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**GREGORY F. LEPORE, ESQ.**

REPLY TO  
LANSDALE

February 9, 2000

ATTENTION: SECRETARY  
Commonwealth of Pennsylvania  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: BORO OF TAMAQUA v. READING, BLUE MOUNTAIN & NORTHERN  
RAILROAD COMPANY  
Complaint Docket No.: C-00992533  
Our File No.: BMRR-002

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Dear Sir/Madam:

Enclosed please find original Exceptions of the Reading, Blue Mountain and Northern Railroad to be filed as well as nine (9) copies relative to the above matter. Also enclosed is one copy to be time-stamped and returned to me in the enclosed self-addressed stamped envelope.

FEB 09 2000  
PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Thank you for your cooperation in this matter.

Sincerely,

  
GREGORY F. LEPORE

GFL/jmy  
Enclosures

- cc: John Waters  
Donald Matalavage  
Jeffrey Bowe, Esquire  
Andrew Gordon, Esquire  
Jason Sharp, Esquire  
Joseph Jones, Esquire  
William Pickering  
Kenneth McClain  
Jean Heffner  
David Salapa, Esquire  
Honorable David Argall  
Wandaleen Poynter-Cole, Esquire  
Randal Noe, Esquire

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FOLDER  
47

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DONALD MATALAVAGE,  
BORO MANAGER, BORO OF TAMAQUA

v.  
READING, BLUE MOUNTAIN &  
NORTHERN RAILROAD COMPANY

:  
:  
:  
Complaint Docket  
No.: C-00992533  
:  
:

EXCEPTIONS OF THE READING, BLUE MOUNTAIN AND NORTHERN RAILROAD  
COMPANY TO THE RECOMMENDED DECISION ISSUED ON JANUARY 26, 2000 BY  
ADMINISTRATIVE LAW JUDGE HERBERT S. COHEN

AND NOW, comes the Reading, Blue Mountain and Northern Railroad Company, by and through its counsel, Gregory F. Lepore, and files the following Exceptions to the Recommended Decision, issued January 26, 2000, authored by Administrative Law Judge Herbert S. Cohen, pursuant to 52 Pa.Code, §5.533:

1. The Railroad excepts to the proposed ordering paragraph number three (3) to the extent that it imposes the sole cost upon the Railroad.

The Railroad excepts to the proposed ordering paragraph number three (3) because it places the entire cost of the crossing reconstruction upon the Railroad.

The ALJ himself cites two (2) decisions of the Public Utility Commission, PennDOT, 68 Pa.P.U.C. 116 (1988) and Application of City of Wilkes-Barre, docket number A-101606 (Order of April 9, 1991) for the proposition that in apportioning costs in a rail/highway crossing case, the Commission should weigh factors such as the relative benefits which will accrue to the interested parties, the availability of State or Federal funds, placement of costs on the party responsible for the situation (i.e. deferred maintenance) and the general equities of each particular situation.

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SECRETARY'S BUREAU

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This is in accord with the relevant Commonwealth Court case law, see Bell Atlantic v. PUC, 672 A.2d 352 (Pa.Cmwlth. 1995).

It is inconceivable that the benefit to a relatively lightly used rail line such as the one at issue here could so outweigh the benefit to the Commonwealth that one hundred percent (100%) of the cost of the project should be assessed to the railroad. It is clear that the ALJ did not conduct a detailed analysis of the benefits which would accrue to either party by a restoration of the Crossing, and thus the ALJ erred as to the first test. First, the record does not provide any evidence that the Railroad would realize any benefit from the improvement of the Crossing. The Railroad only utilizes the Crossing four (4) to six (6) times daily (two trains up, two trains back) (N.T. at 46). The evidence presented by the other parties indicated that the Crossing located within State Route 209 (N.T. at 26) near to its intersection with State Route 309 (N.T. at 40) and receives traffic flow, based on twelve (12) hour traffic studies, of over 8,000 vehicles per day, including 450 trucks (N.T. at 28).

Both the Commission's witness and the Railroad's witness indicated that the rail facility at the Crossing location were not in need of improvement (N.T. at 9 and 48). Further, the Commission's witness testified that the Crossing was in need of replacement in part because of its age and in part because of the "type, amount of traffic the Crossing is getting" (N.T. at 10).

As to the second prong of the test, the availability of State and Federal funds, sole evidence on this issue was provided by

PennDOT's witness who testified that "the subject Crossing is not currently programmed under the Federal Rail Safety Program or under any PennDOT state program at the moment. When questioned about the availability of funds in the future, the witness testified that there was a possibility that this Crossing could be programmed (starting in 2001)" (N.T. at 30). This testimony does not make it evident that there is not State or Federal funding available for the Crossing, simply that it has not been allocated to the Crossing. More importantly, this testimony, even taken at face value, would indicate that State funding is available for this Crossing beginning next year. Given that the Recommended Decision provides nine (9) months for the construction of the Crossing, there is no reason that PennDOT could not be ordered to reimburse the Railroad for all or part of the costs of the construction of the Crossing as part of its allocation of funds in 2001, at which time PennDOT admits that funds would be available.

Another factor required for consideration is whether the situation exists because of deferred maintenance at the Crossing. There is no doubt that the prior Commission Order regarding this Crossing, issued in 1980, (attached to the record as Commission Exhibit 1) placed maintenance responsibility on the Railroad. Although PennDOT contended that there was deferred maintenance with regard to the existing rubberized Crossing, it presented no evidence on the issue, merely the bald testimony "in our opinion, there has not been adequate maintenance done to the Crossing..." (N.T. at 33). However, this testimony was at odds with that given

by the Commission's independent witness, William Knerr, senior civil engineer with PennDOT, who testified that with regard to the type of rubber Crossing referred to here, he was unaware of any type of maintenance which could be performed which would extend its life (N.T. at 17). His opinion concerning what has led to the condition of the Crossing was simply "I think it is a situation where the Crossing has outlived its usefulness. I am understanding that the Crossing was installed somewhere around 1980, 1981 and with the type, amount of traffic the Crossing is getting, that is about the useful life of a rubber surface." (N.T. at 10). This is in accord with the testimony presented by the Railroad. (N.T. at 47-53) Therefore, there is no substantial evidence or support for the fact that the Railroad is at all responsible for the condition of the Crossing - the responsibility lies with regard to the fact that it has outlived its design life and that it receives heavy traffic.

The general equities of the situation likewise do not support placing the entire burden of replacing the Crossing on the Railroad. The Reading, Blue Mountain and Northern Railroad is a short line railroad. It only operates two or three trains daily over the Crossing (up and back). The Crossing is located in the right of way of two very busy State highways (Routes 209 and 309), both of which get significant traffic. The engineer who testified on behalf of the Commission indicated that he observed turning moves being made by large trucks over the rubber surface, which he believed contributed to the deterioration of the surface (N.T. at

14). Clearly, the Borough, the County, and the State receive some benefit from this Crossing, and to assess one hundred percent (100%) of its cost to the Railroad is highly inequitable.

Finally, it is submitted that the Commission's order should be consistent with the prior Order issued in 1980. The 1980 Order required that the then owner of the Crossing (Conrail) perform the work of reconstruction, but receive reimbursement from PennDOT. No party was able to point to any changes in circumstance which would justify the Commission to now order the Railroad to entirely reconstruct the Crossing at its own expense. As a rule of law, an administrative agency "must render consistent opinions and should either follow, distinguish or overrule its own precedent". Bell Atlantic, supra, at 354, citing Standard Fire Insurance v. Insurance Department, 611 A.2d 356 (Pa.Cmwlth. 1992). Given that there is nothing in the record that distinguished the current situation from that the Commission entered its prior Order in 1980, the Commission should enter an Order consistent with its prior decision (the 1980 ruling).

WHEREFORE, for the above reasons, the Railroad respectfully requests that ordering paragraph number 3 be modified as follows:

The Reading, Blue Mountain and Northern Railroad Company, at its initial cost and expense, within six (6) months of the approval of the detailed construction plans, furnish all material and do all work necessary to reconstruct the West Broad Street at Great Crossing in accordance with the approved construction plans. The Pennsylvania Department of Transportation shall reimburse the

Reading, Blue Mountain and Northern Railroad Company a sum or sums of money equal to one hundred percent (100%) of the actual costs of materials furnished, work performed and services rendered by the Reading, Blue Mountain and Northern Railroad Company as they relate to the reconstruction of said Crossing, less the salvage value of any materials recovered.

Respectfully submitted,

HOLL & ASSOCIATES, P.C.

By: 

GREGORY F. LEPORE, ESQUIRE  
Attorney for Defendant,  
Reading, Blue Mountain & Northern  
Railroad Company  
920 South Broad Street  
P.O. Box 807  
Lansdale, PA 19446  
(215) 362-1015

V E R I F I C A T I O N

I hereby verify that the statements made in the foregoing document are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. 4904 relating to unsworn falsification to the authorities.

  
\_\_\_\_\_  
GREGORY F. LEPORE, ESQUIRE

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

2/9/80



CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a true and correct copy of Reading, Blue Mountain and Northern Railroad's Exceptions on the 9<sup>th</sup> day of February, 2000, via the U.S. Postal Service, First Class Mail, Postage Prepaid to the following persons:

John Waters  
READING, BLUE MOUNTAIN &  
NORTHERN RAILROAD  
P.O. Box 218  
Port Clinton, PA 19549

Donald Matalavage  
Boro Manager  
BORO OF TAMAQUA  
320 East Broad Street  
Tamaqua, PA 18252

Jason Sharp, Esquire  
Assistant Counsel  
PennDOT  
Forum Place, 9<sup>th</sup> Floor  
555 Walnut Street  
Harrisburg, PA 17101-1900

Jeffrey Bowe, Esquire  
109 West Broad Street  
P.O. Box 290  
Tamaqua, PA 18252

Andrew Gordon, Esquire  
Chief Counsel  
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Joseph Jones, Jr., Esquire  
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William Pickering, PE  
Chief, PennDOT Bureau of Design  
Row and Utility Division  
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UTILITY COMMISSION  
Bureau of Transportation  
and Safety  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Honorable David Argall  
HOUSE OF REPRESENTATIVES  
Room 415, South Office Building  
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NORFOLK SOUTHERN CORPORATION  
Three Commercial Place  
Norfolk, VA 23510-9241

Respectfully submitted,

HOLL & ASSOCIATES, P.C.

By:

  
\_\_\_\_\_  
GREGORY F. LEPORE, ESQUIRE

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### PUC orders rail fix

#### 90 days allotted at Tamaqua site

**BY SHAWN A. HESSINGER**

*Tamaqua Bureau Chief*  
shessngr@pottsville.infi.net

TAMAQUA -- The Public Utility Commission has officially ordered the Reading, Blue Mountain & Northern Railroad to fix the deteriorated crossing on West Broad Street here.

The PUC decision, announced Thursday at a public hearing in Harrisburg, gives the railroad 30 days to prepare design specifications for the repair and 90 days to complete it, according to a release issued Friday by Downtown Tamaqua Inc.

"We are very pleased with the PUC decision," said Linda J. Yulanavage, Downtown Tamaqua Inc. manager. "We will finally be able to resolve the hazardous conditions that have plagued motorists in our downtown for several years."

The repairs mean travelers on West Broad Street (Route 209) will soon be able to stop their ritual swerve in the southbound lane at the crossing.

The swerve has become a fact of life for motorists wishing to avoid the resulting jolt when driving over the tracks.

In a Feb. 1 story this newspaper reported that an administrative law judge working for the Public Utility Commission (PUC) had recommended that the Reading, Blue Mountain & Northern, which owns the track, be ordered to make repairs to the crossing; however, a final ruling by the commission was thought to be months away.

"If there are no exceptions filed, the commission's review would quite honestly be cursory," said Jeffrey P. Bowe, solicitor for Tamaqua Borough Council.

The railroad missed the deadline for filing exceptions to the decision,

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Herbert J. Cohen, administrative law judge for the PUC, filed his recommendation on Jan. 31.

In his decision, Cohen said he believed the Port Clinton-based railroad company should fix the crossing "at its sole expense within six months," said Lutz.

The railroad had argued that the crossing, because it was located on a state road, was not its responsibility, but should be repaired by the Pennsylvania Department of Transportation, said Bowe.

"There was no disagreement that the crossing was in need of repair," he said.

For five years, borough council has been requesting that the railroad repair the crossing, which requires replacement of rubber cushioning panels around the rails, said Bowe.

"We said, basically, It's a mess - fix it," he said.

On Sept. 21, 1999, Cohen held a hearing in Harrisburg at which both sides in the dispute gave testimony.

State Rep. David G. Argall, R-124, was instrumental in getting the PUC to expedite the hearing process, which cut months off the normal time, said Yulanavage. Argall also recommended that the construction timeline be shortened, Yulanavage said in her release.

Related Links: No links defined



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PLEASE REPLY TO: TAMAQUA OFFICE

JAMES R. BOWE  
THOMAS R. LISELLA  
JEFFREY P. BOWE

February 10, 2000

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FEB 10 2000

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

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Re: Borough of Tamaqua  
vs.

Reading, Blue Mountain and  
Northern Railroad Co.  
Docket No. C-00992533

DOCUMENT  
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Dear Mr. McNulty:

Enclosed please find original and nine copies of the Exceptions which I am filing in the above matter. By copy of this correspondence, and in accordance with the attached Certificate of Service, I am serving all other parties with a copy of the same.

Very truly yours,

BOWE, LISELLA AND BOWE



Jeffrey P. Bowe

JPB/lis

Enclosure

cc Andrew Gordon, Esquire  
Joseph H. Jones, Jr., Esquire  
Gregory F. Lapore, Esquire  
Gina D. Alfonso, Esquire  
William Pickering, PE Chief  
Kenneth McClain  
Jean Heffner, Chief Clerk  
David A. Salapa, Esquire  
Honorable David G. Argall  
Wandaleen Poynter-Cole, Esquire  
Randal S. Noe, Esquire  
Donald Matalavage, Borough Manager

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

BOROUGH OF TAMAQUA :  
 :  
 v. : Docket No. C-00992533  
 :  
 READING, BLUE MOUNTAIN and :  
 NORTHERN RAILROAD CO. :

EXCEPTIONS OF THE BOROUGH OF TAMAQUA  
TO THE RECOMMENDED DECISION BY  
HERBERT S. COHEN, ADMINISTRATIVE LAW JUDGE

The Borough of Tamaqua, by and through its attorney, Jeffrey P. Bowe, Esquire, files the following Exceptions to the Recommended Decision issued January 26, 2000, by Herbert S. Cohen, Administrative Law Judge as follows:

1. The Borough of Tamaqua excepts to paragraph 2 and paragraph 3 of the Recommended Order in that the Reading, Blue Mountain and Northern Railroad Company (hereinafter "Railroad") will be given three months from the date of the Commission Order to submit to all parties of record and to the Commission for approval detailed construction plans, and then after approval of those plans, be given six months to reconstruct the crossing on West Broad Street in the Borough of Tamaqua.

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The Borough of Tamaqua excepts to this proposed time schedule since it will mean a delay of nine months plus the

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time for the Commission to review and approve the detailed construction plans until this crossing is repaired. All parties to the case agree that because of the significant depressions and defects in the rubberized surface of the crossing, there is danger to the safety of pedestrians using the sidewalks adjacent to the crossing and to motor vehicles traveling over the crossing itself. The Borough first complained about the condition of the crossing in April, 1995 (N.T., pp. 20-23), and from April, 1995 to the present, the Railroad has done nothing to alleviate the danger and the hazards attendant to the condition of the crossing. Since the hearing on September 21, 1999, the condition of the crossing has deteriorated even further and has become even a greater hazard to the pedestrian and motor vehicle traffic which use this crossing on a daily basis. To permit the Railroad to defer final construction of the new crossing for a period of nine months after a review of this Decision by the Commission, plus the additional time needed for the Commission and all parties to review the proposed construction plan, will unavoidably delay this construction until the year 2001.

The condition of this crossing is so hazardous that immediate action should be taken to alleviate the hazardous

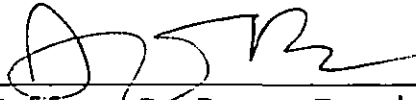
condition. This means that the construction of the new crossing be done as soon as possible.

WHEREFORE, for the reasons set forth above, the Borough of Tamaqua respectfully requests that the Railroad be ordered to prepare and submit to all parties of record for review and to this Commission for review and approval, detailed construction plans within twenty (20) days of the service of the Commission Order and that the Railroad, at its sole cost and expense, within sixty (60) days of the approval of the plans, furnish all material and do all work necessary to reconstruct the West Broad Street crossing in the Borough of Tamaqua.

Respectfully submitted,

BOWE, LISELLA AND BOWE

By: \_\_\_\_\_

  
Jeffrey P. Bowe, Esquire  
Attorney for the Borough of  
Tamaqua  
109 West Broad Street  
P.O. Box 290  
Tamaqua, PA 18252-0290  
Phone: 570-668-1241  
Supreme Court I.D. No. 23188



BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BOROUGH OF TAMAQUA :  
 :  
 v. : Docket No. C-00992533  
 :  
 READING, BLUE MOUNTAIN and :  
 NORTHERN RAILROAD CO. :

CERTIFICATE OF SERVICE

AND NOW, this 11th day of February, 2000, I,  
Jeffrey P. Bowe, Esquire, of the firm of Bowe, Lisella and Bowe,  
attorneys for the Borough of Tamaqua, hereby certify that I  
served the within Exceptions this day by depositing the same in  
the United States mail, postage prepaid, addressed to:

Commonwealth of Pennsylvania  
Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Gregory F. Lapore, Esquire  
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Donald Matalavage, Borough Manager  
Borough of Tamaqua  
320 East Broad Street  
Tamaqua, PA 18252

BOWE, LISELLA AND BOWE

By: 

Jeffrey P. Bowe, Esquire  
Attorneys for the Borough  
of Tamaqua  
Supreme Court I.D. No. 23188  
109 West Broad Street  
P.O. Box 290  
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COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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9<sup>th</sup> Floor - Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1900  
Telephone No. (717) 787-3128

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February 18, 2000

FEB 18 2000

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
Harrisburg, PA 17108

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

IN RE: Borough of Tamaqua v. Reading Blue Mountain and Northern  
Railroad Company, et al.  
Docket # - C-00992533

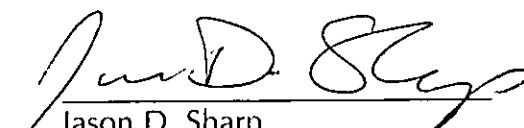
Dear Secretary McNulty:

Enclosed for filing are an original and nine (9) copies of the Department's Reply Exceptions in the above captioned matter.

The parties have been served with two (2) copies of the Reply Exceptions in the manner indicated on the attached certificate of service.

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Very Truly Yours,

  
Jason D. Sharp  
Assistant Counsel

220/JDS:jds

cc: All parties of record  
Gary C. Fawver, P.E., Chief, Right-of-Way and Utilities  
Ken McClain, Grade Crossing, District 5-0

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Borough of Tamaqua,  
Complainant

v.

Reading Blue Mountain and Northern  
Railroad Company,  
Respondent

Docket Number

C-00992533

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

REPLY EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (Department) and submits the following Reply to the Exceptions filed by Reading Blue Mountain and Northern Railroad Company (READING) to the Recommended Decision issued on January 26, 2000 (RD), by Administrative Law Judge Herbert S. Cohen (ALJ):

(READING filed only one Exception to the RD, specifically challenging the allocation of 100 percent of the crossing reconstruction costs to READING. The Department has subdivided its response into sections for the convenience of the reader.)

1. READING requests that the Public Utility Commission (Commission) order the Department to bear 100 percent of the reconstruction costs. READING argues that the ALJ should have simply juxtaposed the benefits accruing to READING with those benefits accruing to other parties and then conclude the Department should bear the entire cost for the crossing replacement.

However, READING's argument undermines its main statement of law, that the Commission takes all relevant factors into consideration. AT&T v. Pa. PUC, 737 A.2d 201, 209 (Pa. 1999). The only fundamental requirement placed on the Commission is that its

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final Order must be just and reasonable. Bell Atlantic – PA, Inc. v. PA. PUC, 672 A.2d 352, 355 (Pa. Cmwlth. 1995). The Commission determines what “factors” are relevant within the context of the proceeding currently before the Commission. Greene Township Board of Supervisors v. Pennsylvania Public Utility Commission, 642 A.2d 541, 543 (Pa. Cmwlth. 1994).

The factors addressed below are by no means exclusive or exhaustive. This Commission is the final determiner as to the relevance of certain factors, based on each specific case. The Department only focuses on the following factors as a reply to READING’s arguments.

**(a) Benefits Accruing to READING**

At the outset, the Department recognizes that the reconstructed crossing will provide a benefit to the motoring public. However, just because the motoring public will receive a benefit for the new crossing does not diminish the substantial benefits that will accrue to READING.

READING argues that it will not receive any benefit from the improved crossing. However, it is clear that installing a full depth concrete crossing would provide a longer useful life than a rubber crossing and would require less maintenance. (RD at 11, citing the Testimony of William J. Knerr).<sup>1</sup> Clearly, a benefit accrues to READING where the concrete crossing will have a long useful life and be relatively maintenance free. Installing

---

<sup>1</sup> In its exceptions, READING identifies Mr. William J. Knerr as “the Commission’s independent witness, William Knerr, Senior Civil Engineer with PennDOT.” It appears that the confusion over Mr. Knerr’s affiliation stems from Finding of Fact No. 35, which states that “PennDOT witness William Knerr, a commission Bureau of Transportation and Safety Civil Engineer . . .”. A review of the record indicates that Mr. Knerr is an employee of the Pennsylvania Public Utility Commission’s Bureau of Transportation and Safety, as a Senior Civil Engineer. (N.T. 8). Mr. Knerr was called as a witness on behalf of the Commission’s Bureau of Transportation and Safety, not the Department. (N.T. 7, 8).

a concrete crossing reduces the frequency with which a total crossing replacement must occur. Therefore, READING will experience the least amount of service interruptions due to major rehabilitation or total reconstruction occasioned crossing deterioration.

*Moreover, the concrete surface requires less maintenance than a rubber crossing.* (RD at 11). In particular, maintenance of a full depth concrete crossing would not require the replacement of timber and asphalt components. Given its choice, READING would have installed a timber and asphalt crossing at the subject location. (N.T. 47). READING admitted that it would maintain the timber and asphalt crossing, replacing wooden ties and asphalt when necessary. (N.T. 56). Therefore, READING will incur very little maintenance-related costs with concrete as opposed to timber and asphalt. This is a benefit to READING in that its maintenance responsibilities will be minimal in relation to the new concrete crossing.

This is glaringly important in light of the fact that READING has failed to perform crossing maintenance in the past.

**(b) State/Federal Funding**

READING also argues that the record does not support a finding that state or federal funding is not currently available for replacement of the subject crossing. However, the testimony in this case shows otherwise.<sup>2</sup>

The Department's witness, Mr. Ken McClain, stated that the subject crossing is not currently programmed under the Federal Rail Safety Program or under any Department state programs. (RD at 123). READING argues that this evidence is not sufficient to

determine that federal or state funding is not currently available for replacement of the subject crossing. However, READING ignores Mr. McClain's response to the follow-up question, indicating that the current crossing improvement program is:

full with other candidate projects that are programmed and approved. The next round of projects that we're going to do, the four-year cycle, starts in the year 2001 through 2004. So this *possibly* could get put on that program starting in 2001.

(N.T. 31) (emphasis added).

Based on the Department's uncontradicted testimony, it is clear that all current federal and state funding has been programmed and allocated to other crossing projects. These crossing projects were submitted, approved and are currently funded and in various stages of design or construction.

Moreover, READING's assertion that funding is actually available for the subject crossing next year is erroneous. Mr. McClain's statements, taken accurately, indicate that a new four-year program will open, starting in the 2001 to 2004 time frame. Therefore, a plan for replacement of the subject crossing would have to be submitted, approved and ultimately prioritized within the grade crossing program.

At best, one could argue that there would be a *potential* for funding starting in 2001-2004. However, it cannot be said with any amount of certainty whether funding would actually be available for this project. Moreover, such funding would certainly come at the expense of another worthy candidate project. It would be inappropriate for the Commission to delay a project that all parties agree is necessary upon the speculative

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<sup>2</sup> In its exceptions, READING identifies the question of the availability of state and federal funding as the "second prong of the test". (READING's Exception at 2). However, as stated previously, the Commission is not limited to any fixed test, but considers all relevant factors. Bell Atlantic, supra.

assertion that replacement of the subject crossing would - in competition with many other projects - be given top priority in the first year of the new grade crossing program.

(c) Deferred Maintenance

READING also argues that it did not defer maintenance to the crossing. However, READING's exception confuses two key issues in this case: 1) what type of maintenance could have been performed at the crossing, and 2) whether READING ever undertook any maintenance or even investigated what maintenance could be performed. Moreover, READING substitutes the age and wear of the crossing as a proxy for its own failure to *perform any type of maintenance at the crossing.*

READING cites Mr. William Knerr's testimony, claiming that he was "unaware of any type of maintenance which could be performed which would extend" the life of the crossing. (READING Exception's at pg. 4). In fact, under cross-examination Mr. Knerr admitted that a proper maintenance schedule implemented in the mid-1990's could have helped to prolong the life of the crossing depending on what type of problem was causing the failure of the crossing panels. (N.T. 17). Mr. Knerr also stated that "because of the type of crossing here, I'm ***not sure just what kind*** of maintenance can be performed on it." (N.T. 17) (emphasis added).

Therefore, Mr. Knerr's testimony stands for two things: 1) a proper maintenance schedule could have prolonged the useful life of the crossing; and, 2) because of type of crossing at issue, he was not sure what kind or type of maintenance could be performed on it. Mr. Knerr never stated that ***no*** maintenance could be performed at the crossing. There is certainly a difference between what kind of maintenance can be performed on the



crossing as opposed to READING's implication that no maintenance could be performed at all.

READING's own witness indicated that the railroad never even made a cursory inspection of the crossing. READING never inspected the crossing panels. (N.T. 52). READING has never investigated the condition of the sub-base. (N.T. 52). READING is unaware of the conditions of the ties. (N.T. 53). READING never replaced any of the rubber panels, even when they began to fail. (N.T. 52).

In this case, the deferred maintenance stems from READING's failure to conduct any type of investigation or assessment of the problems at the crossing, even though it was aware of trouble with the crossing surface as far back as 1995. (N.T. 54). In fact, READING could have actively pursued replacement of this crossing any time in the last five years. If the crossing had been programmed for replacement then, we would most likely have a new crossing at the site today.

The real argument here is that READING failed to perform maintenance because it was not sure what type of maintenance could have been performed. However, READING fails to note that it never attempted to determine what caused the panels to fail or what, if anything, could be done to save the crossing. READING could have addressed the problem early, but instead, it allowed the problem to fester and now seeks to disavow any responsibility for the deterioration of the crossing.

**(d) General Equities**

READING also argues that the general equities of the case do not support requiring READING to bear the cost to replace the subject crossing. However, READING will benefit from a safe, signalized, smooth crossing area that will prevent accidents and

promote public safety. Additionally, READING is responsible for maintenance of the crossing and it is only fair that the party whose lack of diligence in maintaining be held to bear the ultimate cost for reconstruction.

Installation of a new concrete crossing surface will provide a smooth riding surface for vehicular traffic, allowing unimpeded travel through the crossing area. While READING does not find this to be a benefit, the end result is a safer crossing, which benefits READING as much as the motoring public. The fact that a new crossing will prevent erratic car movements, as testified to in the subject proceeding, benefits READING because traffic will be moving through the crossing in the proper signalized areas. (N.T. 11). This helps prevent the likelihood of accidents involving vehicles, trains and pedestrians.

Moreover, as stated above, the new concrete crossing benefits READING because the maintenance burden and associated costs will be substantially low. (Section (a), above).

**(e) Prior Order**

Finally, READING submits that the Commission's Order should be consistent with the prior Commission Opinion and Order, entered May 2, 1980. (Department Exhibit # 4). The 1980 Order required Conrail to construct the current rubber crossing and required the Department to reimburse Conrail for the work. READING claims that there has been no change in circumstances, which would justify the allocation of all the replacement costs to READING. However, READING fails to recognize the main difference between the current proceeding and the 1980 Order.

In the 1980 Order, the Commission determined that the West Broad Street Crossing, which is the subject crossing, should be replaced with a high-type crossing surface. In that case, federal and state funding was available for the reconstruction of the crossing. As such, the Department volunteered to submit the project for placement on the statewide high-type crossing surface program. (Department Exhibit # 4, pg. 3).

In the prior proceeding, the existing crossing was not in dire need of repair, as is the case at bar. Therefore, the replacement of the crossing in 1980 was not immediately necessary or imperative as it is in the present matter. The replacement of the crossing under the 1980 Order could be forestalled until the funding was available and in place.

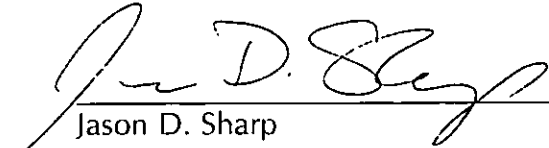
Moreover, the fact that the Department paid for the last total reconstruction of this crossing, coupled with Department's fulfillment of all of its concurrent maintenance responsibilities, supports the allocation of reconstruction costs to READING. It would be improper to require the Department to fund the reconstruction of this crossing where it has voluntarily met its obligations. In contrast, only upon complaints by the local municipality did READING or its predecessor take any action in regard to maintenance at the subject crossing.<sup>3</sup>

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<sup>3</sup> It is interesting to note that the 1980 Order was the result of a complaint filed by the Borough of Tamaqua against Consolidated Rail Corporation alleging that a number of crossings, including the subject one, were in poor condition. In regard to the subject crossing, the Commission was forced to order Conrail to elevate the subject track to the grade of the roadway and to place black top adjacent to the track to provide a safe road

READING and its predecessor failed to perform any maintenance whatsoever which could have preserved or prolonged the life of the subject crossing . The Department has complied, and will continue to comply, with all the requirements placed upon it by the Commission. (N.T. 38-39). It would be unjust and unreasonable for the Department to bear the cost of reconstruction of this crossing, where it paid for the previous installation and has complied with all of its responsibilities as per the Commission's previous orders, while the occupying railroads have shirked their responsibilities.

Respectfully Submitted,

  
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Assistant Counsel  
Pa. Attorney Id. # 80488

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DATED: February 18, 2000

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transition. (Department Exhibit # 4, pg. 3). In regard to the Department, the 1980 Order recognized that the highway approaches to all of the crossings were in good condition. (Department Exhibit # 4, pg. 2).

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Borough of Tamaqua, :  
Complainant : Docket Number  
 :  
v. : C-00992533  
 :  
Reading Blue Mountain and Northern :  
Railroad Company, :  
Respondent :

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation were served this day, February 18, 2000, via First Class Mail, upon the following parties:

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(Counsel for Bureau of Transportation and Safety)

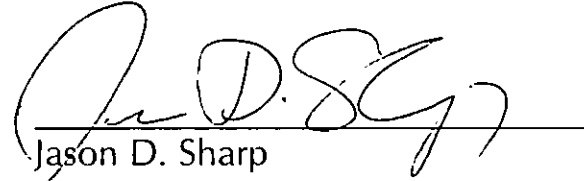
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Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jason D. Sharp", written over a horizontal line.

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DATED: February 18, 2000

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*House of Representatives*  
COMMONWEALTH OF PENNSYLVANIA  
HARRISBURG

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- VICE CHAIRMAN, STATE GOVERNMENT
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- TRANSPORTATION
- POLICY

February 18, 2000

Veronica A. Smith, Deputy Executive Director,  
Public Utility Commission  
118 North Office Building  
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Harrisburg, PA 17105-3265

**RE: Docket No. C-00992533**

Dear Ms. Smith:

I am writing to offer my full support of the Exceptions filed by the Borough of Tamaqua regarding Docket No. C-00992533 The Borough of Tamaqua vs. The Reading, Blue Mountain and Northern Railroad.

It is imperative that replacement of this dangerous and heavily traveled railroad grade crossing not be permitted to drag on any longer than is absolutely necessary. The timeline allowed in the decision handed down recently by the Administrative Law Judge will allow this long overdue project to continue well into the year 2001.

I would greatly appreciate your recommendation of shortening this timeline to allow for total replacement of the crossing this year.

As always, If I can be of any further assistance in this matter, please do not hesitate to contact me.

Sincerely,

*D. Argall*  
DAVID G. ARGALL  
State Representative  
124<sup>th</sup> Legislative District

DOCUMENT  
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PA PUBLIC UTILITY COMMISSION  
PROTHONOTARY'S OFFICE

OFFICE OF  
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