

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITIES COMMISSION

ORIGINAL

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 :  
Whitehall Township vs. :  
R.J. Corman Railroad Company, :  
 The repair and maintenance of the : Docket No.  
 Retaining Wall located underneath : C-20054822  
 the Race Street Bridge along South :  
 Lehigh Avenue, West Catasauqua, :  
 Whitehall Township. The complainant :  
 wants the PUC to enforce :  
 maintenance obligations under PUC :  
 Order dated 7/2/56 against R.J. :  
 Corman Railroad Company. :  
 :

Initial pre-hearing conference :  
 :

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 Pages 1 through 22  
**DOCUMENT  
 FOLDER**

Hearing Room<sup>3</sup>  
 Keystone Building  
 Harrisburg, Pennsylvania

Thursday, March 2, 2006

Met, pursuant to notice, at 10:10 a.m.

BEFORE:

KANDACE F. MELILLO, Administrative Law Judge

APPEARANCES:

FRANK G. PROCYK, Esquire  
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 (For the Complainant)

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 (For Lehigh County)

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WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

None

E X H I B I T S

NUMBER

FOR IDENTIFICATION IN EVIDENCE

None

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P R O C E E D I N G S

1  
2 ADMINISTRATIVE LAW JUDGE MELILLO: Let's go on  
3 the record.

4 This is the time and place assigned for pre-  
5 hearing conference in the matter of Whitehall Township vs.  
6 R.J. Corman Railroad Company. The Docket Number is  
7 C-20054822. It involves repair and maintenance of a  
8 retaining wall located underneath Race Street Bridge along  
9 South Lehigh Avenue, West Catasauqua, Whitehall Township,  
10 Lehigh County, Pennsylvania.

11 For the record, a field conference at the  
12 site was held in September 2005 with commissions from our  
13 Safety Division. There was no resolution at that time. The  
14 proceeding was, therefore, reassigned to the Office of  
15 Administrative Law Judge to be scheduled for hearing.

16 I am Administrative Law Judge Kandace F.  
17 Melillo, assigned in this matter.

18 I need the appearances this morning:  
19 Janet L. Miller, Esquire on behalf of R.J. Corman Railroad  
20 Company; Gina D'Alfonso on behalf of the Commonwealth of  
21 Pennsylvania, Department of Transportation; Frank G. Procyk  
22 and Charles Falzone on behalf of Whitehall Township; Lee  
23 Mescolotto on behalf of the County of Lehigh; Rhonda L.  
24 Daviston, Pennsylvania Public Utilities Commission's Law  
25 Bureau.

1 Good morning everyone.

2 (Mutual greetings.)

3 I have received pre-hearing memoranda from  
4 the following parties: Whitehall Township, R.J. Corman  
5 Railroad Company, the Commission's Law Bureau Prosecuting  
6 Staff, the County of Lehigh and the Pennsylvania Department  
7 of Transportation.

8 I have a few preliminary matters this  
9 morning. I have read the Pleadings concerning whether or  
10 not the County of Lehigh is a proper party to this  
11 proceeding. Does anyone else wish to address that issue at  
12 this time?

13 (No response)

14 JUDGE MELILLO: Hearing nothing, the bridge  
15 and retaining wall are situated in Lehigh County; is that  
16 correct?

17 MR. PROCYK: Yes, it is.

18 JUDGE MELILLO: And the road coming up to the  
19 bridge, that's a public road. The bridge carries public  
20 traffic; is that correct?

21 MR. MESCOLOTTO: They're public roads.

22 JUDGE MELILLO: Very well. I hold that the  
23 County of Lehigh is a proper party in this proceeding and  
24 will not be released at this time.

25 I've also reviewed the pre-hearing memoranda.

1 There has been a jurisdictional question raised by the  
2 County of Lehigh. Is it Lehigh County's position that the  
3 Commission does not have jurisdiction over the matter in  
4 question?

5 MR. MESCOLOTTO: It's echoing too much.

6 JUDGE MELILLO: See if this is any better.

7 (Pause)

8 JUDGE MELILLO: Is that any better? The  
9 acoustics in this room aren't the best.

10 Is it Lehigh's County's position that the  
11 Commission does not have jurisdiction over this matter?

12 MR. MESCOLOTTO: Yes.

13 JUDGE MELILLO: Will you be fining a motion in  
14 that regard, because I have not received any motions.

15 MR. MESCOLOTTO: The reason the motion wasn't  
16 filed, it wasn't clear from the initial complaint as to  
17 exactly where this particular problem was located.

18 I have since discovered that it's not exactly  
19 at the bridge, as I had thought. So I may have to file a  
20 motion.

21 JUDGE MELILLO: I'd rather have that  
22 particular question resolved now than later because there is  
23 no point to going through with the proceeding if the  
24 Commission not a jurisdiction.

25 Dose anyone wish to address that matter at

1 this time?

2 (No response)

3 JUDGE MELILLO: Hearing nothing, I'll await  
4 your motion then, and supporting documentation.

5 The County of Lehigh also mentions appeal  
6 review. Now there was a field conference held in September  
7 2005. Was the County of Lehigh present at that field  
8 conference?

9 MR. MESCOLOTTO: I have no idea. No one from  
10 the Law Department was there. I'm not sure that anyone from  
11 the County was there. I'm sure the Whitehall Township  
12 knows. Was anyone from the County there?

13 MR. PROCYK: We don't believe so, your Honor.

14 JUDGE MELILLO: At this point, that's a matter  
15 that can be resolved among the parties if you want to  
16 arrange for some view as part of the discovery process. But  
17 that there was a field conference and my information  
18 indicates that the County of Lehigh was served with Notice  
19 of a field conference.

20 Yes.

21 MS. D'ALFONSO: Your Honor, may I note if Mr.  
22 Fisher has a record?

23 JUDGE MELILLO: Certainly. Mr. Fisher, do you  
24 have a record of that?

25 (Pause)



1 MR. FISHER: The sign-in sheet from the field  
2 conference shows nobody from Lehigh County was present.

3 JUDGE MELILLO: All right. I do note for the  
4 record that there was a Notice of the field conference sent  
5 to the County of Lehigh.

6 I've received the list of questions of  
7 procedure from the Rail Division. May I ask the parties  
8 address these now as I'm going to be distributing them now.

9 Ms. D'Alfonso, thank you. Would you care to  
10 distribute copies of those to the parties. I think there's  
11 probably enough for everyone here.

12 (Handing document to counsel)

13 (Pause)

14 JUDGE MELILLO: Thank you. I'll be issuing a  
15 subsequent Procedural Order in this matter after today. It  
16 may, however, be after the following week because my  
17 vacation is next week.

18 There's been some additional issues that have  
19 been raised in the pre-hearing memoranda. The pre-hearing  
20 memoranda of R.J. Corman Railroad ceased to indicate that  
21 perhaps there's a question of ownership of this bridge. Is  
22 that correct? R.J. Corman says they're not the owner at  
23 this point.

24 MS. MILLER: There are two portions of the  
25 bridge. The bottom half of the bridge was constructed by

1 Lehigh Valley Railroad which was the predecessor.

2 The top half of the bridge was constructed,  
3 to my understanding, when the bridge...I'm sorry, when the  
4 top half of the wall was constructed, at the time the bridge  
5 was replaced and Lehigh Avenue was widened.

6 R.J. Corman's position is it does not own  
7 that part of the retaining wall. It is not responsible for  
8 any maintenance associated with that.

9 JUDGE MELILLO: Can you speak into the  
10 microphone; I'm not sure everybody is hearing you. So  
11 you're saying that R.J. Corman is accepting ownership and  
12 responsibility of the bottom half of the wall, but not the  
13 top half of the wall?

14 MS. MILLER: At this point in time, R.J.  
15 Corman will accept...they'll agree that they constructed or  
16 its predecessor constructed the bottom half of the retaining  
17 wall. I think there is some question as to whether R.J.  
18 Corman acquired the maintenance responsibility when the  
19 property changed hands.

20 JUDGE MELILLO: Maintenance responsibility  
21 with respect to the top half that you're talking about, or  
22 with respect to the entire...

23 MS. MILLER: With respect to the entire wall.  
24 It's the Company's position they have no maintenance  
25 responsibility for the top half of the retaining wall, even

1 if it turns out they have responsibility for the bottom half  
2 of the wall.

3 JUDGE MELILLO: Is there a way to ascertain by  
4 looking at the wall that there's a top half and a bottom  
5 half?

6 MS. MILLER: It does, your Honor. Yes.

7 MR. PROCYK: We have photographs, your Honor.

8 JUDGE MELILLO: Did you intend to distribute  
9 those or are they part of the discovery responses?

10 MR. PROCYK: We just took them, your Honor.  
11 It was simply for the benefit of the Court's point of  
12 reference, to see what you're dealing with with regard to  
13 this retaining wall. Because just talking about, you're not  
14 going to have as easy a way to identify what the problem is.

15 I can certainly distribute copies of these  
16 things. I don't have copies today to distribute though.

17 MS. D'ALFONSO: Your Honor, we have photos, we  
18 have seven copies which would be enough for your Honor and  
19 the parties to look at at the same time. Then we can deal  
20 with admission at the time of the hearing to individualize.

21 JUDGE MELILLO: Yes, at this point, we haven't  
22 been anticipating taking any evidence. This is noticed as a  
23 pre-hearing conference. In my Pre-hearing Order, I had  
24 asked the Township to ascertain whether the entire 1956  
25 Commission Order was amended to its Complaint because there

1 was a pagination error, possibly. There were two unnumbered  
2 pages between page eight and thirteen.

3 MR. PROCYK: That's correct, your Honor.  
4 That's the way it appears, from looking at it. I  
5 corresponded to the PUC directly and we requested a copy and  
6 they advised me they had to search microfiche or whatever  
7 records and they're sending that to me.

8 JUDGE MELILLO: All right. Very well.

9 MR. PROCYK: I will provide that to your  
10 Honor.

11 JUDGE MELILLO: Please. Thank you.

12 Does anyone else have anything of a  
13 preliminary nature before we talk about the procedural  
14 schedule?

15 (No response)

16 JUDGE MELILLO: Hearing nothing, let's go on  
17 to the procedural schedule.

18 The Township will post a schedule that I  
19 believe I indicated everyone in e-mail that the proposed  
20 schedule conflicts with the General Rate Increase Decision-  
21 writing time that I have. My suggestion was that the  
22 schedule be shortened about ten days.

23 I had suggested May 8<sup>th</sup> and 9<sup>th</sup> for hearings.  
24 Based on my schedule, it looks like the 10<sup>th</sup> and 11<sup>th</sup> might  
25 be better. If I could check on the 11<sup>th</sup> of May in terms of

1 availability of a hearing room, I can set that up.

2 Does anyone have further discussion in this  
3 regard, or concerns?

4 Yes.

5 MR. PROCYK: If I could speak to that, your  
6 Honor. I do have other trials scheduled in Lehigh County  
7 for the week of May the 8<sup>th</sup>.

8 JUDGE MELILLO: You do. All right.

9 MR. PROCYK: The reason I can't give yo a  
10 definite is we're part of a trial pool with the judge.  
11 Trial week begins April 24<sup>th</sup> and runs through the middle of  
12 May. So May 10<sup>th</sup> and 11<sup>th</sup> would conflict severely with cases  
13 that I'm already deemed to be attached for.

14 And that's why I suggested the dates that I  
15 did in the Proposed Schedule.

16 JUDGE MELILLO: Yes, that came out to the time  
17 that I would be writing a major case Decision. And that's  
18 jut not going to work.

19 Yes.

20 MS. MILLER: I'd like to address the three-day  
21 turn-around for the transcript.

22 JUDGE MELILLO: Yes.

23 MS. MILLER: I checked with Commonwealth  
24 Reporting who is assigned to this proceeding. The charge  
25 provides for a three-day turn-around is just under five

1 dollars extra, which means 100 page transcript would be an  
2 additional \$500.00 for each party to obtain the transcript  
3 within that amount of time. That's a heavy burden for some  
4 parties here to accept.

5 And with hearings the 10<sup>th</sup> or 11<sup>th</sup> of May, if  
6 your Honor is expecting a brief by the 26<sup>th</sup>, that's not very  
7 much time to write it.

8 JUDGE MELILLO: Well, I have checked and  
9 ascertained that our office could get three-day transcript.  
10 But you're saying that each party then would be expected to  
11 pick up the three-day charge as opposed to a 21-day charge?

12 MS. MILLER: Yes.

13 JUDGE MELILLO: What is the parties' position  
14 with regard to stretching out the schedule then? I didn't  
15 think I could shorten it any further than what I had. And  
16 unless the parties believe this is a matter of urgency, and  
17 if it is, I could certainly try to shorten the schedule.  
18 But then testimony would be delayed, et cetera, et cetera.

19 I didn't know what the parties wanted to do  
20 with respect to the schedule.

21 Yes, Ms. Miller.

22 MS. MILLER: I have not seen anything, your  
23 Honor, that indicates there's an urgency to the matter.  
24 Although maintenance does need to be made, no one has  
25 identified anything that's urgent.

1 MR. MESCOLOTTO: In fact, your Honor, the  
2 Township indicated it only had to be monitored; not that it  
3 was coming down or they had to put up barricades or anything  
4 like that.

5 MR. PROCYK: On behalf of the Township, your  
6 Honor, we agree, it's not an urgent matter where something's  
7 going to topple next week. We'd like to move the matter  
8 along to conclusion, but I have no difficulty if you want to  
9 extend some of these deadlines to fit within the other case  
10 or your office.

11 JUDGE MELILLO: Yes, I understand also the  
12 County of Lehigh is going to be moving to the effect of  
13 jurisdiction. So I guess we need to get that resolved as  
14 well if we have the time to do that. And you would have to  
15 let me know that in terms of any safety matter that needs  
16 urgent attention.

17 All right. Let's go off the record.

18 (Discussion off the record.)

19 JUDGE MELILLO: Is everyone ready to proceed  
20 with the schedule? Let's go back on the record.

21 We were off-the-record for some discussion  
22 about procedural schedule. While we were off-the-record, I  
23 had a jurisdictional question again. I want to go back to  
24 that.

25 It seems that the County is going to need to

1 have some factual basis for its motion. Motions, under our  
2 procedural rules, generally are applicable when there is a  
3 clear showing from Pleadings that the Commission doesn't  
4 have jurisdiction. The difficulty is if we go to a hearing,  
5 then we've gone through that process. People have given  
6 testimony, we've had witnesses who have appeared, we've had  
7 hearings, that type of thing. So I don't know what the  
8 parties would prefer in this regard.

9 To one extent, we could go to a hearing. I  
10 just would go ahead and have it briefed. I take it not  
11 everyone agrees that we don't have jurisdiction.

12 MR. PROCYK: We agree that you do.

13 JUDGE MELILLO: That's what I thought. So  
14 there's going to be differences there. It appears to me  
15 we're going to need some kind of hearing and maybe we should  
16 just go ahead and have a hearing, have a one-day hearing or  
17 a half-a-day hearing, and then talk about certain facts  
18 which would need to be established for purposes of  
19 jurisdiction. And then come back and have another day of  
20 hearing.

21 How do the parties feel about it? I don't  
22 want to get the parties involved in a long process if we  
23 don't have jurisdiction. But it seems that, on the other  
24 hand, there's going to need to be some factual basis.

25 MR. MESCOLOTTO: Judge, I would agree, but I



1 found in the Statement of Admissions because, number one, I  
2 wasn't at the site; number two, I was under the impression  
3 that this problem was located some distance from the Race  
4 Street Bridge.

5 It appears that it's against the Race Street  
6 Bridge. It appears it begins at the Race Street Bridge,  
7 based on the photos I just looked at.

8 So I don't know. I was going to investigate  
9 it. I was probably going to send you a letter not going  
10 into the jurisdiction.

11 JUDGE MELILLO: All right. So you're not  
12 going to be filing a motion?

13 MR. MESCOLOTTO: I don't think so, based on  
14 the information I received.

15 JUDGE MELILLO: Very well. That takes care of  
16 that particular matter.

17 All right. What procedural schedule have the  
18 parties arrived at? Does someone want to be a spokesperson?

19 MR. PROCYK: If I may, your Honor. I think  
20 what we've agreed upon is the following schedule...

21 JUDGE MELILLO: All right.

22 MR. PROCYK: Discovery deadline May 12, 2006;  
23 deadline for filing direct testimony with exhibits June 9<sup>th</sup>,  
24 2006; deadline for filing rebuttal testimony June 23<sup>rd</sup>, 2006;  
25 dates for hearings with sur-rebuttal June 29<sup>th</sup> and 30<sup>th</sup>,

1 2006...

2 JUDGE MELILLO: What was that again? ...June  
3 29<sup>th</sup> and 30<sup>th</sup>, 2006? So instead of having written sur-  
4 rebuttal, you would have oral sur-rebuttal; is that right?

5 MR. PROCYK: Yes.

6 JUDGE MELILLO: And the hearing. Okay.

7 MR. PROCYK: What we could also do, your  
8 Honor, before then, your Honor, file a case under 351 as to  
9 the nature of the sur-rebuttal.

10 JUDGE MELILLO: All right. You have June 23<sup>rd</sup>  
11 for rebuttal, so you only have...

12 MS. D'ALFONSO: Excuse me. What was the date  
13 for rebuttal?

14 MR. PROCYK: 23<sup>rd</sup>.

15 MS. D'ALFONSO: I wrote down the 21<sup>st</sup>. I mis-  
16 heard you.

17 JUDGE MELILLO: I have June 23<sup>rd</sup>, that's  
18 Friday, for the filing of rebuttal testimony.

19 And you want hearings to start six days  
20 later. So when would you propose an outline be distributed  
21 for sur-rebuttal?

22 MR. PROCYK: 27<sup>th</sup>? Then we're proposing the  
23 date of August 3<sup>rd</sup> for the main briefs to be filed. And  
24 August 18<sup>th</sup>, 2006 for the reply briefs.

25 JUDGE MELILLO: What was the discovery

1 deadline again?

2 MR. PROCYK: May the 12<sup>th</sup>. All right. June  
3 29<sup>th</sup> and 30<sup>th</sup>, 2006 for hearings. I take it hearings would be  
4 in Harrisburg; is that the proposal?

5 MR. PROCYK: Yes, your Honor.

6 JUDGE MELILLO: All right. I'll check our  
7 schedulings to see whether those dates are all right for  
8 hearings. I generally do not have a problem, but I do want  
9 to reserve that. And I actually will check, if the parties  
10 want to remain for just a few moments, I'll check that  
11 before we leave today.

12 Let's continue on. I have a few more  
13 matters. Was there any proposal to change the discovery  
14 deadlines? 20 days for responding to Interrogatories, is  
15 that acceptable?

16 MR. PROCYK: That's acceptable.

17 JUDGE MELILLO: Are the parties in agreement  
18 that electronic mail service, followed by First Class Mail  
19 delivery for hard copy, or Overnight, is acceptable for in-  
20 hand service?

21 (Mutual agreement)

22 JUDGE MELILLO: I would like, if possible, an  
23 e-version of all documents that you file, including  
24 testimony and briefs. It can be in Word, that's  
25 preferable. We have Word 2003 here at the Commission.

1 I'll be issuing a Briefing Order also, at a  
2 later time.

3 Is there any need for public info. hearings  
4 on this matter?

5 (No response)

6 JUDGE MELILLO: All right. Hearing nothing,  
7 we will not schedule any.

8 Have the parties considered building a  
9 settlement conference into the schedule?

10 MS. D'ALFONSO: We are meeting in the field.  
11 We do have a date for that. I think if there's any hope for  
12 settlement discussions, it will evolve out of that meeting  
13 which is in April.

14 JUDGE MELILLO: Very well. I would like to  
15 see the parties try to resolve whatever differences they  
16 can. Even if there's not a full settlement, there may be a  
17 possibility of stipulations which would shorten hearing time  
18 and, therefore, reduce cost for everyone.

19 Do the parties see any need for any  
20 Protective Order in this case with regard to discovery or  
21 testimony or exhibits?

22 MR. PROCYK: No, your Honor.

23 JUDGE MELILLO: We will not do that then.

24 That concludes my list. Does anyone have  
25 anything further for today?

1 MR. PROCYK: No.

2 (Mutual agreement)

3 JUDGE MELILLO: Let me check on these hearing  
4 dates.

5 (Discussion off the record.)

6 JUDGE MELILLO: Let's go back on the record,  
7 briefly. I checked and June 29<sup>th</sup> and 30<sup>th</sup> is acceptable, so  
8 we will send out a Hearing Notice.

9 I'm also going to be sending out a Procedural  
10 Order based on what we decided today. But that will not be  
11 coming out next week. It will probably be the following  
12 week, given my schedule.

13 All right. Is there anything further from  
14 anyone?

15 (Mutual agreement)

16 JUDGE MELILLO: No? Thank you very much.

17 (Whereupon, at 11:17 a.m., the hearing was  
18 adjourned.)

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C E R T I F I C A T E

I hereby certify, as the stenographic reporter, that the foregoing proceedings were taken stenographically by me, and thereafter reduced to typewriting by me or under my direction; and that this transcript is a true and accurate record to the best of my ability.

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By: *Lyn Wilson*  
Marilyn F. "Lyn" Wilson, CVR

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