehensive compromise solution to an abolition proceeding involving many parties with many different points of view. Extensive and detailed negotiations resulted in the Stipulations currently under review by the Commission.

The Stipulations of Settlement offer a comprehensive solution to the questions of crossing safety, future maintenance, and the disposition of each structure at issue. The

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<sup>1</sup> Municipal parties include West Sadsbury Township (Chester County), and the following Lancaster County municipalities: Bart, Conestoga, Eden, Martic, Providence and Sadsbury Townships. Quarryville Borough elected not to participate either in the Stipulation of Settlement or in the hearings held in this matter on June 11 and 12, 1997. Although Eden Township and West Sadsbury Township (Chester County) joined in the Stipulation of Settlement, this Brief is not submitted on their behalf.

<sup>2</sup> We will refer to the "PennDOT Stipulation" and the "Townships Stipulation" as appropriate.

Stipulations also enabled the parties to resolve questions larger in scope than the Commission's rail-highway jurisdiction under the Public Utility Code. If the Stipulations are approved, Conrail will achieve its primary goals to convey the former Enola Branch Line and to relieve itself of future obligations along this abandoned railway.

The Stipulations of Settlement address the removal or future maintenance responsibilities of each rail-highway crossing structure and the roadways at each crossing. Eight structures are scheduled for removal, all for legitimate safety concerns. If approved, the Stipulations will also provide that the real property between the crossings (i.e., the former Enola Branch Line real property) will be transferred to the Townships, along with endowments by Conrail to the Townships to offset expected future maintenance costs.

Friends of the Atglen-Susquehanna Trail ("FAST") early in the process had hoped to take title to the Enola Branch Line from Conrail for the development of a recreational rail-trail. In anticipation, FAST applied for a number of grants, some of which were approved, and all of which were contingent upon FAST's ownership of the real property and upon FAST providing "matching funds." As negotiations shifted, and it became apparent that Conrail could not satisfy its business objectives through conveyance to FAST, the Townships stepped forward and offered to take future responsibility for many crossing structures which might otherwise have been demolished. Unfortunately, FAST, whose "project director" enjoyed salary taken from donations for trail development,

chose to oppose the Stipulations of Settlement.<sup>3</sup> Rather than choosing to become part of the solution by compromise and constructive participation, FAST has elected to blindly oppose the Stipulations that offer so much hope for preservation, a short-sighted strategy that abdicates the legitimate goals of FAST's donors and contradicts its own *raison d'etre* -- to promote development of a trail. (FAST Ex. A-Nettke) To date, FAST has not ventured a comprehensive or realistic alternative to the mediated settlement solution, but merely has flung ineffective and specious criticisms of the hard-won settlement.

The Stipulations do not guarantee that all the crossing structures will remain in place in perpetuity, nor can they. The Stipulations do, however, satisfy this Commission's primary interest in the safety of rail-highway crossings, and address secondary concerns of historic preservation and rail-trail issues in a responsible and realistic manner. The settlement allows an opportunity for, but does not require, the rehabilitation of marginal structures, the future development of a recreational trail and the preservation of "open space" in the form of a continuous real estate corridor for the entire length of the parcel before the Commission. That the settlement does not give FAST, an unfunded, misguided (but perhaps well-intentioned) grass-roots concern, its every wish is not a reason for this Commission to reject or modify an otherwise well-crafted and mediated settlement.

Some twenty-one hours of evidentiary hearings were held before Administrative Law Judge Louis Cocheres on June 11 and 12, 1997. The parties have offered exhaustive evidence of the required consideration of historic preservation and rail-trail impacts of the

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<sup>3</sup> Almost all of FAST's donated funds were used either to pay for additional fundraising or to pay Julie Nettke a "salary." None of the money was used or set aside for improvements to the crossing structures.

settlement. This Brief is submitted in support of the Stipulation of Settlement by Bart, Conestoga, Martic, Providence and Sadsbury Townships.<sup>4</sup>

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Exhibits TWP 10, 11.

<sup>4</sup> We will refer to these Townships as “the Townships,” recognizing that Eden Township and West Sadsbury Township are not represented by the undersigned.

**B. STATEMENT OF QUESTIONS INVOLVED**

1. Is the Stipulation of Settlement between Conrail and the municipalities just, reasonable and in the public interest?

(Suggested answer is in the affirmative.)

2. Is the Stipulation of Settlement between Conrail and PennDOT just, reasonable and in the public interest?

(Suggested answer is in the affirmative.)

3. Do the Stipulations of Settlement fully address public safety concerns with respect to the abolition of the rail-highway crossings?

(Suggested answer is in the affirmative.)

4. Do the Stipulations of Settlement satisfy State and Federal historic preservation statutes and regulations?

(Suggested answer is in the affirmative.)

5. Do the Stipulations of Settlement satisfy Pennsylvania's Rails to Trails statute?

(Suggested answer is in the affirmative.)

### C. SUMMARY OF ARGUMENT

The Commission-sponsored mediation has produced two Stipulations of Settlement that are just, reasonable and in the public interest. The Stipulations of Settlement represent a comprehensive solution to a complex problem - the disposition of some 31 rail-highway crossings along Conrail's former Enola Branch - which balances issues of public safety arising from the abolishment of the crossings and other considerations, including historic preservation and rail-trail development. In addition, the Townships have agreed to enter into an Intermunicipal Agreement for the purpose of preserving a thirty-foot corridor along the length of the Enola Branch for future use by and benefit to the public.

Under the Stipulations of Settlement, all but eight crossing structures will be maintained in place. For the structures to be maintained in place, the Stipulations provide for the allocation of maintenance responsibility among responsible, public entities within the jurisdictional reach of the Commission -- the Townships and PennDOT. Eight crossing structures will be removed at or near the time of conveyance of the Enola Branch Line to the Townships. The removal of these structures is necessitated by public safety concerns. In concluding that removal is necessary, consideration was given by all the parties to the Stipulations to historic preservation and rail-trail considerations.

**D. ARGUMENT**

**1. The Stipulation of Settlement Between Conrail and the Municipalities is Just and Reasonable in the Public Interest and Should be Approved by the Commission.**

**a. Settlements Are Favored and Should Be Approved When in the Public Interest**

It is the policy of the Commission to encourage settlements.<sup>5</sup> The ALJ and the Commission, when presented with a settlement, are charged with the responsibility to review the document and to determine if the proposed settlement is in the public interest. The Stipulations of Settlement, which comprehensively address the issues of public safety and assignment of responsibilities for structure and roadway maintenance relating to the abolishment of the crossings and balance the considerations of public safety with those of historic preservation and rail-trail development, are just, reasonable and in the public interest.

**b. Role of the Public Utility Commission**

The Commission has exclusive jurisdiction over public rail-highway crossings in Pennsylvania.<sup>6</sup> The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which party should perform such work at the crossings and which party shall maintain the crossings in the future.<sup>7</sup> The Commission powers vested under Section 2702(b) are to “effectuate the prevention of

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<sup>5</sup> 52 Pa. Code §5.231.

<sup>6</sup> 66 Pa. C.S. §2702(b).

<sup>7</sup> 66 Pa. C.S. §2702(b).

accidents and the promotion of the safety of the public.”<sup>8</sup> The Commission also is authorized to order the abolition of crossings upon such reasonable terms and conditions as it prescribes.<sup>9</sup>

Section 2702(c) empowers the Commission to order the work associated with abolition of any rail-highway crossing to be performed in whole or in part by any public utility or municipal corporation or by the Commonwealth.<sup>10</sup> Section 2704(a) of the Public Utility Code empowers the Commission to direct the costs against these parties as well, in such proportion as the Commission may determine.<sup>11</sup> In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable.<sup>12</sup> The Commission does not take into account the financial ability of a party to pay when it allocates costs.<sup>13</sup>

**c. Providence Township - Property in Quarryville Borough**

The Townships Stipulation calls for Conrail to convey the Enola Branch Line real property within Quarryville Borough to Providence Township. Providence Township also will take responsibility for crossing structures within the Borough of Quarryville.<sup>14</sup> As Mr. Duvall indicated in his testimony, the Borough of Quarryville originally was a

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<sup>8</sup> 66 Pa. C.S. §2702(b); SEPTA v. Pa. PUC, 592 A.2d 797 (Pa. Cmwlth. 1991).

<sup>9</sup> 66 Pa. C.S. §2702(c).

<sup>10</sup> 66 Pa. C.S. §2702(c).

<sup>11</sup> 66 Pa.C.S. §2704(a).

<sup>12</sup> Greene Township v. Pa. PUC, 668 A.2d 615 (Pa. Cmwlth. 1995); Pa. Game Commission v. Pa. PUC, 651 A.2d 596 (Pa. Cmwlth. 1994); Municipality of Monroeville v. Pa. PUC, 600 A.2d 655 (Pa. Cmwlth. 1991); East Rockhill Township v. Pa. PUC, 540 A.2d 600 (Pa. Cmwlth. 1988).

<sup>13</sup> East Rockhill Township.

<sup>14</sup> Crossings 13 and 14, Townships Stipulation, Section 5.

participant in negotiations leading toward the Stipulation. (N.T. 668) Quarryville voluntarily retired from the negotiations and participated no further. (N.T. 668) As is evident from Exhibit TWP 12, Providence Township has given Quarryville notice and an opportunity to participate in the settlement. Providence Township has not received any written request by Quarryville Borough to become part of the settlement. (N.T. 671)

The powers and duties of townships of the second class are governed by the Second Class Township Code<sup>15</sup> (the "Township Code"). The Township Code applies "to all townships of the second class as now exist or those created, established or re-established after this act takes effect."<sup>16</sup> Article VII of the Township Code sets forth the general powers of second class townships. With respect to the ownership and disposition of real property by a township, the Township Code provides that any township of the second class may:

purchase, acquire by gift or otherwise, hold, lease, let and convey, by sale or lease, any real and personal property it judges to be to the best interest of the township.<sup>17</sup>

The language of Section 66502 does not distinguish between property located within the township and property located outside the township. This provision requires only that the acquisition of the property be "to the best interest of the township." Obviously, it would have been easy for the Legislature to prohibit townships of the second class from acquiring property outside of their own municipal boundaries, had it so intended.

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<sup>15</sup> 53 Pa. C.S. §65101, et seq.

<sup>16</sup> 53 Pa. C.S. §66502

<sup>17</sup> 53 Pa. C.S. §65701.

Specifically, Section 66917 of the Code provides that "[t]he township supervisors hereby are authorized, on behalf of the township, to accept the title to lands which may be donated to the township for any of the purposes mentioned in this article . . . ."<sup>18</sup>

Exhibit TWP 14 is a copy of the Resolution passed on May 6, 1996 by the Providence Township Board of Supervisors stating its view that the acceptance of property in Quarryville Borough is to the best interest of Providence Township. According to the authorities cited above, Providence Township may accept title to land conveyed by Conrail to Providence Township, even where that land lies within the municipal boundaries of the Borough of Quarryville. There being no statutory impediment to the conveyance or the Townships Stipulation, the Townships Stipulation should be approved. It should be noted that Quarryville Borough has been given notice and an opportunity to object and that Quarryville Borough did not appear or otherwise object to the conveyance by Conrail to Providence Township. (Exhibit TWP 12; N.T. 668; Providence Twp. St. 1, p. 2)

**d. The Crossings**

**(1) Crossings to be demolished**

According to the Stipulations of Settlement, Conrail is to demolish the structures at Crossing Nos. 4, 10, 15, 16, 21 and 26.<sup>19</sup> As discussed below, Bart Township will replace the crossing structure at Crossing No. 7A (Lamparter Road) with a roadway placed on fill. In addition, the PennDOT Stipulation calls for PennDOT to demolish the

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<sup>18</sup> 53 Pa. C.S. §66917.

<sup>19</sup> Mr. Cassell testified that safety concerns require the removal of the crossing structures at Crossing Nos. 4, 10, 16 and 17. (N.T. 857)

crossing structure at Crossing No. 17. Finally, at Crossing No. 27, Martic Township will be called upon to demolish the structure only if a realignment of the roadway is not achieved.

Crossing No. 4 involves White Oak Road, a state road in Sadsbury Township. No Township road is involved. (Sadsbury Twp. St. 1, p. 9) If the Stipulations of Settlement are approved, the crossing structure at Crossing No. 4 will be removed at the sole expense of Conrail. (PennDOT Stipulation p. 2; Townships Stipulation ¶2.7) PennDOT will continue to maintain the roadway. The Townships have no objection to the PennDOT Stipulation with respect to Crossing No. 4.

Similarly, Crossing No. 10 involves a state road in Providence Township, Pumping Station Road, which structure will be removed by Conrail for safety reasons. (PennDOT Stipulation p. 2; Townships Stipulation ¶4.4) The Townships have no objection to the PennDOT Stipulation with respect to Crossing No. 10.

Crossing No. 15 involves a Township road, Oak Bottom Road, in Providence Township. It is a below-grade crossing with a stone arch and is to be removed by Conrail. Vertical clearance is only 11'8". (Providence Twp. St. 1, p. 9; Conrail Ex., Crossing No. 15, Answering ¶4) As the record demonstrates, the bridge's inadequate vertical clearance prevents fire protection equipment from negotiating the opening. (Providence Twp. St. 1, p. 10) This places the residential community and its occupants in a precarious position in the event of a fire. (Providence Twp. St. 1, p. 10) Mr. Duvall testified that there is a "definite need" for the removal of the Oak Bottom Road structure and that removal would "not interfere with the continuity of the trail because with the arch out the road could be filled in level and it would be at-grade of the rail, or very

close.” (N.T. 660) FAST concedes that the crossing must be modified to accommodate emergency vehicles. (FAST Exhibit B, Master Park Plan, p. 35)

Furthermore, Mr. Duvall testified that the design of the Master Park Plan is unrealistic and impossible because the FAST design requires acquisition of private land and the filling in of a large stormwater detention facility. (N.T. 661-62) Mr. Flink, the designer of the Master Park Plan, conceded that under the Plan emergency vehicles would have to stop and unlock and remove barriers before entering the crossing. (N.T. 441) Thus, while the parties to the Stipulations carefully have considered and evaluated the need for the crossing structure at Oak Bottom Road to be removed, FAST has suggested an “alternative” that would add precious minutes to emergency response time and would unrealistically require condemnation of private land and the nearly impossible task of reconfiguration or reconstruction of a stormwater detention pond.

Crossing No. 16, Route 222, involves a state road in Providence Township. This below-grade stone arch bridge is to be removed by Conrail. (PennDOT Stipulation, pp. 2-3; Townships Stipulation ¶6.5) As Mr. Duvall indicated, Providence Township is aware of complaints concerning the adequacy of Crossing No. 16, as well as the roadway alignment. (Providence Twp. St. 1, p. 12) Providence Township, therefore, supports the PennDOT Stipulation will respect to demolition of the crossing structure to create a safer crossing for the motoring public. Future trail use could be accommodated by the construction of a pedestrian bridge at this location. (Statement of Counsel, N.T. 567) FAST’s own Master Park Plan acknowledges the feasibility of a pedestrian bridge to allow future trail users to safely cross the Route 222 intersection. (FAST Ex. B, Master Park Plan, p. 36)

As to Crossing No. 17, Fairview Road, a state road, it appears that all parties acknowledge that this bridge ought to be removed due to its poor condition and the need for a realignment of the roadway. (FAST Ex. B, Master Park Plan, p. 34; Staff St. No. 1, pp. 52, 53; PennDOT Stipulation, p. 5; Conrail Ex. No. 1, Crossing No. 17, Answering ¶¶4,7) Although this crossing involves a state road, Providence Township supports the PennDOT Stipulation with respect to the demolition of the crossing structure.

Crossing No. 21, Hollow Road (West), involves a Providence Township roadway. This below-grade stone arch bridge crossing structure is to be removed according to the Townships Stipulation by Conrail for safety reasons. (Townships Stipulation ¶6.10; Providence Twp. St. 1, p. 20; Staff St. No. 1, pps. 62, 63) As Mr. Duvall noted in his testimony, the Solanco School District has expressed serious concerns regarding restricted sight distance and the inability of school buses to negotiate Crossing No. 21 safely. (Providence Twp. St. 1, p. 20) Large transport vehicles, such as fuel trucks and milk delivery trucks, are similarly unable to negotiate the crossing safely because of restricted sight distance. (Providence Twp. St. 1, p. 21) Providence Township suggests that it will be possible to construct a safe at-grade crossing in the event of future trail use (see FAST Ex. B, Master Park Plan, p. 37 - design detail for typical at-grade intersections, which would be feasible for Crossing No. 21).

Crossing No. 26, Sigman Road, a township road in Providence Township, involves a below-grade crossing with a steel girder bridge. Conrail will demolish this crossing structure. (Providence Twp. St. 1, p. 29; Townships Stipulation ¶6.15) The vertical clearance at this structure is only 11'3" and clearly inadequate. (Providence Twp. St. 1, p. 28; Conrail Ex. No. 1, Crossing No. 26, Answering ¶¶4,7) As with Crossing No.

21, an at-grade crossing could be established to allow for future trail use. (FAST Ex. B, Master Park Plan, p. 37)

Crossing No. 27, Route 324 in Martic Township, a state road, involves a clearly inadequate stone arch below-grade crossing. There is inadequate vertical and horizontal clearance at the crossing. (Conrail Ex. 1, Crossing No. 27, Answering ¶4; PennDOT St. No. 1, p. 64) Martic Township, the County of Lancaster, and the Pennsylvania Department of Transportation are working together on a realignment project at this crossing. Ms. Palmoski testified at length concerning Lancaster County's support (including financial support) for the reconstruction of an at-grade crossing at Crossing No. 27 in order to accomplish a badly-needed realignment of the roadway. (N.T. 566-70) The Stipulations also provide that the structure will be removed to improve safety at the intersection if the realignment is not possible within two (2) years after entry of a final order approving the Townships Stipulation. (PennDOT Stipulation, p. 3; Townships Stipulation ¶ 7.3) In such case, Martic Township will remove the structure within one (1) year of notice by PennDOT that the realignment will not happen. (Townships Stipulation ¶7) If the roadway at Crossing No. 27 is realigned, even FAST acknowledges that an at-grade crossing will be recommended for any future trail use. (FAST Ex. B, Master Park Plan, Summary Matrix: Bridge Inventory, Table 2, M.P. 23.04) In the event of roadway realignment, there will be no financial incentive for Martic Township to remove the former stone arch crossing structure, as it will no longer be used by vehicular traffic. (Martic Twp. St. 1, p. 4)

**(2) Crossing No. 28 - Martic Forge Trestle**

Martic and Conestoga Townships have enacted an Intermunicipal Agreement for the purpose of sharing maintenance responsibility of the Martic Forge Trestle into the future. (Exhibit TWP 8) While the immediate goals of Martic and Conestoga Townships will be merely to preserve the Trestle, allowing the structure to remain at this time will provide for the possibility of future preservation responses and/or trail use. For this reason and others, Martic and Conestoga Townships have undertaken the sizable obligation to care for and maintain the Martic Forge Trestle. (Townships Stipulation ¶8.1)

FAST has made much of Paragraph 12.5 of the Townships Stipulation, which includes “demolition” within the ambit of “maintenance.” As Mr. Marvin so eloquently explained, this explicit provision is necessary to allow the Townships the option to make decisions with due regard to fiscal constraints.<sup>20</sup> (N.T. 632-33) Obviously, the existence of other funds, such as grants from the Pennsylvania Historical and Museum Commission (“PHMC”); the Department of Conservation and Natural Resources (“DCNR”); and the County of Lancaster, together with the potential applicability of the ISTEA program, may work to provide funding sufficient to rehabilitate and improve Martic Forge Trestle to the point where it could be made safe for pedestrian travel. It should be noted, however, that while FAST spends much time objecting to the discretion reserved by the municipalities

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<sup>20</sup> With respect to Paragraph 12.5 of the Townships Stipulation, it should be noted that, even in the absence of that language, where a Township agrees to maintain a crossing structure, or is ordered to do so by the PUC, upon abolition of that crossing the Commission relinquishes jurisdiction. It is thus questionable whether any order of the Commission lawfully could require a Township to maintain (as opposed to demolish if necessary) any crossing structure in perpetuity.

with respect to this major assumption of potential financial responsibility, FAST has no funds available itself to rehabilitate the structure. (Exhibit TWP 10) FAST's cash donations have been spent either on Julie Nettke's "salary," or on further fundraising. (Exhibit TWP 11)

**(3) Crossing structures to remain in place**

As indicated above, the Townships have elected to take responsibility for future maintenance of crossing structures.<sup>21</sup> In this way, the Townships Stipulation clearly promotes the possibility of future trail development. Paragraph 12.5 of the Township Stipulation, as discussed above, allows the Townships the necessary financial flexibility to remove a crossing in the future if necessary. Several of the Township Supervisors indicated expressly that there is no immediate need to remove structures for which the Townships are taking responsibility pursuant to the Township Stipulation. In fact, there is a financial disincentive to the Townships immediately to spend Conrail's endowments on crossing demolition. Only where the cost of rehabilitation greatly exceeds the cost of demolition would demolition become financially indicated. FAST has provided no testimony that this is the case. Furthermore, FAST, and any other entity willing to do so, has the opportunity in the future to offer funding to the Townships specifically for the purpose of rehabilitating the crossing structures. Although FAST has not elected to set aside any of the substantial funds it has solicited to date for this purpose, it may do so in the future if it is able. As discussed above, the availability of any public funding in the

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<sup>21</sup> Crossing Nos. 1, 2, 3, 5, 6, 9, 11, 13, 14, 20, 22, 23, 24, 28, 30 and 31. (Townships Stipulation ¶¶ 2.5, 2.6, 2.7, 3.3, 3.4, 4.3, 4.5, 5.4, 5.5, 6.9, 6.11, 6.12, 6.13, 8.1, 9.4 and 9.5)

form of grants or the like also will help the Townships with rehabilitation. The Townships are responsible for the maintenance of miles of roadway and other bridges (over which the PUC does not have jurisdiction) on a daily basis. The Townships by this settlement are committed to maintaining the subject crossing structures in a safe condition.

The Stipulations do much to avoid the immediate demolition of all crossing structures at below-grade crossings, as advocated by the Bureau of Transportation and Safety. The Stipulations allow the crossing structures to remain in place so long as there is funding to rehabilitate them. Although FAST complains loudly about the discretion reserved to the Townships with respect to future maintenance of the crossing structures, FAST's complaints are hardly credible where the group has squandered its funds instead of reserving them for rehabilitation.

**(4) Crossing 7A - Bart Township**

On or about March 5, 1993, the Board of Supervisors of Bart Township entered into a Stipulation ("Bart Stipulation") with Lancaster County, Conrail, PennDOT, the Department of Environmental Resources, and FAST concerning the disposition of crossing structure 7A (Lamparter Road) and Mount Pleasant Road. The Bart Stipulation was entered at consolidated Complaint Dockets C-00913256 and C-00913258. By Tentative Decision entered June 22, 1993 (and Order entered October 25, 1993, Modified Order entered March 2, 1994) at those docket numbers, the Bart Stipulation was approved by the Commission. In accordance with the Tentative Decision and Orders, Bart Township removed the Mount Pleasant Road bridge and replaced it with a roadway over

fill and installed a culvert. The Tentative Decision and Orders did not address the duties of Bart Township at Lamparter Road, although the Bart Stipulation, which did address those issues, was approved.<sup>22</sup> On or about May 5, 1995, Bart Township filed a Petition for Amendment or Rescission regarding the Lamparter Road bridge. On or about August 10, 1995, Bart Township filed a Motion to consolidate the proceeding at Docket No. C-00913256 (Lamparter Road Complaint case) with the Conrail abolition of 31 crossings of the Enola Branch at Docket No. A-00111016. On September 14, 1995, Judge Cocheres granted the Motion for Consolidation of the Proceedings at Docket Nos. A-00111016 and C-00913256.

Bart Township's Petition for Amendment or Rescission filed at Docket No. C-00913256, on or about May 5, 1995, is still pending.<sup>23</sup> In its Petition at paragraph 4, Bart Township asserted that certain facts became known after the signing of the Petition, which facts were not known to Bart Township at the time the original Bart Stipulation was signed and the Tentative Decision and Orders were prepared. Bart Township supported its Petition with verified factual assertions which demonstrate generally that: the cost of the Mount Pleasant Road bridge culvert installation was substantially more expensive than anticipated; Bart Township does not have the necessary funds to complete another very expensive culvert installation; FAST's Master

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<sup>22</sup> The Bart Stipulation provides that "Bart Township shall remove and replace Lamparter Road Bridge in accordance with Sketch Plan for Lamparter Road Bridge prepared by N.M. Lake & Associates, Inc., dated March 3, 1993 before December 31, 1996." (Bart Stipulation at ¶2, p. 3)

<sup>23</sup> The Petition of Bart Township complies with 52 Pa. Code §5.572. It should be noted that no party filed an answer or any response to the Petition within ten (10) days as required by §5.572(e). At the time of the filing of the Petition, Section 5.572(c) required an answer to a petition filed under that section be served within ten (10) days after service of the petition. Recently promulgated Section 5.572(e) is the same as former subsection 5.572(c). FAST filed its Answer, out of time, on May 26, 1995.

Park Plan indicates that at-grade crossings would be sufficient to provide for trail use; a continuous at-grade crossing at Lamparter Road would be physically possible without a culvert installation; the crossing "depth" is approximately 20 feet as opposed to the approximate 50 feet depth at the Mount Pleasant Road crossing; a 12:1 approach grade is physically possible at the Lamparter Road crossing, where such crossing was not possible at the Mount Pleasant Road location; the Mount Pleasant Road culvert had become an attractive nuisance and had caused safety problems; and there was a substantial chance that there may not be a trail owned, operated and sponsored by FAST.

In addition, at the hearings held on June 11 and 12, 1997, Bart Township provided additional substantial evidence concerning its request for a modification of the prior Bart Stipulation and Order at Docket No. C-00913256. Ray Marvin set forth Bart Township's position with respect to the prior Bart Stipulation of Settlement in this matter:

At the time of the 1993 [Bart] Stipulation, Bart Township, and the other parties to the [Bart] Stipulation, were under the factual impression that FAST would acquire the Enola Branch Line from Conrail and operate it as a recreational trail. As of the date of the 1997 [Townships] Stipulation of Settlement, Conrail entered into a binding contractual agreement to convey the Enola Branch to Bart Township and the other Townships party to that [Townships] Stipulation of Settlement. As such, the conditions have changed dramatically from the date of the entry of the 1993 [Bart] Stipulation, which required a culvert. Because FAST will not own the real estate, and because Bart Township has no intention to provide pedestrian access through the fill via a culvert, the 1993 [Bart] Stipulation should be vacated and the 1997 [Townships] Stipulation of Settlement should be approved. Bart Township, in entering into the earlier stipulation, relied upon the representations of FAST that it would be the recipient of the real property associated with this crossing. Because Bart Township will become the owner of the Line, because no culvert crossing is necessary and because the placement of the culvert is

prohibitively expensive, the 1997 [Townships] Stipulation of Settlement in the instant matter should be approved without the requirement of the placement of a culvert.

(Bart Township Statement No. 1, p. 10) In addition, on cross-examination, Mr. Marvin explained very succinctly Bart Township's position with respect to Lamparter Road. (N.T. 626, 635-36).

The Public Utility Code provides that:

The Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected and, after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.<sup>24</sup>

Obviously, FAST and the other parties to the Bart Stipulation and to the proceeding at Docket No. C-00913256 have had ample notice and opportunity to be heard with respect to the request of Bart Township to rescind or amend the prior Bart Stipulation and Tentative Decision and Orders approving it. FAST's untimely answer<sup>25</sup> to Bart Township's Petition opposes the Petition on the basis that the trail is a "near certainty" and is "many times closer to opening." The fact that FAST will not get funding or take title to the property or manage a trail in Bart Township (see Exhibit TWP 10) demonstrates conclusively that the factual basis for the Bart Stipulation at Docket No. C-00913256 has changed drastically. Therefore, Bart Township's request for relief should

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<sup>24</sup> 66 Pa. C.S. §703(g).

<sup>25</sup> FAST filed a response to Bart Township's Petition on May 26, 1995, 21 days after the filing of Bart Township's Petition and 11 days late. 52 Pa. Code §5.572.

be granted and the Order entered at C-00913256 should be amended consistent with the Townships Stipulation.

The primary reason for the Bart Stipulation was that FAST had planned to own and operate a trail through Bart Township. The culverts were expected to provide a means for trail users to pass beneath the reconstructed Lamparter Road crossing. Subsequent to the signing of the Stipulation, Conrail's plans to convey the property to FAST changed. FAST will no longer be taking title to the Conrail property; nor will FAST be operating a trail project in Bart Township. As such, the expensive and unnecessary culvert crossing should not be required to be constructed by Bart Township. As Mr. Marvin testified, in the event of future trail use, a slope as gentle as 12:1 may easily be constructed along the Lamparter Road fill area. (N.T. 626) Furthermore, a crossing constructed without a culvert will allow unlimited tonnage to use Crossing 7A. FAST's own Master Park Plan allows for at-grade crossings. Where, as here, the crossing structure is only 19 feet above the former grade of the railway, a safe and sufficient at-grade crossing can be constructed in the event of any future trail use. It also should be noted that a roadway on fill without a culvert already exists at Crossing No. 8. (Bart Township Statement 1, p. 13)

As a final note, the disposition of the Lamparter Road crossing without the requirement of a culvert is an integral part of the complex and delicate balance of interests that led to the Townships Stipulation. Clearly, Bart Township has, through its Petition and subsequent evidence in this proceeding, demonstrated the change in

circumstances required by the Commission for the granting of petitions for reconsideration under 66 Pa. C.S. §703(g).<sup>26</sup>

**2. The Stipulation of Settlement Between Conrail and PennDOT is Just, Reasonable and in the Public Interest and Should be Approved by the Commission.**

Like the Townships Stipulation, the PennDOT Stipulation addresses safety of crossings and is a key element of the comprehensive settlement package. In supporting the PennDOT Stipulation, the Townships wish to note and commend PennDOT's flexibility in allowing some structures to remain in place, a position which allows for the preservation of grade-separated crossings into the future.

**3. The Stipulations of Settlement Fully Address Public Safety Concerns with Respect to the Abolition of the Rail-Highway Crossings.**

The parties to the Stipulations fully evaluated the crossing structures to be maintained and observed no public safety considerations at this time which would warrant the removal of the majority of the structures. Eight crossing structures are scheduled for removal at the time of the conveyance of the Enola Grade real property to the Townships. As more fully set forth in Argument, Part 1, sub-part (d)(1), the removal of these eight crossing structures is necessitated by public safety considerations.

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<sup>26</sup>See Phillip Duick et al. v. Pennsylvania Gas & Electric Company; 56 P.U.C. 553 (1982); AT&T v. Pa. PUC, 568 A.2d 1362 (Pa. Cmwlth. 1990).

#### **4. The Stipulations of Settlement Satisfy State and Federal Historical Statutes and Regulations.**

##### **a. National Historic Preservation Act**

On or about October 3, 1989, Conrail filed with the Interstate Commerce Commission ("ICC") a notice of exemption pursuant to 49 CFR §1152.50, to abandon approximately 66.5 miles of track, the Enola Branch Line extending through Lancaster and Chester Counties. The ICC,<sup>27</sup> on February 14, 1990, issued a decision and order regarding Conrail's notice of exemption. In its decision, the ICC concluded that abandonment of the subject portion of the Enola Line would not affect either the quality of the human environment or conservation of energy resources provided certain conditions were satisfied. One of those conditions was the requirement that Conrail 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.<sup>28</sup> The time for completion of the Section 106 review process would have terminated on August 29, 1990, by virtue of passage of 330 days from the date of filing of Conrail's notice of exemption.<sup>29</sup> On April 14, 1993, the ICC issued its Order granting abandonment.<sup>30</sup>

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<sup>27</sup> The ICC's duties relevant to this matter were transferred to the Surface Transportation Board ("STB").

<sup>28</sup> 16 U.S.C. 470. Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to perform certain duties whenever they implement a "federal undertaking." A federal undertaking occurs whenever a federal agency provides financial assistance, exercises significant oversight over a project or licenses a project under a federal statute. The federal agency is required to take into account the impact the federal undertaking will have on any structure that is included, or eligible for inclusion, in the national register.

<sup>29</sup> 49 U.S.C. §10904 (c)(3) and 49 C.F.R. §1105.8(f). Section 1105.8(f) provides in relevant part: historic preservation conditions imposed by the Commission in rail abandonment cases generally will not extend beyond the 330-day statutory time period in 49 U.S.C. 10904 for abandonment proceedings.

<sup>30</sup> In addition, a party must appeal an ICC decision within 60 days of the ICC decision. 28 U.S.C. §2344. Failure to do so means the ICC's decision is final and unappealable. No party took an appeal from the ICC's April 14, 1993 Order. FAST filed a Petition to Reopen this matter on or about April 15, 1996. To date, it has not been granted.

Under Section 106, the ICC has been limited authority to “afford the advisory council on historic preservation established under part B of this subchapter, a reasonable opportunity to comment with regard to such undertaking.”<sup>31</sup> That limitation is recognized by the ICC in Ex Parte No. 55 (Sub-No. 22A)<sup>32</sup> as follows:

Where historic property is involved, our ability to protect is very limited. Despite the broad scope of the ACHP regulations (which encompass all property in the vicinity), we can impose historic preservation conditions only to the extent the particular property is owned by the applicant carrier and has a sufficient nexus to the proposal under review. Moreover, even where the property is subject to our conditioning authority, we do not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the deed, as a condition to obtaining abandonment or acquisition authority. Nor can we deny ICC approval of a transaction solely on the ground that it would adversely effect historic resources. Thus, as a practical matter, documentation of the historic resources involved in the proposal under review (before they are altered or removed) is the only form of nonconsensual mitigation available to us.

(Conrail Ex. 7, pp. 828-29 (footnotes omitted))

The ICC has acknowledged that the NHPA process injected considerable uncertainty into the business activities regulated by the Commission, by delaying indefinitely the disposition of rail property. This concern was manifested by the ICC in Ex Parte No. 55 (Sub-No. 22A), as follows:

To expedite the historic review process, we will continue to set reasonable time limits for our consultation with SHPOs and the Advisory Council in individual cases. We also will terminate (or move to the next stage of) the process where a SHPO or the Advisory Council declines to participate in a timely manner or “sleeps on its rights.”

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<sup>31</sup> 49 U.S.C. §470(f).

<sup>32</sup> Implementation of Environmental Laws, 7 ICC2d 807 (decided July 19, 1991).

(7 ICC2d at 827 (emphasis added))

The NHPA is only applicable to a federal agency when it retains the ability to affect the outcome of the federal agency's action. Where the federal agency retains no authority to terminate an action or significantly to impact the project, the NHPA is not applicable.<sup>33</sup> In Gettysburg Battlefield, the plaintiffs alleged that the applicable federal agency failed to conduct the required NHPA review prior to transfer of federal land to a private entity. The Court emphasized:

in the absence of ongoing federal involvement and control there is no jurisdiction for a federal court to order a federal agency to undertake NHPA review or to enjoin the project of private actors. This is not an otherwise living case and the redress sought is unavailable.<sup>34</sup>

The NHPA does not provide for an after-the-fact remedy once the federal agency is no longer involved. The ICC granted abandonment by virtue of its April 14, 1993 Order. Thus, it no longer possesses the power to influence the federal licensing, and no remedy remains under the NHPA.<sup>35</sup>

Section 470(f) of the NHPA provides in relevant part:

The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

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<sup>33</sup> Gettysburg Battlefield Preservation Association, et. al. v. Gettysburg College, et. al., 799 F. Supp. 1571 (M.D. Pa. 1992).

<sup>34</sup> 799 F. Supp. at 1581-82.

<sup>35</sup> Gettysburg Battlefield. See also, Consolidated Rail Corp. v. Surface Transportation Board, 93 F.3d 737 (1996) (upon issuance of abandonment certificate, the ICC is relieved of jurisdiction, citing Presseault v. ICC, 494 U.S. 1, 110 S.Ct. 914 (1990)); Fritch v. ICC, 59 F.3d 248 (D.C. Cir. 1995) (ICC's jurisdiction terminates once abandonment is granted and consummated by the rail carrier).

(16 U.S.C. §470(f)) Numerous correspondence between the PHMC and Conrail evidence completion of the comment process under Section 106. Conrail, in Paragraph 2 of its Answer to the Motion of FAST filed February 5, 1996, lists these numerous correspondence. The list is set forth below for the convenience of the Commission and is as follows:

- a. October 18, 1989 - - letter of Kurt W. Carr of the Pennsylvania Historical Museum Commission ("PHMC") to John J. Paylor, Esquire, of Conrail, reciting that the project "has been reviewed" but requesting further information as to specific bridges;
- b. November 15, 1989 - - letter of John J. Paylor, Esquire, of Conrail, to Kurt W. Carr, of PHMC, enclosing information responsive to Carr's request of October 18;
- c. December 12, 1989 - - letter of Brenda Barrett, Director of the Bureau of Historic Preservation to John J. Paylor, Esquire of Conrail, listing 44 bridges that are considered not eligible for listing on the National Register for Historic Places, 33 bridges considered eligible for listing on the register and 37 bridges at locations believed to have possible archaeological significance with a request for map locations of those bridges;
- d. January 30, 1990 - - letter of John J. Paylor, Esquire of Conrail to Brenda Barrett of PHMC, providing requested maps with bridge locations marked thereon;
- e. March 5, 1990 - - letter of Kurt W. Carr, of PHMC, to John J. Paylor, Esquire, of Conrail, acknowledging receipt of the requested maps;
- f. September 4, 1991 - - letter of Brenda Barrett, of PHMC, to John P. Mikowychok, Lancaster County Department of Parks and Recreation, again reciting that the "above-named project has been reviewed";
- g. February 24, 1994 - - letter to Brenda Barrett, of PHMC, to Wendy Tippetts advising that: "the above-named project has been reviewed by the Bureau of Historic Preservation (State Historical Preservation Office) in accordance with Section 106 of the National Historic Preservation Act of 1966 as amended in 1980,

and the regulations (36 C.F.R. Part 800) of the Advisory Council on Historic Preservation”;

- h. April 19, 1994 - - letter of Brenda Barrett, of PHMC, to Mike Keiser, Pennsylvania Department of Transportation and Ronald T. Bailey, Executive Director, Lancaster County Planning Commission again reciting that the “named project has been reviewed”;
- i. October 19 (sic [17]), 1994 - - letter of Kurt W. Carr, of PHMC, to David C. Eaton, Esquire, of Nauman, Smith, Schissler and Hall, reviewing the eligibility of structures on the Enola branch for registration on the National Register of Historic Places again reciting that the “above-named project has been reviewed”;
- j. November 16, 1994 - - letter of Kurt W. Carr of PHMC, to Fred W. Bauser, Director, Bureau of Design, Department of Transportation, cautioning compliance by the Department with certain regulations again reciting that the “above-named project has been reviewed”;
- k. March 16, 1995 - - letter of Kurt W. Carr, of PHMC to Julie Nettke, Friends of Atglen - Susquehanna Trail, Inc., which again recites that the Bureau of Historic Preservation (the State Historic Preservation Office) “has reviewed” the above-named project;
- l. April 4, 1995 - - letter of Kurt W. Carr of PHMC, to Catherine J. Horne, Executive Director, Quarryville Area Chamber of Commerce which, for the first time since January 30, 1990, states “the Bureau of Historic Preservation (the State Historic Preservation Office) is reviewing the above-named project”.

(Conrail Answer to Hearing Motion of FAST filed February 5, 1996) The existence of this correspondence strongly supports the conclusion that the PHMC and interested parties had more than a reasonable opportunity to comment regarding this undertaking. Compliance with the NHPA in ICC cases is ultimately the responsibility of the ICC, and

the NHPA does not give the State Historic Preservation Officer veto power over ICC actions.<sup>36</sup> In sum, there is no bar to the Commission's grant of the pending settlement.

**b. Pennsylvania Historic Preservation Act**

Pursuant to the Pennsylvania Historic Preservation Act ("PHPA"), the Pennsylvania Historical and Museum Commission ("PHMC") is authorized to provide assistance, advice and comment with reference to actions by public and private entities and individuals affecting historic resources.<sup>37</sup> As stated by Brenda Barrett, the PHMC acts in an advisory and advocative capacity. (N.T. 722) The decisions and positions of the PHMC are not binding on the deliberations and determinations of the Commission in the exercise of its statutory responsibilities.<sup>38</sup> Ms. Barrett affirmatively stated that her testimony served as the medium for PHMC's input regarding preservation issues in this proceeding.<sup>39</sup>

Under the PHPA, Commonwealth agencies,<sup>40</sup> including the Commission, are charged with certain responsibilities for property under their "ownership or control" that may have historic significance. These responsibilities include consultation with and solicitation of advice from the PHMC; the initiation of measures and procedures to provide for the maintenance of historic resources that are listed on or eligible for the

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<sup>36</sup> Conrail Exhibit 7 at 833.

<sup>37</sup> 37 Pa. C.S. §502.

<sup>38</sup> O'Connor v. Pa. PUC, 582 A.2d 427,432 (Cmwlth. Ct. 1990).

<sup>39</sup> PHMC did not intervene or otherwise seek to participate in the proceeding at any time following the filing of Conrail's application in 1993. Ms. Barrett appeared by subpoena.

<sup>40</sup> Notably, Section 507 of the PHMA, relating to interagency cooperation with regards to archaeological resources, applies to Commonwealth agencies, political subdivisions and municipal authorities. By contrast, Section 508, relating to interagency cooperation with regards to historical structures, applies only to Commonwealth agencies. Goldsboro v. Commonwealth, 572 A.2d 1172 (Cmwlth. Ct. 1990).

Pennsylvania Register of Historic Places<sup>41</sup> by means of preservation, rehabilitation or restoration; and the institution of measures and procedures in regulatory programs and activities which contribute to the preservation of historic resources.<sup>42</sup> However, PHMA does not confer on the PHMC authority to “delay, deny, condition or limit or cause to be delayed, denied, conditioned or limited any permits” which would otherwise be issued by a Commonwealth agency. No property under the ownership or control of the Commission is implicated in this proceeding. Rather, this proceeding involves real property under the present ownership and control of Conrail, a private corporation, and, by the Townships Stipulation, under the proposed ownership and control of the Townships. The PHMA imposes no duties or responsibilities on the Townships with respect to potential historic resources which must be satisfied in order for the Townships Stipulation to be approved.

With respect to the individual crossing structures at issue in this proceeding, the Stipulations provide for the retention of the majority of the structures and the removal of only those structures for which serious safety concerns have been identified. Ms. Barrett recognized that the issues of historic preservation must be balanced with those of safety. (N.T. 757, 765-66) She further acknowledged that the PHMC would not necessarily conclude that preservation goals were precluded or violated by the removal of individual structures under the balancing approach. (N.T. 757) The Townships also recognize that

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<sup>41</sup>It is the duty of the PHMC to establish a Pennsylvania Register of Historic Places. 37 Pa. C.S. §502(2). Despite the legislative mandate, no such Register exists.

<sup>42</sup> 37 Pa. C.S. §508.

the Enola Branch Line has some historical significance.<sup>43</sup> (N.T. 630, 659, 696, 708) As also indicated by the Townships, they are poised to sign an Intermunicipal Agreement preserving a continuous corridor of 30 feet (approximately the width of the current utility corridor used by Amtrak).<sup>44</sup> (N.T. 638) Ms. Barrett concurred that the corridor agreement would “preserve” the resource. (N.T. 800). The Stipulations of Settlement and the Intermunicipal Agreement operate in a manner which preserves most of the structures and the corridor, thereby satisfying the objectives of the PHPA.

**5. The Stipulations of Settlement Satisfy Pennsylvania’s Rails to Trails Act.**

**a. Rails-to-Trails Act**

Pennsylvania’s Rails-to-Trails Act<sup>45</sup> adds others factors for the Commission to consider in rail-highway crossing abolition proceedings. The relevant section reads as follows:

**§ 5620. Coordination with the Pennsylvania Public Utility Commission**

**(a) Method of coordination.**--Whenever the Pennsylvania Public Utility Commission receives or considers any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission shall notify the Department of Environmental Resources. The department shall evaluate the proposed abandonment or removal in order to determine the impact of such action upon the development, expansion and existing use of public

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<sup>43</sup> However, the historical significance of the line, as set forth in the record, appears to be largely that it is flat. (N.T. 421-22)

<sup>44</sup> This corridor could fully accommodate a trail, as illustrated by Greenways, Inc.’s Master Park Plan. (FAST Ex. B, Figure 3, p. 20; Figure 4, p. 21; Figure 5, p. 22; Figure 6, p. 23; Figure 7A, p. 27)

<sup>45</sup> 32 Pa. C.S. §5611, et seq.

recreational trails and may participate in proceeding before the commission concerning such matter.<sup>46</sup>

**(b) Actions by the commission.**--Before taking final action on any request for the abandonment or removal of a railroad grade crossing, bridge or tunnel, the commission 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.

Section 5620 does not, by its terms, require the Commission to alter its duties under Section 2702 to take necessary action to prevent accidents and to promote public safety.<sup>47</sup> Section 5620 of the Rails-to-Trails Act simply adds a factor for the Commission to consider in fulfilling its other duties under the Public Utility Code - - that it provide opportunity for and consider evidence related to whether or not it is safe and in the public interest to allow structures to remain in place and be used for public recreational purposes.<sup>48</sup> Significantly, the Rails-to-Trails Act does not require the Commission to leave structures in place if trail use is contemplated. It merely requires the Commission to evaluate alternatives that would minimize the adverse impact on development and use of recreational trails. If after evaluating alternatives, the Commission decides that it is necessary to remove structures in order to prevent accidents or to promote public safety, it can order those structures to be removed. Removal of crossing structures is not, therefore, inconsistent with the Rails-to-Trails Act or the analysis required by that Act.<sup>49</sup>

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<sup>46</sup> Notably, while DCNR intervened, it offered no evidence in this proceeding; nor does it oppose the settlement.

<sup>47</sup> See Pa. Game Commission.

<sup>48</sup> Pa. Game Commission.

<sup>49</sup> Montour Trail Council v. Pa. PUC, 663 A.2d 285 (Pa. Cmwlth. 1995), vacated and remanded on other grounds, 690 A.2d 703 (Pa. 1997).

The Commission may order only concerned utilities and municipal corporations or the Commonwealth to perform work or bear costs in abolishing rail-highway crossings.<sup>50</sup> FAST and the Lancaster County Historic Preservation Trust (“HPT”) are not “concerned parties” within the meaning of Sections 2702(c) and 2704(a). The Rails-to-Trails Act does not grant the Commission any jurisdiction or authority over FAST or HPT.<sup>51</sup>

FAST appears to complain that, if the Townships Stipulation is accepted by the Commission, the Townships will have the discretion in the future with respect to the demolition or rehabilitation of given structures at any given point in time. This is true. As Mr. Marvin testified, it gives the Townships the required fiscal flexibility to address future maintenance in a sound and responsible manner. (N.T. 632-633) Nothing in the Rails-to-Trails Act supports FAST’s position that some guarantee should or must be provided by the Townships with respect to eternal preservation of the crossing structures.<sup>52</sup> Significantly, since the passage of the Rails-to-Trails Act, the Legislature has not amended Sections 2702 and 2704 of the Public Utility Code to provide otherwise. The Rails-to-Trails Act does not limit the Commission to any fixed rule. Since the enactment of the Rails-to-Trails Act, the Commonwealth Court has reviewed Commission decisions involving the abolition of crossings where trail use is contemplated. The Commonwealth Court has not ruled that the Rails-to-Trails Act

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<sup>50</sup>66 Pa. C.S. §§2702(c), 2704(a).

<sup>51</sup> The Public Utility Commission can exercise only those powers expressly granted to it. Borough of Tarentum v. Pa. PUC, 171 Pa. Super. 156, 90 A.2d 853 (1953).

<sup>52</sup> Notably, FAST has not set aside or committed any funds whatsoever for repairs to avoid the threat of demolition. FAST has no funds available for bridge improvements. Exhibit TWP 10, p. 3, answer to Interrogatory #9.

imposes any new standard or criteria on the Commission which did not exist before passage of the Rails-to-Trails Act.<sup>53</sup>

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<sup>53</sup> See Pa. Game Commission; Montour Trail Council.

**E. CONCLUSION**

Based on the foregoing, the Townships respectfully request that the Commission approve the Stipulation of Settlement between them and Conrail, as well as the Stipulation of Settlement between Conrail and PennDOT, in their entirety and as presented. The Stipulations represent a comprehensive settlement achieved in great part through Commission-sponsored mediation. They assign maintenance responsibility for those crossings remaining in place, minimize the number of crossings to be removed, and provide the possibility of future trail development, consistent with the best judgment of the parties concerning issues of public safety at each of the crossings affected. While FAST may object to some specifics of the Stipulations, consideration should be given to the fact that the Stipulations allow for trail proponents to pursue development of the corridor as a public trail by preserving the corridor intact, while allowing the new owners of the Enola Branch, the Townships, the flexibility to address safety concerns in the future at the crossings as those questions arise.

## **F. PROPOSED FINDINGS OF FACT**

1. The Department of Conservation and Natural Resources presented no witnesses nor any opposition to the Stipulations of Settlement between Conrail and PennDOT or Conrail and the Townships. (N.T. 393)
2. The Pennsylvania Historical and Museum Commission did not intervene in the proceeding; participation was limited to the presentation of testimony by Brenda Barrett under subpoena. (N.T. 755)
3. Greenways, Inc., the creator of the Master Park Plan, would be willing to work with the Townships for the development of a trail. (N.T. 409)
4. Greenways, Inc. was paid approximately \$35,000.00 by FAST to prepare the Master Park Plan. (N.T. 418)
5. The Master Park Plan was prepared with the assumption that certain structures would be removed and others retained. (N.T. 411-12)
6. Greenways, Inc. agreed that several structures should be removed for automobile safety concerns. (N.T. 410)
7. Those structures identified in the Master Park Plan as slated for removal were so designated because of poor condition and/or highway safety concerns (N.T. 412-13)
8. Where crossing structures are removed, at-grade or pedestrian bridge crossings are recommended for trail development by Greenways, Inc. (N.T. 414)
9. The Master Park Plan includes a typical at-grade design detail. (N.T. 418)
10. The Master Park Plan is severable; any trail development may take place in segments or stages. (N.T. 409)

11. The historic value of the line was taken into consideration by Greenways, Inc. in the preparation of its Master Park Plan. (N.T. 419)

12. Amtrak will continue to maintain its electric transmission line along the Enola Branch Line. (N.T. 559)

13. Conrail does not object to an order requiring it to remove electrical casings and housings not used by either Conrail or Amtrak. (N.T. 539-540)

14. Lancaster County currently supports the preservation of the corridor here on the Enola Grade Line and supports the Stipulations signed by the parties in this case. (N.T. 604-05)

15. Lancaster County believes that the main purpose of a corridor agreement among the Townships is to maintain the unity of the parcels of land involved and not necessarily the bridge structures themselves. (N.T. 578)

16. Lancaster County has expressed a commitment for County funding for the Martic Forge Bridge, Route 324 realignment, and, perhaps, for a pedestrian bridge at Route 222. (Statement of Counsel at N.T. 567)

17. Lancaster County is willing to seek modification of the Transportation Improvement Plan to fund crossing improvements at Route 324 for a realignment and at-grade crossing as indicated in the Stipulation of Settlement between Conrail and the Townships. (N.T. 569-70)

18. Crossing Nos. 4, 10, 15, 16, 17, 21 and 26 create safety hazards to the traveling public which outweigh any safety hazard to trail users crossing a trail at-grade, assuming that a trail is built on the right-of-way.

19. Crossing No. 15 has an inadequate vertical clearance which prevents fire emergency vehicles from negotiating the opening and which puts the residential community at risk in the event of a fire. (Providence Twp. St. 1, pps. 9, 10)

20. Crossing No. 21 has restricted site distance which compromises the ability of school buses to negotiate the crossing safely. (Providence Twp. St. 1, p. 21) Similarly, large transport vehicles, such as fuel trucks and milk delivery trucks, are unable to safely negotiate the crossing. (Providence Twp. St. 1, p. 21)

21. Crossing No. 26 has an inadequate vertical clearance of 11'3". (Providence Twp. St. 1, p. 28)

22. A trail along the Enola Branch at any point is speculative at this time.

23. FAST has no present ownership interest in the Enola Branch or structures thereon.

24. FAST has no present funding to maintain or preserve structures along the Enola Branch Line or a trail along the line. (Exhibits Twp. 10, 11)

25. Assuming that a trail is constructed on the right-of-way, the trail owner can construct a structure which trail users can use to cross the roadway, or the trail users can cross the roadway at-grade.

26. The purpose of the proposed corridor agreement among the Townships is to bring an understanding and cooperation among the municipalities on how the line will be developed and maintained for future use. (N.T. 593-94)

27. Circumstances have changed with respect to Crossing 7A, Lamparter Road, since the submission of the Bart Stipulation and the entry of the Commission's Decision and Orders, which undermine the continued necessity for the previously

ordered bridge culvert and pedestrian passage. These include such factors as the extraordinary and unexpected cost of the improvement to accommodate a trail when trail development is speculative and where an at-grade crossing is physically possible. (Bart Twp. St. 1, p. 10; N.T. 626, 635-36)

28. Conrail filed its notice of exemption to abandon the Enola Branch with the ICC on October 3, 1989. The ICC issued an Order granting abandonment of the Enola Branch on April 14, 1993.

29. As early as 1991, the PHMC completed its 106 review related to Conrail's notice of exemption. (Conrail Answer to Hearing Motion of FAST filed February 5, 1996)

## G. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and the subject matter of this proceeding, except that the Commission has no jurisdiction over FAST or the Historic Preservation Trust of Lancaster County. 66 Pa. C.S. §§102, 2702, 2704.
2. The Commission has exclusive jurisdiction over all rail-highway crossings in the Commonwealth and the approaches thereto. 66 Pa. C.S. 2702; Department of Transportation v. Pa. PUC, 440 A.2d 657 (Pa. Cmwlth. 1982); Springettsbury v. Pa. PUC, 289 A.2d 762 (Pa. Cmwlth. 1972).
3. The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. 66 Pa. C.S. §2702.
4. The Commission is empowered to determine and prescribe the manner in which rail-highway crossings may be altered and reconstructed. 66 Pa. C.S. §2702.
5. The Commission is empowered to order the alteration and reconstruction of rail-highway crossings upon such reasonable terms and conditions, including the assignment of future maintenance of any portion of the crossing remaining in place, as it shall prescribe. 66 Pa. C.S. §2704(a).
6. The Commission has the exclusive authority to access the costs of the work ordered performed upon the parties to this proceeding in such proper proportions as it may determine. 66 Pa. C.S. §2704(a).
7. In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes into consideration all relevant facts, the only requirement being that its

order must be just and reasonable. Greene Township v. Pa. PUC, 668 A.2d 615 (Pa. Cmwlth. 1995); Municipality of Monroeville v. Pa. PUC, 600 A.2d 655 (Pa. Cmwlth. 1991); East Rockhill Township v. Pa. PUC, 540 A.2d 600 (Pa. Cmwlth. 1988).

8. Removal of structures at rail-highway crossings is not inconsistent with the Rails-to-Trails Act. 32 Pa. C.S. §5611, et seq. Montour Trail Council v. Pa. PUC, 663 A.2d 285 (Pa. Cmwlth. 1985).
9. The allocation of costs for this project and the assignment of future maintenance responsibility as set forth in the Stipulations of Settlement between Conrail and PennDOT and between Conrail and the Townships, respectively, is fair, just and equitable to each party.
10. The Commission favors settlements. 52 Pa. Code §5.231.
11. The Stipulation of Settlement between Conrail and the Townships is just, reasonable, and in the public interest.
12. The Stipulation of Settlement between Conrail and PennDOT is just, reasonable and in the public interest.
13. Bart Township has demonstrated a sufficient change in circumstances to warrant a modification of the Order entered at Docket Nos. C-00913256 and C-00913258 by Tentative Decision on June 22, 1993 and by Order on October 25, 1993 (as modified by Order entered March 2, 1994) consistent with the Townships Stipulation.
14. The federal 106 process does not operate as a bar to the entry of a decision by this Commission on Conrail's application.

**H. PROPOSED ORDER**


Therefore, IT IS ORDERED:

1. That the Application of Consolidated Corporation at Docket No. A-00111016 for approval to abolish the crossings identified in this proceeding, as follows, is granted.
2. That the request of Bart Township for modification of the Order entered at Docket Nos. C-00913256 and C-00913258 relating to Lamparter Road (Township Road T-774) is granted.
3. That the Stipulation of Settlement between Conrail and Bart, Conestoga, Eden, Providence, Martic, Sadsbury and West Sadsbury Townships is hereby approved as just, reasonable and in the public interest.
4. That the Stipulation of Settlement between Conrail and the Pennsylvania Department of Transportation is hereby approved as in the public interest.
5. That Conrail must remove all electrical housings and casings not used by Conrail or Amtrak from the property to be conveyed.
6. That except as otherwise set forth in the Stipulations of Settlement, any relocation of, changes in or removal of any adjacent structures, equipment or other facilities of any public utility, other than Conrail, which may be required as incidental to the abolition of the crossings be made by said public utility at its sole cost and expense, in such manner as will not interfere with the abolition of the crossings, and such relocated or altered facilities thereafter be maintained by said public utility at its sole cost and expense.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Louis G. Cocheres  
Administrative Law Judge

Respectfully submitted,



---

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Malatesta Hawke & McKeon, LLP  
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DATED: June 24, 1997

Counsel for Bart, Conestoga, Martic,  
Providence and Sadsbury Townships

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Bart, Conestoga, Martic, Providence and Sadsbury Townships' Brief upon the persons named and in the manner indicated below.

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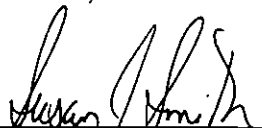
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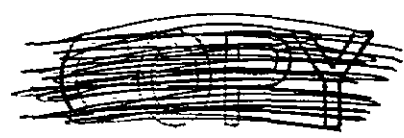
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\_\_\_\_\_  
Susan J. Smith

DATED: June 24, 1997

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ATTORNEY AT LAW



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June 25, 1997

Louis G. Cocheres,  
Administrative Law Judge  
Public Utility Commission  
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DOCUMENT  
FOLDER

#EM

Re: Application of Consolidated Rail Corporation for the abolition of thirty-one crossings of the Enola Branch, LC:201323, MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg Division, Lancaster County, Pennsylvania - Docket No. A-00111016 and consolidated case C-00913256

Dear Judge Cocheres:

I am writing to correct a typographical error in the Brief of FAST in the above-referenced case. On page 18, eleventh line from the top, the date which reads June 10, 1997 should read June 10, 1993.

Nine copies of this letter are being sent for filing, and a copy has been served upon all parties on the attached service list for the Brief.

Thank you for your attention to this matter.

Sincerely,

DOCKETED

JUL 01 1997

Joyce A. Nettke,  
Attorney at Law

JN

cc: Secretary (with nine copies)  
parties of record - for Brief

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**MEM**

June 27, 1997

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RE: **Conrail Enola Branch - PUC**  
**Docket No. A-00111016**  
**Our File No. 12607**  
**Conrail File No. MPAC-486**

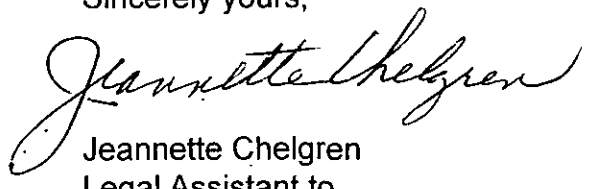
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Dear Mr. Frazier:

I enclose an original and nine (9) copies of a Motion of Consolidated Rail Corporation for Leave to File a Reply Brief for filing in the above matter.

In accordance with the accompanying Certificate of Service we have provided copies of the Motion to all active parties of record.

Sincerely yours,



Jeannette Chelgren  
Legal Assistant to  
David C. Eaton, Esquire

/jc  
Enclosures

cc: All Parties of Record  
ALJ Louis G. Cocheres (by hand delivery)  
Scott K. Wasserkrug, Esquire

**DOCUMENT  
FOLDER**

143

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated :  
Rail Corporation : Docket No. A-00111016

CERTIFICATE OF SERVICE

I hereby certify that copies of the Motion of Conrail for Leave to File a Reply Brief have been served upon the persons named and in the manner indicated below:

**BY HAND DELIVERED:**

Honorable Louis G. Cocheres  
Administrative Law Judge  
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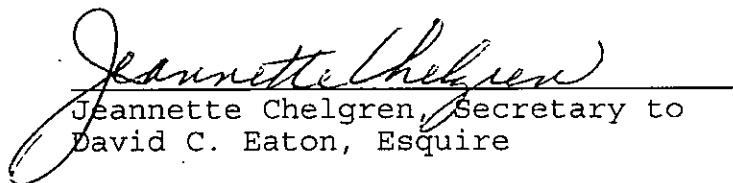
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Jeannette Chelgren, Secretary to  
David C. Eaton, Esquire

Dated: June 27, 1997

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated :  
Rail Corporation : Docket No. A-00111016  
:

ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 1997, upon consideration of the foregoing Motion, Consolidated Rail Corporation is hereby granted permission to file a Reply Brief in the form as thereto attached.

BY THE COMMISSION,

---

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FOLDER

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated :  
Rail Corporation : Docket No. A-00111016  
:

MOTION OF CONSOLIDATED RAIL CORPORATION  
FOR LEAVE TO FILE A REPLY BRIEF

NOW COMES Consolidated Rail Corporation ("Conrail"), by its attorneys, Nauman, Smith, Shissler & Hall, and makes the following motion for leave to file a Reply Brief to the Brief of Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"):

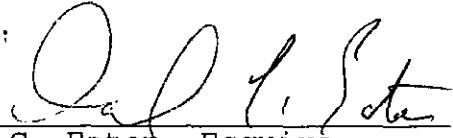
1. FAST, within its principal post-hearing brief, has incorrectly asserted that Conrail is subject to Section 106 (16 U.S.C. § 470f) of the National Historic Preservation Act.

2. There is attached hereto a copy of the Reply Brief which Conrail will file if leave is granted.

WHEREFORE, Consolidated Rail Corporation requests permission to file a very short Reply Brief on the single point set forth above.

NAUMAN, SMITH, SHISSLER & HALL

By

  
David C. Eaton, Esquire  
Supreme Court ID#07169

200 North Third Street  
P. O. Box 840  
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Counsel for Consolidated  
Rail Corporation

10  
ACCEPTED  
JUL 02 1997  
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Date: June 27, 1997

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