

COMMONWEALTH OF PENNSYLVANIA  
Department of Conservation and Natural Resources  
October 22, 1997

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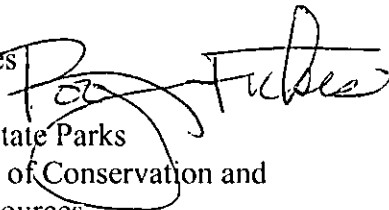
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**SUBJECT:** A-00111016 and C-00913256  
Opinion and Order  
Issued: October 9, 1997  
Consolidated Rail Corporation  
Lancaster County

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

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



In response to your recent request, attached is the "Acknowledgement of Receipt & Acceptance of Service" form with my signature along with date acknowledging the Bureau of State Parks' receipt of the subject "Opinion and Order."

If you have any questions, please contact Eric Milliron at 717-783-3343.

Attachment

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OCT 23 1997

Joyce A. Nettke  
ATTORNEY AT LAW

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PROTHONOTARY'S OFFICE  
PHONE (717) 687-9311

P.O. Box 27, Strasburg, PA 17579

FAX (717) 687-6749

October 23, 1997

Secretary  
Pennsylvania Public Utility Commission  
North Office Building  
PO Box 3265  
Harrisburg, PA 17105-5265

ORIGINAL

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-~~009113256~~ 00913256

To the Secretary:

Enclosed for filing please find an Original and nine copies of a Petition for Reconsideration in the above-captioned case.

Sincerely,



Joyce A. Nettke,  
Attorney at Law

JN

cc: parties of record, ALJ Cocheres

DOCUMENT  
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ORIGINAL

RECEIVED

OCT 23 1997

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION PUBLIC UTILITY COMMISSION

CLERK'S OFFICE

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 -E-00913250 Lamparter Road.

PETITION FOR SUPPLEMENTATION OF THE RECORD AND

RECONSIDERATION

NOW COMES Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"), and moves the Commission to supplement the record and reconsider its Opinion and Order ("the Order") of October 9, 1997, adopting the Recommended Decision of the Administrative Law Judge dated September 15, 1997 in the above-caption case.

Request for Supplementation of the Record

1. In the Order, the Commission refers on the last page to an Order of the Surface Transportation Board (hereinafter "the STB Order") dated September 23, 1997. (A true and correct copy of the STB Order is attached hereto as Exhibit A.)

2. The STB Order was not before the Administrative Law Judge because it was entered after the close of the record.

3. The said STB Order has not formally been made a part of the record.

4. Good cause exists to reopen and supplement the record because the STB Order was not available before the record closed; the Order is relevant to the subject matter of the case, particularly to the issue of subject matter jurisdiction as discussed infra; has already been mentioned in the Commission's Order; and is relevant to any appellant proceedings in this case.

WHEREFORE, FAST requests that the record be supplemented to make the STB Order dated September 23, 1997, and served October 2,

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1997 a part of the Commission record in the instant case.

Request for Reconsideration

Paragraphs one through 4 above are incorporated herein by reference as though set forth at length.

5. The instant consolidated cases came before the Commission on application of Consolidated Rail Corporation (Conrail") for abolition of thirty-one crossings of the Enola Low-Grade Line ("the line").

6. The Commission's Order adopted the ALJ's recommendation (with minor modifications) that two stipulations offered regarding the line and crossings be approved.

7. One of the approved stipulations is between Conrail and the Pennsylvania Department of Transportation ("PADOT") dealing with proposed work and costs at certain subject crossings; the second stipulation which was approved is between the Conrail and seven local Townships providing for payment of 1.4 million dollars by Conrail to the Townships, conveyance of the line in separate parcels to the Townships, and demolition of ten bridges of the line with additional bridge demolition at the election of any township after taking ownership. (Exhibits 6A and 6B, ALJ Decision.)

8. FAST, intervenor, argued that the Commission was preempted from entering an Order which paved the way for any "adverse effects" upon the line or its crossings within the meaning of the National Historic Preservation Act ("NHPA"), and regulations known as "section 106". (36 CFR 800 et seq). (Adverse effects under NHPA upon a historic resource include destruction, damage or alteration (800.9(b)(1) and transfer, lease or sale of the property

(800.9(b)(5)).

9. In support of this proposition FAST argued that a historic preservation condition imposed by the Interstate Commerce Commission (now the STB) ordering Conrail to retain ownership and not to alter historic structures of the line remained in effect. (Please see discussion in STB Order, Exhibit A hereto.)

10. Conrail argued the condition was no longer in effect stating Conrail had no further obligation under section 106, taking the position the issue was moot because more than 330 days had passed since the condition was imposed. (Brief of Conrail at 24.)

11. The ALJ in his Decision agreed with Conrail and held the issue was moot. (ALJ Decision at 102.)

12. The STB Order makes clear the issue was not moot and the condition remains in effect. (Ordering Paragraph 2, STB Decision.) (FAST has asked the STB to reconsider Ordering Paragraph 3.)

13. On information and belief the full Commission was only aware of the STB Order for, at most, two days prior to issuance of the 75-page Opinion and Order.

14. The Commission could not have had time to give full consideration to the impact of STB Order and the 106 process, merely mentioning it "Miscellaneous" at Page 75, because (on information and belief) the Commission's Order was drafted by the time the STB Order came to the Commission's attention.

16. The impact of the STB Order needs to be considered fully because it is relevant to the issue of preemption.

15. The Commission's authority is preempted if it conflicts with federal law. Although abandonment proceedings at STB and

abolition of crossing proceedings by the PUC are not necessarily in conflict the Commission in the instant case is preempted from deciding to order adverse effects on the bridges when the federal law and regulations have not been carried out as to the resource in question. (Brief of Fast 6-7.)

WHEREFORE, FAST requests the Commission to vacate the Order of October 9, 1997 under federal preemption principles.

16. Additionally, FAST requests the Commission to reconsider the October 9, 1997 Order in light of the moratorium on cases like the instant case, enacted by the full Commission, noting that "in the Commission's judgment, it is now time to step back and review the Commission's practices in this area before more structures essential to trail development but not an immediate threat to public safety are lost." (Motion of Chairman John M. Quain dated October 23, 1997.

17. The instant case is one of the most important rail lines in the state for future trail use, and the record is replete with evidence showing the importance of the many bridges on this line to a future trail.

18. The moratorium Motion of Chairman Quain specifically recognizes and addresses the importance of preserving bridges and tunnels like those in the instant case, yet, despite the fact this moratorium was contemplated, the instant case was placed on the fast track, with the time shortened for filing and replying to exceptions, and invoking the "time of the essence rule" that "52 Pa. Code Section 1.56 cannot be used to extend the prescribed period..." (letter from Secretary McNulty mailed out with ALJ

Decision.)

19. Clearly, it is not just, fair, sensible or reasonable to adopt an ALJ decision directing the demolition of ten essential bridges and permitting new local owners to demolish all of the additional bridges on the subject line at their discretion, without assigning a reason therefor. (Clause 12.5 Exhibit A, ALJ Decision, Township-Conrail Stipulation.)

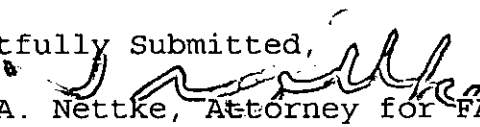
20. The bridges in this case have not been considered in light of the moratorium policy to saving them if at all possible; the scenario in this case started with the Commission rail staff recommending tearing down all of them, making any less extreme course seem moderate by comparison. Nevertheless the thrust of the moratorium discussion in Chairman Quain's Motion indicates that the PUC staff will not in the future automatically use canned testimony to urge demolition of all such bridges, with 2:1 slope-backs, as in the instant case. The instant ALJ Recommendation which has been adopted reflects the old scenario which was for the rail staff not to offer any alternatives.

21. This historic and important state resource, the subject line, should benefit from the eighteen month long effort to consider new ways to approach jeopardized bridges which can be turned into trails.

WHEREFORE, FAST requests the Commission to Vacate the Order of October 9, 1997 in light of the said moratorium.

Dated: October 23, 1997

Respectfully Submitted,

  
Joyce A. Nettke, Attorney for FAST  
PO Box 27, Strasburg, PA 17579  
(717) 687-9311  
ID No. 45706

28287  
EB

SERVICE DATE - OCTOBER 2, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

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

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

Decided: September 23, 1997

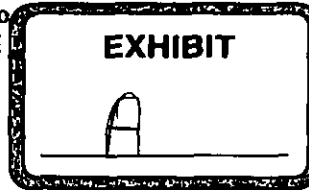
BACKGROUND

On October 3, 1989, Conrail filed a notice of exemption under 49 CFR 1152 Subpart F--  
Exempt Abandonments to abandon 66.5 miles of track called the Enola Line in Lancaster and  
Chester Counties, PA. By decision served February 22, 1990, the ICC imposed a historic  
preservation condition that required Conrail to retain its interest in and take no steps to alter the  
historic integrity of the bridges on the line until completion of the section 106 process of the  
National Historic Preservation Act, 16 U.S.C. 470f. The ICC also imposed public use and interim  
trail use conditions and permitted Conrail, subject to these conditions, to salvage track and  
material from the line. The decision provided that if no interim trail use agreement was reached,  
Conrail was authorized to fully abandon the line. The period for negotiating trail use was  
subsequently extended to April 15, 1993. By decision served April 19, 1993, the trail use  
condition was vacated, and Conrail was permitted to abandon the line. No reference was made,  
however, to the previously imposed historic preservation condition.

By petition filed April 15, 1996, a group called the Friends of the Atglen-Susquehanna  
Trail, Inc. (FAST), seeks to reopen the proceeding. Specifically, FAST requests that the historic  
preservation condition previously imposed be broadened from applying only to the bridges on the  
line to apply to the entire property as a linear resource. To justify reopening, FAST includes  
"new information" consisting of a letter from Brenda Barrett, Director of the Pennsylvania  
Historical and Museum Commission of the Bureau of Historic Preservation (SHPO), to Wendy  
Tippetts of an organization known as "TWO." In that letter, Ms. Barrett states that: "It is the  
opinion of the State Historic Preservation Office that the following properties are eligible for  
listing in the National Register of Historic Places: Low Grade Freight, Enola Branch, Atglen &  
Susquehanna Branch, A&S, Chester Cumberland, Lancaster, and York Counties. This early 20<sup>th</sup>  
century line meets National Register criteria A and C for the period 1903 to 1944." The letter is  
dated February 24, 1994, and the ICC was sent a copy. Conrail apparently was not notified of the  
letter at the time.

FAST also includes a letter, dated March 20, 1996, sent to it by Ms. Elaine Kaiser, Chief  
of the Board's Section of Environmental Analysis. Ms. Kaiser explains that historic preservation  
conditions the ICC (and now the Board) imposes do not normally expire or lapse due to the

<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC  
Termination Act or the Act), which was enacted on December 29, 1995, and took effect on  
January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain  
functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the  
Act provides, in general, that proceedings pending before the ICC on the effective date of that  
legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve  
functions retained by the Act. This decision relates to proceedings that were pending with the  
ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to  
49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and  
citations are to the former sections of the statute, unless otherwise indicated.



passage of time, and that post-imposition abandonment authorization does not implicitly vacate such a condition. Rather, it remains in effect until the Board issues a decision removing or modifying the condition.

Conrail and the Bureau of Transportation and Safety of the Pennsylvania Public Utility Commission (PUC) replied to FAST's petition. PUC notes that, pursuant to the ICC's April 19, 1993 abandonment authorization, Conrail has removed the rails, ties, and other track materials from the right-of-way. PUC claims that this constitutes consummation of the abandonment and terminates the Board's jurisdiction in this matter.

Conrail explains the numerous actions it took to comply with the section 106 process, noting that the last action it took in this regard was the submission of various maps to the SHPO on January 30, 1990. The SHPO acknowledged receipt of the maps by letter to Conrail of March 5, 1990, and added it would "advise you shortly what additional archaeological survey would be required if the bridges were to be removed." Conrail states it has not received any further identification of archaeological sites. Conrail argues that, with termination of the negotiating period for trail use and its consummation of the abandonment, the only possible further action by the Board is completion of the section 106 process.<sup>2</sup> Conrail claims there is no basis for reassessment of the line's eligibility for inclusion in the National Register.

#### DISCUSSION AND CONCLUSIONS

FAST's petition will be denied. Neither FAST nor the SHPO has provided any justification for the SHPO's apparently<sup>3</sup> changed position with regard to eligibility of the entire line in the National Register. Indeed, the SHPO letter submitted by FAST does not even acknowledge that the SHPO had ever reached a previous determination on this matter. Although FAST maintains that it furnished additional information about the line to the SHPO, this information has not been supplied to Conrail or submitted for entry into the public record in this proceeding. It is clear that the SHPO was originally concerned only with the eligibility of certain bridges and archaeological sites for section 106 purposes. The fact that certain items were included in the SHPO's original opinion while others were excluded indicates that the SHPO did not originally consider the entire line eligible.

In addition to the lack of justification for broadening the exemption to encompass the entire line as a linear resource, the amount of time that has elapsed since imposition of the original condition--four years--dictates against its expansion. Conrail has had the opportunity to work on satisfying the originally imposed condition. To expand it at this time would only add further delay to the process. Although the Board retains jurisdiction over this matter until completion of the section 106 process, we will not broaden the previously imposed condition at this late date.

We note, however, that the original condition imposed by the ICC has never been modified to apply only to the bridges determined by the SHPO as eligible for listing in the National Register and to the potential archaeological sites near certain bridges. We will do so at this time.

---

<sup>2</sup> Conrail expresses its belief that the section 106 process expired 330 days after its issuance and that the process has been completed; however, it is not arguing that position at this time.

<sup>3</sup> Although its caption lists the docket number in this proceeding, Ms. Barrett's February 24, 1994 letter to TWO refers to a project including additional lines and additional counties. It is unclear what this project entails.

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

It is ordered:

1. This proceeding is reopened.
2. The historic preservation condition imposed in the decision served and published in the Federal Register on February 22, 1990, is modified to read as follows: Conrail shall retain its interest in and take no steps to alter the historic integrity of the 32 bridges eligible for the National Register and the potential archaeological sites near 36 of the bridges.
3. The request by FAST to expand this condition to include the entire line as a linear resource is denied.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

CERTIFICATE OF SERVICE

I, Joyce A. Nettke, hereby certify that I served on October 23, 1997, the foregoing document(s) upon the parties of record and the Administrative Law Judge by placing a copy in the United States regular mail, paid to the addresses shown below.

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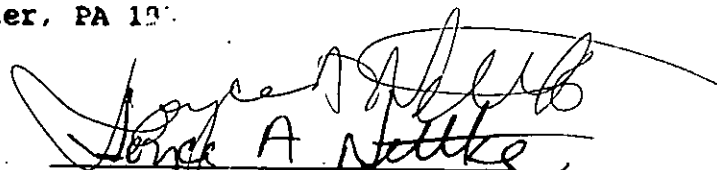
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✓ John Wiker  
Chairman, Conestoga Township Supervisors  
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✓ Ray Marvin, Chairman  
Bart Township Supervisors  
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I.D. 45706

COMMONWEALTH OF PENNSYLVANIA

DATE: October 29, 1997

SUBJECT: A-00111016, C-00913256

TO: Office of Special Assistants

FROM: *WJK* James J. McNulty, Acting Secretary

A-00111016 APPLICATION OF CONSOLIDATED RAIL CORPORATION  
C-00913256 BART TOWNSHIP BOARD OF SUPERVISORS  
v.  
CONSOLIDATED RAIL CORPORATION, ET AL

---

Attached is copy of a Petition for Supplementation of the Record and Reconsideration to the Commission's Order of October 9, 1997 filed by Friends of the Atglen-Susquehanna Trail, Inc.(FAST) in connection with the above docketed proceedings.

This matter is assigned to your Office for appropriate action.

Attachment

cc: TSL  
TSR

wjz

**DOCKETED**  
OCT 30 1997

**DOCUMENT  
FOLDER**

THE LAW FIRM OF

MALATESTA HAWKE & McKEON LLP

JOSEPH J. MALATESTA, JR.  
WILLIAM T. HAWKE  
KEVIN J. McKEON  
LOUISE A. KNIGHT  
THOMAS J. SNISCAK  
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LILLIAN SMITH HARRIS  
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October 30, 1997

MAILING ADDRESS:  
P.O. BOX 1778  
HARRISBURG, PA 17105

PROTHONOTARY'S OFFICE

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KJR

James McNulty, Prothonotary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Room 206, North Office Building  
Harrisburg, PA 17105-3265

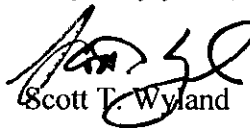
RE: Application of Consolidated Rail Corporation for the Abolition of 31 Crossings of the Enola Branch, LC: 201323, MP 3.5 to MP 27.0, Sub. No. 1095X, Harrisburg Division, Lancaster County, Docket No. A-00111016; **ANSWER OF CONESTOGA, MARTIC, PROVIDENCE, BART AND SADBURY TOWNSHIPS TO FAST'S "PETITION FOR SUPPLEMENTATION OF THE RECORD AND RECONSIDERATION"**

Dear Prothonotary McNulty:

Enclosed for filing with the Commission are the original and three (3) copies of Conestoga, Martic, Providence, Bart and Sadsbury Townships' Answer to FAST's "Petition for Supplementation of the Records and Reconsideration."

As set forth in the Certificate of Service, all parties of record have been served with a copy of this Answer. Should you have any questions regarding this filing, please do not hesitate to contact us.

Very truly yours,

  
Scott T. Wyland

Enclosure

cc: All active parties

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FOLDER

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In 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. : Docket No. A-00111016  
No. 1095X, Harrisburg Division, Lancaster :  
County :

---

**ANSWER OF CONESTOGA, MARTIC,  
PROVIDENCE, BART AND SADBURY TOWNSHIPS  
TO FAST'S "PETITION FOR SUPPLEMENTATION  
OF THE RECORD AND RECONSIDERATION"**

---

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The Recommended Decision in this matter was issued on September 17, 1997. Exceptions and replies thereto were filed by the parties, and the Commission entered an Opinion and Order on October 9, 1997. On October 23, 1997, FAST filed a "Petition for Supplementation of the Record and Reconsideration." Conestoga, Martic, Providence, Bart and Sadsbury Townships ("the Townships") submit that FAST's Petition should be dismissed or denied in its entirety.

**Standard of Review**

Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), provides that the Commission may rescind or amend any order made by it, after providing the parties with notice and an opportunity to be heard. The procedures for petitions for relief following a final decision are set forth in 52 Pa. Code §5.572.

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In its Petition, FAST requests that the record in this case be supplemented with an Order of the Surface Transportation Board ("STB"). FAST further seeks reconsideration of the Commission's October 9, 1997 Order on the basis of the same STB Order and on a Motion of Chairman Quain at the Public Meeting of October 23, 1997.

**Request to Supplement the Record**

The Commission set forth the standards for petitions for relief following a final decision in Duick v. Pennsylvania Gas and Water Company, 56 Pa. PUC 553 (December 17, 1982). With respect to supplementing the record, the Commission has stated as follows:

A petition for rehearing, under the provisions of 66 Pa. C.S. §703(f), properly must seek the reopening of the record for the introduction for additional evidence of some sort. As grounds therefore it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record.

Duick at 558.

FAST's Petition to Supplement the Record must be denied. The Order of the STB dated September 23, 1997 was expressly discussed by the Commission in its October 9, 1997 Order at page 32, footnote 3. As such, the reopening of the record for the admission of copy of that Order would be futile and meaningless. Furthermore, the Commission may (and in fact did) take official notice of the existence of the Order and its contents. See 52 Pa. Code §5.408. Because the Commission expressly considered the September 23, 1997 Order of the STB at its Docket No. AB-167 (Sub 1095X), FAST's request for supplementation of the record is moot and should be denied.

### Requests for Reconsideration

A petition for reconsideration under 66 Pa. C.S. §703(g) may raise matters designed to convince the Commission that it should exercise its discretion to rescind or amend a prior Order in whole or in part. Parties are not to be permitted in a petition for reconsideration to raise the same questions which were specifically considered and decided against them. Duick at 559.

What we expect to see raised in such petitions [for reconsideration] are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

### Id.

Despite the fact that the Commission expressly considered the effect of the Order of the STB in this matter, FAST argues in its Petition for Reconsideration that the Commission “could not have had time to give full consideration to the impact of the STB Order . . . .” (FAST Petition ¶14). FAST’s Petition should be denied because it merely asks the Commission to repeat its review of a matter that was already considered and decided against FAST in the October 9, 1997 Order.

In its Petition, FAST asserts that the Commission’s authority is preempted if it conflicts with federal law. In a general argument unsupported by any authority, FAST merely asks the Commission to reverse itself with respect to the effect (if any) of the STB Order. The pendency of the STB Order, as the Commission correctly determined in its October 9 Order, is of no effect to

the Commission's legal authority to dispose of Conrail's application under Sections 2702 and 2704 of the Public Utility Code, 66 Pa. C.S. §§2702 and 2704. FAST's request for reconsideration should be denied.

Finally, FAST requests the Commission to vacate its Order of October 9, 1997 because of a later motion of the Commission at the Public Meeting of October 23, 1997. As of the date of the filing of FAST's Petition of Reconsideration (and in fact through the date of the filing of this Answer), the Commission has not entered an Order concerning a moratorium on bridge demolition. Furthermore, retroactive application of a yet-to-be entered order postdating the Final Order in the instant case would raise serious constitutional issues as to parties who have entered into the settlements approved by the Commission on October 9, 1997. Because the Order regarding the moratorium has not yet been drafted or entered, FAST cannot credibly argue that the Order in this case should be vacated. When an Order on the moratorium is entered, it cannot selectively be applied to cases previously decided by the Commission. Because it is expected that a moratorium would be prospective only, FAST's request that the future Order concerning the moratorium be applied retroactively to a case that has been decided should be denied.

The Commission closely reviewed the evidence supporting the removal of the limited number of crossings called for in the Recommended Decision:

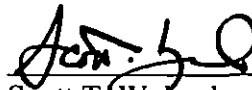
With respect to the recommended crossings removals, we find that there the ALJ properly concluded that those crossings be removed for valid safety reasons and that the ALJ's recommendations are supported by substantial, competent and probative evidence.

(Opinion and Order of October 9, 1997 at p. 33). FAST's Petition for Reconsideration offers no basis for concluding that the Commission's decision was other than thorough and reasoned.

**Conclusion**

Based on the foregoing, Conestoga, Martic, Providence, Bart and Sadsbury Townships respectfully request that the Petition of FAST for Supplementation of the Record and Reconsideration be denied in its entirety.

Respectfully submitted,



Scott T. Wyland  
Malatesta Hawke & McKeon  
Harrisburg Energy Center  
100 N. 10<sup>th</sup> Street  
P. O. Box 1778  
Harrisburg, PA 17105-1778  
(717) 236-1300

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

DATED: October 30, 1997

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the Conestoga, Martic, Providence Bart and Sadsbury Townships' Answer to FAST's "Petition for Supplementation of the Record and Reconsideration" upon the persons named and in the manner indicated below.

**VIA First Class Mail:**

Honorable Louis Cocheres  
Pennsylvania Public Utility Commission  
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PROthonotary's OFFICE

97 OCT 30 PM 4:19

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\_\_\_\_\_  
Scott T. Wyland

DATED: October 30, 1997

ORIGINAL

Joyce A. Nettke  
ATTORNEY AT LAW

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PHONE (717)687-9311

FAX (717)687-6749

October 31, 1997

Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
North Office Building  
Harrisburg, PA 17120

KJR

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

To the Secretary:

Please find enclosed for filing an original and nine copies of an Application for Supersedeas filed by Friends of the Atglen-Susquehanna Trail, Inc. ("FAST") in the above-captioned consolidated cases.

Again, I ask that you please correct my mailing address in your records to the address shown above. Orders have recently been mailed to me at an address that appears nowhere on the service list for this case. This has substantially delayed receipt of important papers! Thank you.

Sincerely,

Joyce A. Nettke,  
Attorney at Law

JN  
Enclosure  
CC: service list

RECEIVED  
FROM THE OFFICE

97 NOV -3 PM 2:51

016141

DOCUMENT  
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58

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

016122

Docket No. 97 NOV -3 PM 2:49 A-00111016

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Board of Supervisors of Bart Township v. Consolidated Rail Corporation, Pennsylvania Department of Transportation and Lancaster County, et al.

Docket No. C-00913256

ORDER

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 1997, upon application of FAST, a Supersedeas is hereby Ordered in the above-captioned consolidated case, and the Order entered October 9, 1997 is hereby stayed pending the conclusion of appellate proceedings.

By the Commission:

\_\_\_\_\_

Entered:

ORIGINAL

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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  
016123

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RECEIVED  
NOTICE OF RECEIPT OFFICE

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

APPLICATION FOR SUPERSEDEAS  
PENDING PROCEEDINGS ON PETITION FOR REVIEW

NOW COMES Friends of the Atglen-Susquehanna Trail, Inc. ("FAST") and moves your Honorable Commission to stay the Order and Opinion adopted October 9, 1997 in the above-captioned consolidated cases. Applicant states in support:

1. A Petition For Review of the above-referenced Order has been filed this day in the Commonwealth Court of Pennsylvania.
2. Applicant, FAST, has made a substantial case on the merits even though this Commission rejected FAST's arguments.
3. Irreparable harm will result if a supersedeas is not granted in that bridges may well be demolished, along with the conveyance of property and payment of money by Conrail to municipal parties, prior to the conclusion of appellate proceedings.
4. One of the issues raised by FAST involves subject matter jurisdiction. FAST has argued the Commission was preempted by federal law from entering the said Order. Although the Commission rejected that argument, the Order should not be carried out until this jurisdictional issue is decided by the Court.

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5. A moratorium on all cases similar to the instant case was enacted by this Commission on October 23, 1997 on Motion of Chairman Quain. FAST has submitted the instant case was excluded and should have been included in the said moratorium.

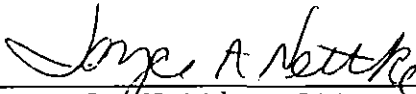
6. Issuance of a supersedeas will not not substantially harm other interested parties.

7. The public interest will not be adversely affected by a supersedeas but rather, the public interest will be protected. This is a public case with public questions of law involved, including but not limited to adverse effects on historic properties, interpretation of state statutes, and taxpayers' assumption of liabilities through the acquisition of land and bridges by local municipalities. Irreparable harm will result to the public if the Order is carried out prior to Court review.

WHEREFORE, FAST requests the Public Utility Commission to enter a Supersedeas of its Opinion and Order of October 9, 1997.

Dated: 10-31-97

Respectfully Submitted,

  
\_\_\_\_\_  
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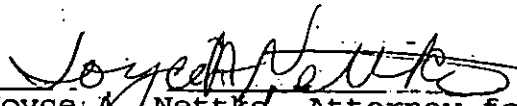
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CERTIFICATE OF SERVICE

I, Joyce A. Nettke, hereby certify that I served on October 31, 1997, the foregoing document(s) upon the parties of record and the Administrative Law Judge by placing a copy in the United States regular mail, paid to the addresses shown below.

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James Landis, Chairman  
West Sadsburg Township  
Board of Supervisors  
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~~H. Joseph Little~~ Chairman  
Eden Township Board of Supervisors  
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Roger Pickes, Director  
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Pennsylvania Public Utility Commission v. Friends of the  
Atglen-Susquehanna Trail, Inc. KJR

A-00111016,  
C-00913256

---

NOTICE OF PETITION by Friends of the Atglen-  
Susquehanna Trail, Inc., at No. 3003 C.D. 1997,  
Commonwealth Court of Pennsylvania, from the order of  
the Commission dated October 9, 1997 in the above-  
captioned proceeding.

B-00973671

Filed: October 31, 1997

**DOCKETED**  
NOV 20 1997

**DOCUMENT  
FOLDER**



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

ORIGINAL

IN REPLY PLEASE  
REFER TO OUR FILE

October 31, 1997

Mr. James J. McNulty, Acting Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Room G-05, North Office Building  
Harrisburg, PA 17105-3265

**RE:** 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.

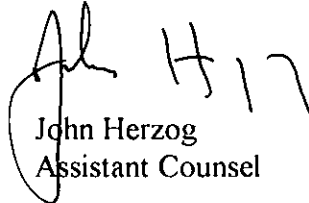
Consolidated Rail Corporation and the Pennsylvania  
Department of Transportation and Commissioners of  
the County of Lancaster, et al.  
Docket Nos. A-00111016 and C-00913256

PROCEEDINGS CLERK'S OFFICE  
OCT 31 11:28  
KJR

Dear Acting Secretary McNulty:

Enclosed for filing are an original and three copies of the Bureau of Transportation and Safety's Answer to Friends of the Atglen-Susquehanna Trail, Inc.'s Petition for Supplementation of the Record and Reconsideration. With a copy of this letter, I am sending copies of the enclosed to those persons listed on the attached Certificate of Service.

Very truly yours,

  
John Herzog  
Assistant Counsel

Enclosures

DOCUMENT  
FOLDER

64

ORIGINAL

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated	:		
Rail Corporation for the	:		
abolition of thirty-one	:	Docket Nos.	
crossings of the Enola Branch,	:	A-00111016	
Harrisburg Division, Lancaster	:		
County.	:		
	:		
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.	:		

PROTECTOR GENERAL'S OFFICE

97 OCT 31 AM 11:28

---

ANSWER OF THE BUREAU OF TRANSPORTATION AND  
SAFETY TO FRIENDS OF THE ATGLEN-SUSQUEHANNA TRAIL, INC.'S  
PETITION FOR SUPPLEMENTATION OF THE RECORD AND RECONSIDERATION

---

AND NOW, comes the Bureau of Transportation and Safety of the Pennsylvania Public Utility Commission ("BTS"), to file its Answer to the "Petition for Supplementation of the Record and Reconsideration", filed by Friends of the Atglen-Susquehanna Trail, Inc. ("FAST"). BTS avers as follows:

1. Admitted. By way of further answer, the Commission's Order entered October 9, 1997, speaks for itself and refers to the Surface Transportation Board's September 23, 1997 Order numerous times.

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2. Admitted. By way of further answer, BTS submits that while the Surface Transportation Board's Order was entered after the issuance of the Recommended Decision, this is immaterial due to the Administrative Law Judge's conclusion that the Commission's jurisdiction is not dependent upon the Interstate Commerce Commission's authorization of abandonment of the rail-line.

3. Admitted.

4. Denied. BTS submits that good cause does not exist to reopen and supplement the record. The September 23, 1997 Surface Transportation Board's Order was duly considered by the Commission in its October 9, 1997 Order (see Order, p. 32). The Surface Transportation Board's Order has no bearing on the outcome of this case. Reopening the record to include irrelevant matter is not "good cause".

5. Admitted.

6. Denied. The Commission's Order entered October 9, 1997 speaks for itself.

7. Admitted. By way of further answer, the Settlement Agreements are part of the record and speak for themselves.

8. Admitted. By way of further answer, BTS submits that FAST's arguments are a matter of record and speak for themselves.

9. Admitted. By way of further answer, BTS submits that FAST's arguments are a matter of record and speak for themselves.

10. Admitted. By way of further answer, BTS submits that Conrail's arguments are a matter of record and speak for themselves.

11. Admitted. By way of further answer, the Administrative Law Judge's Recommended Decision is part of the record and speaks for itself.

12. Denied. The Surface Transportation Board's Order does not address the Public Utility Commission's jurisdiction over rail-highway crossings vis-à-vis compliance with the National Historic Preservation Act.

13. Denied. After reasonable investigation, BTS is without sufficient information to form an opinion regarding when the Commission became aware of the September 23, 1997 Surface Transportation Board's Order.

14. Denied. BTS submits that the Commission considered the Surface Transportation Board's Order at length and properly determined its impact on this case.

15. Denied. It is denied that any conflict between state and federal law exists in this case.

16. Denied. BTS submits that the Surface Transportation Board's Order was fully considered by the Commission in its October 9, 1997 Order.

16<sup>1</sup>. Denied. This is an allegation requesting relief to which no response is required.

17. Denied. After reasonable investigation, BTS is without sufficient information to form an opinion as to the truth of matter asserted regarding the importance of the trail.

18. Denied. BTS denies this case was placed on the "Fast Track", the original application having been filed over four (4) years ago.

19. Denied. BTS denies that sufficient reasons were not provided to support the Commission's October 9, 1997 Order.

20. Denied. BTS denies that due consideration was not given to preserving the bridges for trail use. Consistent with Chairman Quain's Motion, both the Department of Transportation and the Department of Conservation and Natural Resources had no objection to the Commission's disposition of the crossings.

21. Denied. BTS denies that an 18 month delay will benefit the line. The decision has been made, and all relevant considerations accounted for.

---

<sup>1</sup> BTS refers to "16" twice, since FAST has not sequentially numbered its paragraphs. This "16" refers to Paragraph 16 found on (unnumbered) Page 4 of FAST's petition.

BY WAY OF FURTHER ANSWER, Bureau of

Transportation and Safety avers:

22. The legal requirements for granting a petition for reconsideration were established in Duick v. Pennsylvania Gas and Water Company, 56 Pa. PUC 553 (1982). The standards delineated for consideration of such a petition are the following:

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.

In this regard, we agree with the court in the Pennsylvania Railroad Company [v. Pennsylvania Public Service Commission], 118 Pa. Super. 380 (1935)] case, wherein it was said that:

Parties... cannot be permitted by a second motion to review and reconsider, raise the same questions, which were specifically considered and decided against them.

What we expect to see raised in such petitions are new and novel arguments not previously heard or considerations which appear to have been overlooked or not addressed by the Commission.

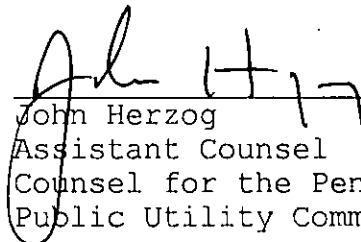
(Duick, at p. 559).

23. FAST's petition to reconsider is simply a repetition of the same issues already considered by the Administrative Law Judge and the Commission. The Commission considered the effect of the Surface Transportation Board's September 23, 1997 Order. Also, the Commission considered the impact on trail use. FAST raises no new or novel arguments in its

petition nor has it established that any considerations were overlooked or not addressed by the Commission. That FAST is dissatisfied with the Commission's resolution of the case is not grounds for reconsideration.

WHEREFORE, the Bureau of Transportation and Safety requests that FAST's petition be denied.

Respectfully submitted,

  
\_\_\_\_\_  
John Herzog  
Assistant Counsel  
Counsel for the Pennsylvania  
Public Utility Commission

P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 783-2840

Dated: October 31, 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 in accordance with 52 Pa. Code §1.54.

SERVICE BY FIRST CLASS MAIL ADDRESSED AS FOLLOWS:

Honorable Louis G. Cocheres  
Administrative Law Judge  
Pa. Public Utility Commission  
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Susan J. Smith, Esquire  
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Department of Conservation and  
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Friends of Atglen  
Susquehanna Trail, Inc.  
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C-TEC Corporation  
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Eden Township Board of Supervisors  
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Consolidated Rail Corporation  
Nauman, Smith, Shissler and Hall  
18th Floor, 200 N. Third Street  
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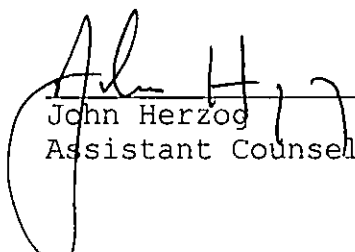
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Dated: October 31, 1997

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November 3, 1997

James J. McNulty, Prothonotary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Room 206, North Office Building  
Harrisburg, PA 17105-3265

DOCUMENT  
FOLDER

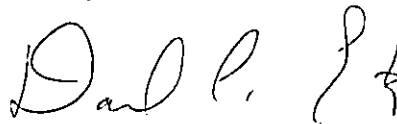
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PROTHONOTARY'S OFFICE

Re: Application Docket No. A-00111016

Dear Prothonotary McNulty:

We enclose herewith an original and nine copies of Conrail's Response to the Petition of FAST for Supplementation of the Record and Reconsideration. By copy of this letter, I am supplying a copy of Conrail's Response directly to the Judge as well as to the various other parties.

Yours very truly,



David C. Eaton

DCE/jai

cc: ALJ Louis G. Cocheres  
cc: Parties of Record

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PROHONOTARY'S OFFICE  
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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of Consolidated	:	
Rail Corporation for the	:	
abolition of thirty-one	:	
crossings of the Enola Branch,	:	Docket Nos. A-00111016
Harrisburg Division, Lancaster	:	
County,	:	
	:	
Board of Supervisors of Bart	:	
Township	:	
	:	
v.	:	Docket No. C-00913256
	:	
Consolidated Rail Corporation	:	
and the Pennsylvania Depart-	:	
ment of Transportation and	:	
Commissioners of the County	:	
of Lancaster, et al	:	

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CONRAIL RESPONSE TO THE PETITION OF  
FAST FOR SUPPLEMENTATION OF THE RECORD  
AND RECONSIDERATION

Conrail has considered the "Answer of Conestoga, Martic, Providence, Bart and Sadsbury Townships to the foregoing Petition of FAST served October 30, 1997 and concurs with the arguments set forth therein. Conrail therefore adopts as its own the Answer of the various Townships.

In supplementation of the foregoing Answer, and with particular reference to the argument that the 1990 Order of the Surface Transportation Board directing preservation of the status quo of the Enola Branch within Lancaster County, preempts the

decision of this Commission requiring conveyance of a portion of that line and removal of certain structures along the line, Conrail calls the attention of the Commission to the following matters:

1. Conrail has heretofore argued that the ICC, prior to the inception of the Surface Transportation Board, had adopted a rule to the effect that an historic review process will terminate where a State Historic Preservation Officer fails to act within 330 days:

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

"We agree with 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 the future any delaying conditions which 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."

Interstate Commerce Commission, ex parte No. 55 (Sub No. 22a) Implementation of the Environmental laws 7 ICC 2<sup>nd</sup> 827.

The effect of that limitation was expressly not ruled upon by the STB in its recent consideration (October 2, 1997) of FAST's Motion relative to Enola Branch, and hence there is no order in effect

that could be deemed preemptive.

2. Assuming, but certainly not conceding, that this Commission could find that the STB Order of 1990 staying disposition of the line pending completion of the historic preservation process remains in effect, that Order certainly does not preempt this Commission's ability to order such action as it finds warranted with respect to the line and its structures. The Order of the ICC merely stayed county and/or destruction of structures on the line pending completion of the historic preservation process and clearly contemplated completion of that process within a definite time (330 days) as limited by the ICC Order. The ALJ here has encouraged Conrail to attempt to reconcile with the State Historic Preservation Officer any remaining matters needed to conclude her review process and, while the fact is not a matter of record having arisen since the record closed, communications have been continuing between Conrail and the Historic Preservation Officer in an effort to identify and meet her requirements. Clearly, there is no need to reconsider the Order which has been entered by this Commission which imposes deadlines for action a considerable period in advance of the present during which any questions of historic preservation may well be resolved. If they should remain unresolved, there will be ample opportunity for Conrail or other interested parties to seek an extension or a stay of execution of the Order entered pending compliance with any


remaining requirements of the ICC Order. It is only execution which raises the issue of conflict between State and Federal authorities which is barred by pre-emptive principles: D & H Corp.v. Public Utility Commission, 149 Pa. Comm. Ct. 507, 613 A.2d 622, 624 (1992). (There it is stated that a Federal aid project does not preempt state action until such time as DOT has issued a final voucher to the federal government. Here, it may well be that, notwithstanding the 330-day rule, the interest of the State Historic Preservation Officer will have been satisfied and the STB will have been so notified, in advance of any action by Conrail in execution of the Order heretofore entered by this commission.

3. Conrail's efforts to abolish the various crossings along the Enola Branch within Lancaster County, no longer needed in pursuit of its corporate purposes, have extended over a period of more than 3 years. They have involved many conferences in pursuit of the ADR process, several hearings and continued hearings before the Administrative Law Judge and uncounted informal consultation among the various parties. The many issues raised and the multiple interests which have been advanced received exhaustive consideration by the ALJ in his 95-page Recommended Decision and have been considered thoroughly by this Commission in its ultimate substantial adoption of the ALR's Recommended Decision.

This matter should be put to rest. Conrail opposes

reconsideration which it sees as unwarranted.

**NAUMAN, SMITH, SHISSLER AND HALL**

By:   
**David C. Eaton, Esquire**  
Supreme Court ID# 07169

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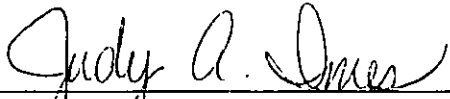
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Planning Commission  
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Lancaster, PA 17608

  
\_\_\_\_\_  
Judy A. Imes, Secretary to  
David C. Eaton, Esquire

Dated: November 3, 1997

COMMONWEALTH OF PENNSYLVANIA

DATE: November 5, 1997

SUBJECT: A-00111016, C-00913256

TO: Office of Special Assistants

FROM: *WJZ* James J. McNulty, Acting Secretary

KJR

A-00111016 APPLICATION OF CONSOLIDATED RAIL CORPORATION  
AND  
C-00913256 BOARD OF SUPERVISORS OF BART TOWNSHIP  
v.  
CONSOLIDATED RAIL CORPORATION, et al.

Attached is copy of a Application for Supersedeas Pending Proceedings on Petition for Review of Friends of the Atglen-Susquehanna Trail, Inc. filed in connection with the above docketed proceeding.

This matter is assigned to your Office for appropriate action.

Attachment

cc: TSL  
TSR

wjz

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