

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township

v.

Norfolk Southern Railway Company

:
:
:
:
:

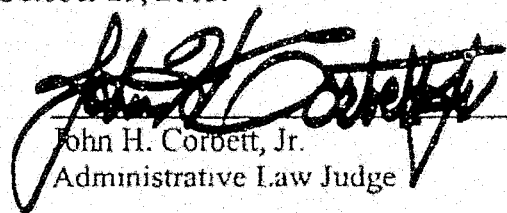
C-20030526

DOCUMENT

INTERIM ORDER
TAKING UNDER ADVISEMENT
A MOTION TO DISMISS

FEB 19 2004

AND NOW, to wit, this 14th day of January, 2004, upon due consideration of the motion of Norfolk Southern Railway Company to dismiss this complaint for lack of subject matter jurisdiction, together with the addendum thereto, and the response of Harmar Township thereto, copies of all of which I have just received today, and after careful review of the cited authorities, including relevant portions of the Public Utility Code, 66 Pa. C.S. §§101, *et seq.*, and City of Chester v. Pa. P.U.C., 798 A.2d 288 (Pa. Cmwlth. 2002) and County of Bucks v. Pa. P.U.C., 684 A.2d 678 (Pa. Cmwlth. 1996), together with a review of other relevant authorities permitted during the short period allowed for consideration of this motion, and it appearing that this motion presents mixed questions of law and fact, IT IS THEREFORE ORDERED that this motion is hereby taken under advisement pending development of an evidentiary record in this case commencing with the scheduled hearing on Thursday, January 29, 2004 and concluding with the parties filing briefs in support of their respective positions on this matter; AND PROVIDED FURTHER, that the parties are hereby placed on notice that they should develop an evidentiary record during the hearing on January 29, 2004 to support their respective positions on this matter in addition to answering the standard Questions and Procedures attached to the hearing notice that was served on the parties on October 29, 2003.


John H. Corbett, Jr.
Administrative Law Judge

OALJ Hearing Report

Please Check Those Blocks Which Apply

Docket No:	C-20030526		YES	NO
Case Name:	Harmar Township v. Norfolk Southern Railway Company	Prehearing Held:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Location:	Pittsburgh	Hearing Held:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Date:	January 29, 2004	Testimony Taken:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
ALJ:	John H. Corbett, Jr.	Transcript Due:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Reporting Firm:	Commonwealth Reporting	Hearing Concluded:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		Further Hearing Needed:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		Estimated Add'l Days:		
		RECORD CLOSED:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		DATE:		
		Briefs to be Filed:	<input checked="" type="checkbox"/>	<input type="checkbox"/>
		DATE:		
		Bench Decision:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
		REMARKS:	<i>Att. will send briefing letter to parties.</i>	

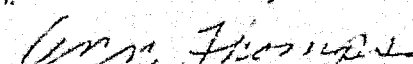
DOCUMENT
FOLDER

RECEIVED
 MAR 11 11:33:20
 OALJ

PLEASE PRINT CLEARLY - Incomplete Information may result in delay of processing.

Name and Telephone Number	Address	Who are you representing?
DAVID A. SALAPA	P.O. Box 3265 4100 NORTH ST HARRISBURG PA 17105-3265	Pa. P.U.C., Bureau of Transportation & Safety
Telephone: (717) 753-2841	E-mail Address: DSALAPA@STATE.PA.US	Fax Number: (717) 772-7931
Benjamin C Dunlap, Jr.	Nauman, Smith, Sheller & Hill, LLP 200 N. Third Street P.O. Box 840 Harrisburg PA 17108	Norfolk Southern Railway Company
Telephone: (717) 276-3010	E-mail Address: bdunlap@naumsmith.com	Fax Number: (717) 276-1525
Tyson D Sharp	P.O. Box 8412 Harrisburg PA 17105	PEUNDOT
Telephone: 717 787 3128	E-mail Address: jsharp@state.pa.us	Fax Number: 717-772-2471

Check this box if additional parties or attendees appear on back of form.


 Reporter's Signature **RJP**

Note: Completion of this form does not constitute an entry of appearance, see 52 Pa. Code §§1.24 and 1.25.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
1103 PITTSBURGH STATE OFFICE BUILDING
300 LIBERTY AVENUE
PITTSBURGH, PENNSYLVANIA 15222-1210

Tel: 412-565-3550
Fax: 412-565-5692

IN REPLY PLEASE
REFER TO OUR FILE

February 27, 2004

TO ALL PARTIES OF RECORD:

Re: *Harmar Township v. Norfolk Southern Railway Company*
Docket No. C-20030526

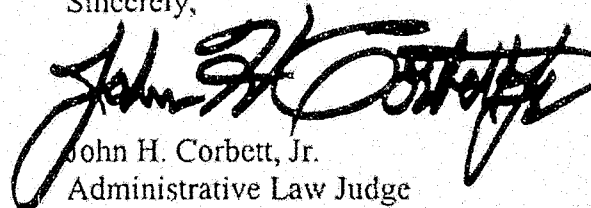
The record in this proceeding discloses that the parties will file briefs. In addition to the issues that the parties may wish to address, I ask the parties to also supply me in their briefs with the exact language of the pertinent enabling statutory authority or common law precedent allowing the Commission to enter its 1930 Order relating to this crossing. Your research will give me a better understanding of the issues in this case.

In accordance with the Commission's Rules of Administrative Practice and Procedure, main briefs are due on or before March 26, 2004; reply briefs, if any, are due on or before April 12, 2004. If briefs are not received within the allotted time, they will not be accepted for filing except by special permission of the presiding officer for good cause shown. Your main briefs should be concise and must comply with 52 Pa. Code §5.501.

An original and nine (9) copies of each main and reply brief must be filed with the Commission in accordance with 52 Pa. Code §1.4 and in care of the New Filing Section, P.O. Box 3265, Harrisburg, PA 17105-3265. Also, one hard copy of the brief, together with one copy by email in Word 2002 format, must be served on me and two hard copies on each party of record. My email address is johncorbett@state.pa.us. If you cannot furnish a copy in proper format, then two hard copies will suffice. If you have any questions, please call this office at 412-565-3550.

Thank you for your attention and anticipated cooperation.

Sincerely,



John H. Corbett, Jr.
Administrative Law Judge

pc: Amanda Rumsey, Esq.
Elzalena Ditzler, Scheduling Unit Supervisor
Elizabeth L. Plantz, Office Support Staff
File Room

SECRETARY'S BUREAU

2004 MAR -3 11:10:10

RECEIVED

R.F

RICK SANTORUM
PENNSYLVANIA

REPUBLICAN CONFERENCE
CHAIRMAN

WASHINGTON, DC
511 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-6324

COMMITTEES
FINANCE

BANKING, HOUSING, AND URBAN AFFAIRS
RULES AND ADMINISTRATION
SPECIAL COMMITTEE ON AGING

United States Senate

<http://santorum.senate.gov>

February 26, 2004

DOCUMENT FOLDER

C-20030526

RECEIVED
PA PUC AFFAIRS
OFFICE-LEGIS. AFFAIRS
2004 FEB 30 - 4:19:04
2004 MAR - 1 AM 10:30

Ms. June Perry
Director, Legislative Affairs
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, Pennsylvania 17105

Dear Ms. Perry:

I have recently received correspondence from Mr. Thomas Affinito, the Secretary-Treasurer for Hammar Township, Pennsylvania. Mr. Affinito contacted my office regarding the decision of Norfolk Southern Railroad to petition the Pennsylvania Public Utility Commission for the right to remove the pedestrian railway crossing at Wenzel Drive.

In his letter, Mr. Affinito highlighted the crossing importance to Township residents and business. After being utilized by the community for decades, Mr. Affinito believes that the elimination of the crossing will present an extreme hardship to the community as the residents and businesses must adjust their daily routine to longer and unsafe detours by pedestrians to their homes and stores. In addition to expressing his concern, Mr. Affinito included seven pages of petitions from over 100 Hammar residents requesting the continued access to this valuable pedestrian crossing.

I ask that the concerns of Mr. Affinito and his fellow Hammar Townships residents receive full and fair consideration as the Public Utility Commission contemplates the request of Norfolk Southern. I have included a copy of Mr. Affinito's correspondence with my office for your benefit. Any information your office could provide regarding this matter would be greatly appreciated.

Thank you for your assistance in reviewing this and your thoughtful consideration of their request. If you needed any additional information, the staff contact for this referral is Jay French who can be reached at 412-562-0533.

Sincerely,

Rick Santorum
United States Senate

SECRETARY'S BUREAU
RECEIVED
2004 MAR 1 11:30

RJS:jl

- ALLENTOWN 3502 FEDERAL OFFICE BUILDING 504 WEST HAMILTON STREET ALLENTOWN, PA 18105 (610) 770-0142
- ALTOONA REGENCY SQUARE SUITE 202 ROUTE 220 NORTH ALTOONA, PA 16601 (814) 946-7023
- COUDERSPORT 81 MARVIN HILL ROAD COUDERSPORT, PA 16915 (814) 274-9773
- ERIE 1705 WEST 26TH STREET ERIE, PA 16508 (814) 454-7114
- HARRISBURG 555 WALNUT STREET FIRST FLOOR HARRISBURG, PA 17101 (717) 231-7540
- PHILADELPHIA WIDENER BUILDING ONE SOUTH PENN SQUARE SUITE 900 PHILADELPHIA, PA 19107 (215) 864-6900
- PITTSBURGH 100 WEST STATION SQUARE DRIVE LANDMARKS BUILDING SUITE 250 PITTSBURGH, PA 15219 (412) 562-0533
- SCRANTON 527 LINCOLN STREET SCRANTON, PA 18503 (570) 344-8799

Case work

FACSIMILE TRANSMISSION

HARMAR TOWNSHIP

701 Freeport Road
Cheswick, PA 15024

PHONE: (724) 274-4550
FAX: (724) 274-9522

TO: Senator Rick Santorum

FAX NO.: 202-228-0604

DATE SENT: January 14, 2004

NUMBER OF PAGES:
(INCLUDING THIS PAGE)

FROM: Thomas J. Affinito
Secretary/Treasurer

We would appreciate your support in this important matter. For further information do not hesitate to call.

ORIGINAL WILL FOLLOW

ORIGINAL WILL NOT FOLLOW

**IF YOU DO NOT RECEIVE ALL PAGES OF THIS TRANSMISSION, PLEASE CALL (724) 274-4550

RECEIVED
PA PUC
OFFICE-LEGIS. AFFAIRS
2004 JAN -1 AM 10:02

RECEIVED
2004 JAN -1 AM 11:30
SECRETARY'S BUREAU

RECEIVED
PA PUC
OFFICE-LEGIS. AFFAIRS
2004 FEB-30 PM 9:48

BOARD OF SUPERVISORS

James R. DiPalma - Chairman
Robert W. Selbert Jr. - Vice Chairman
Donald Muse - Supervisor
Kimberly A. Tony - Supervisor
Leo Chini - Supervisor
Blaine A. Lucas - Solicitor
Thomas J. Affinito - Secretary/Treasurer
Senate Engineering Co. - Engineers

HARMAR TOWNSHIP

701 Freeport Road
Cheswick, Pennsylvania 15024 - 1208
Phone No. (724) 274 - 4550
Fax No. (724) 274 - 9522

PLANNING COMMISSION

John Colpa - Chairman
Donald Kiser - Vice Chairman
Carmela DiPalma - Secretary
Fredrick Domaratz - Member
Gerard Bennett - Member
Tim Bluh - Solicitor
Senate Engineering Co. - Engineers

January 14, 2004

U.S. Senator Rick Santorum
511 Dirkson Senate Office Building
Washington, D.C. 20510-3809

Dear Senator Santorum:

Several Harmar Township residents have circulated a petition (enclosed) opposing elimination of the pedestrian railway crossing at Wenzel Drive, Harmar Township.. Residents have been using this crossing for decades and its elimination would be an extreme hardship to both residents and business owners as well.

Harmar Township will appear at a hearing of the Public Utilities Commission on January 29, 2004 in an effort to be heard on this matter. The Norfolk Southern Railroad is attempting to eliminate this pedestrian crossing.

We would very much appreciate a letter supporting the Township's position. If you need additional information, please contact Tom Affinito, Harmar Township Secretary/Treasurer, at (724) 274-4550. Please send a letter supporting the Township's position so that it is received in our office by January 26, 2004.

Sincerely,

Thomas J. Affinito
Secretary/Treasurer

Enclosure

RECEIVED
PA PUC
OFFICE - LEGIS. AFFAIRS
2004 FEB 28 AM 9:48

SECRETARY'S BUREAU

2004 MAR - 1 AM 11:31

RECEIVED

RECEIVED
PA PUC
OFFICE - LEGIS. AFFAIRS
2004 MAR - 1 AM 10:02

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1001 at Route 2B and Guys Run Road..

NAME (SIGN) PRINT NAME ADDRESS (STREET, CITY AND ZIP CODE)

- Robert W. Seibert Jr* ROBERT W. SEIBERT JR 22 Denny Est Pgh PA 15238
- Leo Chini* Leo Chini 1211 FREEPORT RD CHARTER 15024
- Stanley L. Malak* STANLEY L. MALAK 15 DOMINICI LN, CHESWICK PA 15024
- Thomas J. Burkhart* THOMAS J. BURKHART ONE HARBORVIEW DR CHESWICK, PA 15024
- Ronald W. Smith* Ronald W. Smith 2514 WENZEL Drive Pittsburgh, Pa 15235-1422
- James H. Jump* 2542 Wenzel Ave. Harmar Pa. 15233
- Joe Krason* 2542 Wenzel Apt-1 Pgh Pa 15238
- Joseph Robinson* JOSEPH ROBINSON 232 MEADOWVALE DR. CHESWICK, PA 15024
- Jerry Rata* 1081 11th AVE. NATRONA HTS PA 15065
- Thomas Kelly* 14 MEADOWVALE DR. CHESWICK PA 15024
- W. T. Rosko Jr* W. T. ROSKO JR 246 ORLAND ST HARMAR PA 15049
- Dolores J. Prasad* DOLORES J. PRASAD 507 2516 Wenzel Dr Pgh PA 15238
- Norm Mancione* 4623 BANCROFT ST Pgh PA 15201
- Tom Meggs* 2818 WENZEL DR Pgh PA 15238
- Steve Halmy* 447 HARMON AVE SPRINGDALE, PA 15144
- Carl E. Smith* Carl E. Smith 1090 N BLUEE DR New Kensington, Pa.
- Howard Howard* 441 GUYS RUN RD 15238

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1001 at Route 26 and Guys Run Road..

NAME (SIGN) PRINT NAME ADDRESS (STREET, CITY AND ZIP CODE)

James W. Anderson ^{JAMES W.} ANDERSON, II 2524 WENZEL DR PGM, PA 15238-1422

James B Anderson JAMES B ANDERSON (OWNER OF ABOVE)

Alisa Sobien Alisa Sobien 874 Progress St Pgh PA 15212

Mary Brangan Mary Brangan 1530 Spruce St Cheswick, PA 15024

John Grindler John Grindler 293 Cottan St Springdale, PA 15144

Dildred Pampin DILDRED PAMPIN 1609 MONROE ST, Pgh. PA 15218

Kathy Wilson 743 Grant St Springdale 15144

Christa Jones 309 S Atlantic Ave. Cheswick, Pa 15024

Paul J. Staller 316 Stonybrook Drive Cheswick Pa 15024

Joseph Connel 4433 Colden St. Springdale Pa) 15144

DEAK REMALEZ 700 MARION AVE SPRINGDALE 15144

Ernie Wang 202 Allegheny Ave Cheswick Pa 15024

M. Joseph Peterson 421 Butler St Springdale Pa 15144

John White 330 Sutter St Pgh PA 15230

Kurt Long 12E Lygier Ct New Kensington, PA 15068

Patrick Thibodeau Patrick Thibodeau 700 Pine Street Pgh, PA 15202

Paul B Anderson Paul B Anderson 347 Butler Street Springdale Pa 15144

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1001 at Route 28 and Guys Run Road..

NAME (SIGN) PRINT NAME ADDRESS (STREET, CITY AND ZIP CODE)

- ~~Margaret Prosko~~ M.O. Prosko 846 Orchard St, Harmar PA 15139
- ~~Chris Connor~~ Chris Connor 2521 Wertzler Dr Harmar 15232
- ~~Raymond Wood~~ 1037 KEENE ST Springdale Pa 15144
- ~~Chuck Henderson~~ Chuck Henderson PO Box 101 Springdale Pa
- ~~Darlene Walters~~ Darlene Walters Pitts St - Springdale
- ~~John Wayne~~ John Wayne 40 WERNER CAMP RD PA 15238
- ~~Frank Galore~~ Frank Galore 362 Laurel Hill Rd. Cheswick Pa 15029
- ~~Ann Meigs~~ Ann Meigs C. ANN MEIGS 2518 WENZEL DR, HARMAR 15238
- ~~Michael J. Pityk~~ Michael J. Pityk 320 FINNIN RD. NEW KEN. 15068
- ~~John Wood~~ John Wood 101 Wertzler Dr Harmar PA 15232
- ~~June Wood~~ June Wood PO Box 114 Venona PA 15147
- ~~Russell S. Galt~~ Russell S. Galt 1139 DANLIHS RD PA 15238
- ~~John Galt~~ John Galt (Galt) 401 W 9th Ave
- ~~John Galt~~ John Galt 73 W. 9th Ave Harmar 15239
- ~~John Galt~~ John Galt 113 W. 9th Ave Harmar 15238
- ~~John Galt~~ John Galt 115 FRANKLIN ST HARMAR PA 15084
- ~~John Galt~~ John Galt 2501 M. W. 7th DR PA 15238

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1001 at Route 28 and Guys Run Road..

NAME (SIGN)	PRINT NAME	ADDRESS (STREET, CITY AND ZIP CODE)
<i>Janice A. Kieley</i>	JAN KIELEY	715 OLDMILL RD PGM, PA 15238
<i>George Kieley</i>	George Kieley	2534 Wenzel Dr PGM, PA 15238
<i>Amy Olson</i>	Amy Olson	2536 WENZEL DR PGM PA 15238
<i>MARGARET OLSON</i>	Margaret Olson	2570 WENZEL DR PGM, PA 15238
<i>Marlene Lewis</i>	MARLENE LEWIS	2532 WENZEL DR PGM PA 15238
<i>Barbara A. Olson</i>	Barbara A. Olson	715 Old Mill Rd PGM, PA 15238
<i>Larry Olson</i>	Larry Olson	2510 Wenzel Dr PGM PA 15238
<i>Ronald C. Lewis Jr</i>	Ronald C. Lewis Jr	2532 Wenzel Dr PGM PA 15238
<i>William E. Meigs</i>	W E AM MEIGS	2518 Wenzel Dr 15238
<i>Frank Van Rosten</i>	Frank Van Rosten	4203 ROSTEN ALLEN PARK PA 15238
<i>Frank G. Lewis</i>	Frank G. Lewis	3102 Laurel Hill Rd Chewink PA 15024
<i>Eric J. Lewis</i>	ERIC LEWIS	1327 PINEBROOK ST CHEWINK PA 15024
<i>Eric J. Lewis</i>	Eric Lewis	" " " " " " " "
<i>Mark Beckman</i>	Mark Beckman	961 Garden City Dr Mansfield PA 15746
<i>Frank J. Kieley</i>	Frank J. Kieley	224 Fitzgerald Dr Summer 16055
<i>Paul D. Kieley</i>	Paul D. Kieley	-341 CLEVER ST SPR 15144

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1061 at Route 28 and Guys Run Road..

- | NAME (SIGN) | PRINT NAME | ADDRESS (STREET, CITY AND ZIP CODE) |
|--------------------|--------------------|---|
| <i>Joe Fogle</i> | JOE FOGLE | 928 MAIN ST Harwick Pa 15249 Alley |
| <i>[Signature]</i> | William Brannan | 2501 Wenzel Dr., Harmanville, Pgh. Pa. 15238 |
| <i>[Signature]</i> | Michael A. Wenzel | 7521 WENZEL Drive Harmanville, PA 15238 |
| <i>[Signature]</i> | Charles P. Roth | 750 6th St Cokinmont Pa 15139 |
| <i>[Signature]</i> | James B. Andrews | 129 BUCKNELL DR. SPRINGDALE, PA 15144 |
| <i>[Signature]</i> | John Schilling | 7313 1/2 BUTLER ST., PITTSBURGH, PA 15206 |
| <i>[Signature]</i> | Robert Genschler | 56 Wood St Madras Pa |
| <i>[Signature]</i> | Bob Genschler | 1144 Butler Rd Springdale, Pa 15244 |
| <i>[Signature]</i> | Rose M. Neathy | 323 S Home Ave Pittsburgh Pa 15202 |
| <i>[Signature]</i> | Joselynne Burrows | Residence Burrows 435 Starwood Avenue, Pa 15239 |
| <i>[Signature]</i> | Victor T. Castagna | 504 Wenzel Dr. Pgh PA 15238 |
| <i>[Signature]</i> | Victor T. Castagna | 504 Wenzel Dr. Pgh PA 15238 |
| <i>[Signature]</i> | Joe Fogle | 928 Main St Harmanville PA 15249 |
| <i>[Signature]</i> | Karen Burrows | 30 Joseph St Cheswick 15227 |

PETITION OPPOSING ELIMINATION OF PEDESTRIAN RAILROAD CROSSING

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

THE ATTACHED LETTER FROM NORFOLK SOUTHERN RAILROAD TO HARMAR TOWNSHIP GIVES CAUSE FOR THIS PETITION TO CIRCULATED AND SIGNED.

The undersigned oppose the removal of the pedestrian rail crossing as established by PUC APPLICATION DOCKET NUMBER 21878-1950; FURTHER; We respectfully request that the crossing be maintained to an acceptable, safe and intended condition; FURTHER, that the crossing be paved no less than 4' in width over the rail right of way with adequate steps to L.R. 1001 at Route 28 and Guys Run Road..

NAME (SIGN) PRINT NAME ADDRESS (STREET, CITY AND ZIP CODE)

Edward J. Corbett EDWARD J. CORBETT 355 STRATFORD AV PGH 15232

Ralph Prosser Ralph Prosser 2501 Wagon Rd 15238

Bernard Mazon BERNARD MAZON 30 COLFAX SPR.

Lois Fry LOIS FRY 110 Peachtree Lane Tarentum PA 15084

David E. For DAVID E. FOR 110 PEACHTREE LANE TARENTUM PA 15084

Eleanor P. Prueh ELEANOR P. PRUEH 3501 SHELBY BLVD, PITTSBURGH, PA. 15238

Kathy Prueh KATHY PRUEH 152 W. Main Ave., Chickadee, Pa 15004

Charles J. Prueh CHARLES J. PRUEH 57 MC KEARNEY BLVD, PITTSBURGH, PA 15029

Michael J. Prueh MICHAEL J. PRUEH 3525 SHELBY BLVD, PITTSBURGH, PA 15029

David E. For DAVID E. FOR 110 PEACHTREE LANE TARENTUM PA 15084

Lois Fry LOIS FRY 110 PEACHTREE LANE TARENTUM PA 15084

Lois Fry LOIS FRY 110 PEACHTREE LANE TARENTUM PA 15084

Miguel McMeas MIGUEL MCMERAS 449 GUYS RUN HWY HARMAR 15238

James J. Prueh JAMES J. PRUEH 527 GUYSON RD HARMAR 15038

James J. Prueh JAMES J. PRUEH 527 GUYSON RD HARMAR 15038

James J. Prueh JAMES J. PRUEH 527 GUYSON RD HARMAR 15038

James J. Prueh JAMES J. PRUEH 527 GUYSON RD HARMAR 15038



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

IN REPLY PLEASE
REFER TO OUR FILE

ORIGINAL

March 25, 2004

Mr. James J. McNulty, Secretary
Pa. Public Utility Commission
2nd Floor, 400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Docket No C-20030526

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine copies of the Bureau of Transportation and Safety's Brief in the above referenced matter. With a copy of this letter, I am sending copies of the enclosed to those persons listed on the Certificate of Service.

Very truly yours,

David A. Salapa
Assistant Counsel

Enclosures

DOCUMENT
FOLDER

SECRETARIAT & BUREAU

RECEIVED
MARCH 25 2004

34

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township

v.

Norfolk Southern Railway Company

Docket No. C-20030526

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

DOCUMENT
FOLDER

David A. Salapa
Assistant Counsel

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2841

Dated: March 25, 2004

SECRETARY'S BUREAU

DOCKETED

MAR 25 2004

PROCEDURAL HISTORY

This matter began when Harmar Township (Township) filed a complaint with the Pennsylvania Public Utility Commission (Commission) on June 11, 2003. The complaint alleges that Norfolk Southern Railway Company (Norfolk Southern), has failed to maintain an at grade pedestrian crossing over Norfolk Southern's facilities located in Harmar Township, Allegheny County. The complaint asserts that the pedestrian crossing at this location was created by an order of the Pennsylvania Public Service Commission at Application Docket No. 21878-1930. The Pennsylvania Public Service Commission order directed that an existing vehicular crossing be altered to create a four foot wide pedestrian crossing and directed the Pennsylvania Railroad, then the railroad operator at this location, to maintain the pedestrian crossing in the future. The Township's complaint requests that the Commission order Norfolk Southern to comply with the Pennsylvania Public Service Commission order, repair the crossing and maintain it in the future.

The Pennsylvania Department of Transportation (DOT) filed an answer to the Township's complaint denying the allegations set forth in the complaint and requesting that the Commission schedule a field conference at the site of the crossing. Allegheny County filed an answer to the Township's complaint agreeing that Norfolk Southern was responsible for maintaining the crossing pursuant to the prior Pennsylvania Public Service Commission order.

Norfolk Southern filed an answer and new matter on August 18, 2003. Norfolk Southern's answer and new matter contend that the Commission has no jurisdiction over pedestrian crossings and requests that the Commission dismiss the complaint. Norfolk Southern also filed a preliminary motion alleging that the Commission has no jurisdiction over pedestrian crossings and asserting that any previous order asserting jurisdiction over the pedestrian crossing was without effect. Norfolk Southern requests in both its answer and new matter and

preliminary motion that the Commission dismiss the Township's complaint. The Township filed a response to Norfolk Southern's new matter and preliminary motion on July 30, 2003, denying the assertions in Norfolk Southern's new matter and preliminary motions.

By letter dated October 29, 2003, the Commission assigned the matter to Administrative Law Judge (ALJ) John H. Corbett, Jr., and set the matter for hearing on January 29, 2004. By order dated January 14, 2004 ALJ Corbett issued an interim order stating that he was taking Norfolk Southern's motion to dismiss under advisement.

ALJ Corbett conducted a hearing on this matter on January 29, 2004. At the hearing, the Township presented evidence that the pedestrian crossing is located on a line of railroad parallel to and between the Allegheny River and Freeport Road. (Township Exhibit No. 1) Some homes and businesses are located between the railroad tracks and the Allegheny River. (N.T. 20, Township Exhibit 7a-7c). Other businesses are located on the opposite side of Freeport Road from the railroad tracks. (N.T. 21)

The Township presented evidence that the Pennsylvania Public Service Commission had issued an order in 1930 altering the crossing from a vehicular crossing to a pedestrian crossing. (Township Exhibits 2-4) Township witnesses testified that there is no longer any crossing surface between Norfolk Southern's rails at the crossing location or anywhere within the railroad right-of-way. (N.T. 21-23, Township Exhibit 8b) Township witnesses testified that individuals use the pedestrian crossing to access restaurants, banks and other businesses located along Freeport Road from houses, a bar and a boat dock located on the opposite side of the tracks. (N.T. 23, 29-30) In addition, there is a pedestrian crosswalk on Freeport Road adjacent to the pedestrian crossing of Norfolk Southern's facilities that is signalized, enabling pedestrians to cross Freeport Road and access the pedestrian crossing over Norfolk Southern's facilities. (N.T.

25-26, Township Exhibits 9a-9c) According to the Township, the approach to the crossing located between the railroad tracks and the Allegheny River has never been vacated by the Township. (N.T. 37) The Township wants the railroad to reinstall planking or paving within its right-of-way in order to make the pedestrian crossing smoother. (N.T. 39) According to the Township, prior railroad operators maintained the pedestrian crossing first with a timber and asphalt surface and later with an asphalt surface. (N.T. 43-44) The Township indicates that the asphalt paving within the railroad right-of-way was removed several years prior to the date the Township filed the complaint. (N.T. 44) Township residents also testified that they had seen people with bicycles using the crossing. (N.T. 76)

Norfolk Southern presented evidence that railroad traffic on the line is currently 16 trains per day at a maximum speed of 40 miles per hour. (N.T. 108) Norfolk Southern believes that the amount of rail traffic on this rail line will increase due to increased coal traffic traveling to power plants. (N.T. 109) Norfolk Southern is concerned about the safety of pedestrians using the crossing due to the speed of trains traveling on the rail line. (N.T. 119) Norfolk Southern is also concerned that pedestrians standing adjacent to the tracks could be injured by debris hanging from the passing trains. (N.T. 119-120)

By letter dated February 27, 2004, ALJ Corbett directed the parties to file Main Briefs on or before March 26, 2004. This is the Bureau of Transportation and Safety's Main Brief

SUMMARY OF ARGUMENT

In this proceeding, the Commission does not have jurisdiction over a crossing where it is strictly for pedestrian use. The 1930 Pennsylvania Public Service Commission order altered the subject crossing from vehicular crossing to a four foot wide pedestrian crossing and specifically designated it as a pedestrian crossing. In addition, the steps leading from Freeport Road to the railroad tracks would indicate that the intent of the order was that the crossing be only used by pedestrians. Since the Public Utility Code defines highway as a right-of-way used by vehicular traffic and vehicles do not use this crossing, the subject crossing is not a rail highway crossing within the Commission's jurisdiction found at 66 Pa. C.S. §2702 & 2704.

However, the Commission does have the authority to enforce its orders pursuant to 66 Pa. C.S. §501-503 & 66 Pa. C.S. §701. In this case, the Township filed a complaint pursuant to 66 Pa. C.S. §701 requesting that the Commission enter an order directing Norfolk Southern to comply with the Pennsylvania Public Service Commission order. The Pennsylvania Public Service Commission entered the order pursuant to an application to alter the subject crossing and to create a new crossing. This was within the jurisdiction of the Pennsylvania Public Service Commission. Since the Pennsylvania Public Service Commission had jurisdiction to alter the crossing, the order is valid and enforceable. Therefore, the Commission can order Norfolk Southern to comply with the terms and conditions of that order.

ARGUMENT

I. THE PENNSYLVANIA PUBLIC UTILITY COMMISSION DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE SUBJECT CROSSING PURSUANT TO 66 PA. C.S. §2702 & §2704 WHERE THE CROSSING IS LIMITED TO USE BY PEDESTRIANS.

The Commission has the exclusive authority, pursuant to 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the exclusive authority to determine and order which party shall perform such work at the crossing and which party shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. SEPTA v. Pa. PUC, 592 A.2d 797 (Pa. Cmwlth. 1991), alloc. denied, 611 A.2d 714 (Pa. 1992). The Commission, pursuant to 66 Pa. C.S. §2702(b), determines and prescribes the manner in which such crossings may be constructed, altered, relocated, suspended, abolished, maintained, operated or protected. The Commission, pursuant to 66 Pa. C.S. §2702(c), orders the relocation, alteration, suspension or abolition of a crossing upon such reasonable terms and conditions as the Commission prescribes. Pennsylvania Game Commission v. Pa. PUC, 651 A.2d 596 (Pa. Cmwlth. 1994), alloc. denied, 644 A.2d 977 (Pa. 1995).

Additionally, the Commission, pursuant to 66 Pa. C.S. §2704(a), has the exclusive authority to assess the costs of any work it orders upon the concerned parties to a proceeding in such proper proportions as the Commission may determine. The Commission determines what parties are concerned within the meaning of 66 Pa. C.S. §2704(a) and §2702(c). County of Chester v. Pa. PUC, 408 A.2d 552 (Pa. Cmwlth. 1979); Consolidated Rail Corp. v. Pa. PUC, 671 A.2d 24 (Pa. Cmwlth. 1995). In apportioning costs in rail highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. Wheeling and Lake Erie Railway

Co. v. Pa. PUC, 778 A.2d 785 (Pa. Cmwlth. 2001), alloc. denied, 790 A.2d 1021 (Pa. 2001); Greene Twp. v. Pa. PUC, 668 A.2d 651 (Pa. Cmwlth. 1995); AT&T v. Pa. PUC, 737 A.2d 201 (Pa. 1999).

Among the factors that the Commonwealth Court noted in the Greene Twp. case as relevant are the following: (1) Which party built the crossing; (2) Whether the roadway existed before or after the construction of the crossing; (3) Relative benefit conferred on each party with the construction of the crossing; (4) Whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) The relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors the Commission can consider. Bell Atlantic-Pa. Inc. v. Pa. PUC, 672 A.2d 352 (Pa. Cmwlth. 1996); AT&T v. Pa. PUC, 727 A.2d 201 (Pa. 1999); PECO Energy Co. v. Pa. PUC, 791 A.2d 1155 (Pa. 2002).

As the complainant in this case, the Township has the burden to establish its case before the Commission by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. PUC, 578 A.2d 600 (Pa. Cmwlth. 1990). The evidence that the Township presents must be substantial and legally credible. The Township must establish by a preponderance of the evidence that it is entitled to the relief requested in its complaint.

The Commission has jurisdiction over rail highway crossings pursuant to 66 Pa. C.S. §2702 and 2704. The general rule granting jurisdiction over rail highway crossings is set forth in 66 Pa. C.S. §2702(a) as follows:

"No public utility engaged in the transportation of passengers or property, shall, without prior order of the Commission, construct its facilities across the facilities of any other such public utility or cross any highway at grade or above or below grade or at the same or different levels, and no highway without like order, shall

be so constructed across the facilities of any such public utility, and, without a like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished." (emphasis added)

Therefore, in order for a rail highway crossing to be within the Commission's jurisdiction as set forth above, the road or street involved must be a highway. The Public Utility Code defines the term "highway" at 66 Pa. C.S. §102 as follows:

"A way or place of whatever nature opened to the use of the public as a matter of right for purposes of vehicular traffic."

For a road or path to be a highway within the meaning of 66 Pa. C.S. §102, that road must meet two criteria. First, the road must open to the use of the public as a matter of right and second it must be opened for the purpose of vehicular traffic. Consolidated Rail Corp. v. Pa. PUC, 463 A.2d 90 (Pa. Cmwlth. 1983).

As to the first criteria, if a road or street is opened to the use of the public, as a matter of right, it is a highway. However, if the road or street is not opened to the use of the public, as a matter of right, it is not a highway as defined by the Public Utility Code. City of Bethlehem v. Pa. PUC, 627 A.2d 244 (Pa. Cmwlth. 1993); Township of Swatara v. Pa. PUC, 312 A.2d 809 (Pa. Cmwlth. 1973); Reading Company v. Pa. PUC, 333 A.2d 525 (Pa. Cmwlth. 1975); Delaware, Lackawanna and Western Railway Co. v. Shuman, 115 A.2d 161 (Pa. 1955). The language set forth above in 66 Pa. C.S. §2702(a) and 66 Pa. C.S. §102 is identical throughout the above cited cases. See City of Bethlehem v. Pa. PUC, 627 A.2d 244, 246 n.3 (Pa. Cmwlth. 1993).

In this case, it would appear that the street in question is open to the public as a matter of right. The prior order of the Pennsylvania Public Service Commission directed the highway crossing to be converted to a four foot wide pedestrian crossing. Nothing in that order directed the Township to vacate the road. The Township presented evidence that the path leading to the

pedestrian crossing was never vacated and is open to the public. (N.T. 37) The Township also presented evidence that it maintained the path and cut vegetation in the summer to keep the path open. (N.T. 23, 50, 70)

Assuming that the thoroughfare is open to the public as a matter of right, the street must also be open for purpose of vehicular traffic to be considered a highway pursuant to 66 Pa. C.S. §102. The Commonwealth Court has construed the phrase "vehicular traffic" very broadly. In Consolidated Rail Corp. v. Pa. PUC, 463 A.2d 90 (1983), the Commonwealth Court ruled that bicycles using a road or path constitute vehicular traffic and that a path intended for use by bicycles as well as pedestrians constitutes a highway for purposes of 66 Pa. C.S. §102. However, the Commonwealth Court has also ruled that a bridge constructed solely for pedestrian use is not a highway as defined by 66 Pa. C.S. §102 because no vehicular traffic was intended or permitted. County of Bucks v. Pa. PUC, 684 A.2d 678 (Pa. Cmwlth. 1996).

Therefore, it appears that the crossing must be either intended or permitted for use by vehicles for a path to be considered a "highway" pursuant to 66 Pa. C.S. §102. From that it would appear that occasional non-permitted use of a path by vehicles may not be sufficient for the path to be considered a "highway" pursuant to 66 Pa. C.S. §102.

In this case, the crossing does not appear to have been intended or permitted for use by vehicles. There is some evidence that the path is used occasionally by people with bicycles. (N.T. 29, 34, 50, 76-77) However, it appears that the people with bicycles are not riding them across the crossing but are walking across the crossing carrying their bicycles. (N.T. 29, 77) Strictly speaking people walking their bicycles across the crossing are still pedestrians. The steps between the crossing and Freeport Road impede individuals from riding a bicycle or any

other vehicle across the crossing (N.T. 29, 77) The Commission can therefore infer that the crossing was not altered with the intent that it be used by bicycles or other vehicles.

In addition, the Pennsylvania Public Service Commission order creating the pedestrian crossing intended that it be used only by pedestrians. The prior order specifically identifies the altered crossing as pedestrian, not pedestrian and vehicular. The order states that it is altering the crossing from a vehicular and pedestrian crossing to a pedestrian crossing. (Township Exhibit #4) If the Pennsylvania Public Service Commission had intended the four foot wide crossing to be used by vehicles as well as pedestrians the order would not have stated that crossing was altered to a pedestrian crossing. There would have been no reason to alter the crossing since the existing vehicular crossing already served both pedestrians and vehicles. It is clear by the wording of the order that the Pennsylvania Public Service Commission intended that the altered crossing be limited to pedestrians. People who occasionally walk their bicycles across the crossing or drive other vehicles over the crossing (N.T. 50) do not change the intended use of the crossing.

The Pennsylvania Public Service Commission order intended that the altered crossing be used only by pedestrians. The regular users of this crossing are pedestrians, going from the residential area adjacent to the Allegheny River to the other side of Freeport Road or going from the other side of Freeport Road to the Allegheny River, the local tavern or marina. (N.T. 29-30, 33-35, 75-77, 87-90, 95-96)

The Commission has only such authority as is provided by its statute. City of Philadelphia v. Philadelphia Electric Co., 473 A.2d 997 (Pa. 1984). If the Public Utility Code does not authorize the Commission to assume jurisdiction over a particular type of crossing pursuant to 66 Pa. C.S. §2702 & 2704, the Commission cannot take jurisdiction over that

crossing. In this case, the statute by its wording, limits Commission jurisdiction to highway crossings. Highway in turn is specifically defined as a way open to the public as a matter of right for vehicular traffic. There is no evidence of record to support the proposition that this pedestrian way is or was ever intended for use by vehicular traffic.

The Township as the complainant has the burden of proof to establish its case before the Commission by a preponderance of evidence. Samuel J. Lansberry, Inc. v. Pa. PUC, 578 A.2d 600 (1990). Part of that burden of proof is proving facts necessary to establish subject matter jurisdiction. The Township has failed to establish by preponderance of the evidence that the crossing in question is or was ever intended to be a way open to the use of the public as a matter of right for vehicular traffic. Therefore, the Commission should dismiss the complaint to the extent that it requests the Commission to exercise jurisdiction pursuant to 66 Pa. C.S. §2702 & 2704.

II. THE COMMISSION HAS THE AUTHORITY TO ENFORCE THE ORDER OF THE PENNSYLVANIA PUBLIC SERVICE COMMISSION.

Although as argued above, the subject crossing is not a rail highway crossing within the Commission's jurisdiction pursuant to 66 Pa. C.S. §2702 & 2704, the Commission retains authority pursuant to 66 Pa. C.S. §501-503 to enforce its orders. The Commission may also, pursuant to 66 Pa. C.S. §701, hear complaints regarding violation of Commission orders. Pa. PUC v. Norfolk and Western Railway Co., 461 A.2d 1353 (Pa. Cmwlth. 1983); Waddington v. Pa. PUC, 670 A.2d 199 (Pa. Cmwlth. 1995); West Penn Power Co. v. Pa. PUC, 659 A.2d 1055 (Pa. Cmwlth. 1995)

In this case the Pennsylvania Public Service Commission at Application Docket No. 1878-1930, ordering paragraph No. 3, ordered the vehicular at grade crossing altered and converted to a four foot wide planked or paved pedestrian crossing. The order at Paragraph No.

7 directed the Pennsylvania Railroad, then the railroad operator at this location, to maintain the pedestrian crossing. No subsequent order of the Pennsylvania Public Service Commission or Pennsylvania Public Utility Commission has modified or rescinded the order at Application Docket No. 21878-1930. The Township is requesting the Commission to order Norfolk Southern as the current railroad operator to maintain the pedestrian crossing pursuant to the Pennsylvania Public Service Commission order. The Commission has held that successor railroads may be responsible for maintenance obligations of their predecessors at rail highway crossings. Consolidated Rail Corp. v. Pa. PUC, 423 A.2d 1108 (Pa. Cmwlth. 1980); Pa. PUC v. SEPTA, 343 A.2d 371 (Pa. Cmwlth. 1975).

In response, Norfolk Southern alleges in its preliminary motion that the Commission has no jurisdiction pursuant to 66 Pa. C.S. § §2702 and 2704 over pedestrian crossings citing County of Bucks v. Pa. PUC, 684 A.2d 678 (Pa. Cmwlth. 1996). Norfolk Southern's reliance on the Bucks County case is misplaced. While Norfolk Southern is correct that the Commission cannot exercise jurisdiction over a pedestrian crossing pursuant to 66 Pa. C.S. §§2702 and 2704, the County of Bucks case does not address the issue of enforcing a previous Commission order.

In the County of Bucks case, AMTRAK filed an application to abolish a crossing where the Central Avenue pedestrian bridge crossed over its facilities. In response, the Commission ordered AMTRAK, at its initial cost, to remove the stairways to the bridge and barricade it to pedestrians. The Commission order stated further that the Commission would conduct a hearing to allocate the costs of the stairway removal and determine final disposition of the balance of the structure. At the subsequent hearing, AMTRAK requested permanent closure of the structure rather than its removal. The Commission issued an order directing that the structure be left in

place and allocating the cost of the stairway removal 75% to Bucks County and 25% to Bristol Township

Bucks County appealed the Commission's order to Commonwealth Court contending that the Commission lacked jurisdiction over the crossing pursuant to 66 Pa. C.S. §2702 & 2704 because the crossing involved a pedestrian only bridge and that the Commission could therefore not allocate the cost of the stairway removal pursuant to 66 Pa. C.S. §2704. The Commonwealth Court agreed that the Commission had no jurisdiction over the pedestrian crossing pursuant to 66 Pa. C.S. §2702 to order AMTRAK to remove the stairways and therefore had no authority under 66 Pa. C.S. §2704 to allocate the cost of the stairway removal to Bucks County.

In this case, Harmar Township has not filed a complaint requesting that the Commission order the pedestrian crossing altered pursuant to 66 Pa. C.S. §2702 or to have the Commission allocate the cost of an alteration pursuant to 66 Pa. C.S. §2704. The Township is alleging in its complaint, filed pursuant to 66 Pa. C.S. §701, that Norfolk Southern is violating the provisions of the Pennsylvania Public Service Commission order and requesting that the Commission enforce the previous order by directing Norfolk Southern to maintain the pedestrian crossing consistent with the Pennsylvania Public Service Commission order. The Commission has previously granted such relief in a similar case. (Staff Exhibit No. 1) Since Harmar Township is not asking the Commission to exercise jurisdiction over the crossing pursuant to 66 Pa. C.S. §§ 2702 and 2704, the ruling in the County of Bucks case is inapplicable to this proceeding and the Commission retains the authority to enforce the order of the Pennsylvania Public Service Commission.

Norfolk Southern also alleges in its preliminary motion that the prior assertion of jurisdiction over the pedestrian crossing by the Pennsylvania Public Service Commission was

without effect and that the Pennsylvania Public Service Commission order assigning maintenance responsibilities for the pedestrian crossing to the Pennsylvania Railroad also was without effect. Norfolk Southern's contentions misstate the factual background of the Pennsylvania Public Service Commission Order and fail to distinguish between Commission subject matter jurisdiction and its authority to order a particular result. Norfolk Southern also fails to recognize that the un-appealed Pennsylvania Public Service Commission Order is entitled to preclusive effect as res judicata.

The Pennsylvania Public Service Commission did not assert jurisdiction over a pedestrian crossing. The Pennsylvania Railroad filed an application with the Pennsylvania Public Service Commission requesting that the Commission approve the alteration of a vehicular crossing by converting it into a four foot wide pedestrian crossing, approve the abolition of another vehicular crossing and approve the creation of a new at grade vehicular crossing at a different location. (Township Exhibit 2). The Pennsylvania Public Service Commission had the same jurisdiction as the current Public Utility Commission has over rail highway crossings to order the alteration, abolish and construction of the at grade crossings in question. See Act of July 26, 1913, P.L. 1374, Article V, Section 12. In conjunction with that subject matter jurisdiction, the Pennsylvania Public Service Commission could prescribe the manner in which the crossings were altered, abolished or constructed. Therefore, the Pennsylvania Public Service Commission did not lack subject matter jurisdiction over the Pennsylvania Railroad's application to alter, abolish and construct a rail highway crossing. The Pennsylvania Public Service Commission's order directing the alteration of the crossing was a valid exercise of its jurisdiction.

Whether the Pennsylvania Public Service Commission had the power to order a vehicular crossing converted to a pedestrian crossing is a different matter. The Pennsylvania Public

Service Commission's enabling act did not define "highway" as the Public Utility Code currently does. Therefore it is arguable that the Commission exceeded its authority by ordering a vehicular crossing converted to a pedestrian crossing. However, even if the Pennsylvania Public Service Commission had no power to order a vehicular crossing converted to a pedestrian crossing, that lack of power does not render the Pennsylvania Public Service Commission order without effect and unenforceable.

As the Pennsylvania Supreme Court stated in Delaware River Port Authority v. Pa. PUC, 182 A.2d 682 (Pa. 1962), the terms "jurisdiction" and "power" are not interchangeable. Jurisdiction relates to the competency of a tribunal to determine controversies of a certain class while power means the ability of the tribunal to order a certain result. As stated above, the Pennsylvania Public Service Commission had jurisdiction over the construction, alteration and abolition of vehicular rail highway crossings. The Pennsylvania Public Service Commission may or may not have had power to order one of those crossings converted into a pedestrian crossing. However, the time for challenging the validity of the Pennsylvania Public Service Commission's order has long passed. The Pennsylvania Supreme Court stated in Delaware River Port Authority v. Pa. PUC, 182 A.2d 682 (Pa. 1962), quoting Burke v. Pittsburgh Limestone Corporation, 100 A.2d 595 (Pa. 1953)

"Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them. The comment, b, states: 'The principle stated in this section is applicable although the judgment was erroneous, either on the law or the facts. The unsuccessful party has an opportunity to attack the judgment by steps properly taken in the action in which the judgment is rendered. He may take proceedings in the trial court to have the judgment set aside. He may take proceedings in an appellate court to have it reversed. He cannot, however, in a subsequent action relitigate the matters determined by the judgment.' Thus any mistakes in the original judgment are wrapped up in that judgment and cannot be inquired into thereafter" (Emphasis added)

In this case the Pennsylvania Public Service Commission had jurisdiction over the parties and the cause of action and it issued an order deciding the matter. None of the parties to the Pennsylvania Public Service Commission proceeding appealed the order or otherwise challenged the power of the Commission to order the crossing converted. Norfolk Southern as successor in interest to the Pennsylvania Railroad, cannot now use this proceeding to challenge the validity of the Pennsylvania Public Service Commission order entered more than seventy years ago. The order therefore remains valid and enforceable.

The only difference between this case and the Delaware River Port Authority case is that the Pennsylvania Public Service Commission's order in this case was not affirmed by an appellate court. However, un-appealed decisions of Commonwealth administrative agencies are entitled to res judicata effect where the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which parties had an opportunity to litigate. Kentucky-West Virginia Gas v. Pa. PUC, 721 F.Supp. 710 (M.D.Pa. 1989), aff'd 899 F.2d 1217 (3rd Cir. 1990). Here the Pennsylvania Public Service Commission acted in a judicial capacity and it resolved any issues with regard to the conversion of the subject crossing from vehicular to pedestrian. The Pennsylvania Public Service Commission order is therefore entitled to res judicata effect.

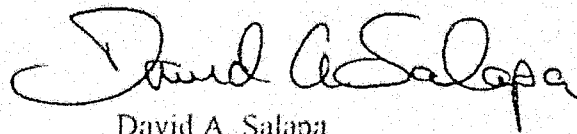
While 66 Pa. C.S. §703 (g) grants the Commission authority to modify prior orders, the Pennsylvania Supreme Court has stated that this power should be used sparingly because it would result in the disturbance of final orders. City of Pittsburgh v. Pa. Department of Transportation, 416 A.2d 461 (Pa. 1980); City of Philadelphia v. Pa. PUC, 720 A.2d 845 (Pa. Cirwlt, 1998), aff'c denied, 742 A.2d 677 (Pa. 1999). Norfolk Southern has not in this case

requested that the Commission modify the Pennsylvania Public Service Commission order. In the absence of a request to modify it, the Pennsylvania Public Service Commission order remains valid and enforceable.

CONCLUSION

The Commission has jurisdiction over rail highway crossings pursuant to 66 Pa. C. S. §2702. In order for a road to be a highway within the meaning of Section 2702, the road must be open to the public as a matter of right and be open to vehicular traffic. Because there is no evidence presented in this case to establish the elements required for Commission jurisdiction, the Commission should dismiss its complaint in so far as it requests that the Commission exercise jurisdiction pursuant to 66 Pa. C.S. §2702. However, the Commission should enforce the provisions of the Pennsylvania Public Service Commission's order as they relate to the pedestrian crossing.

Respectfully submitted,



David A. Salapa
Assistant Counsel

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 873-2843

Dated: March 25, 2004

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, pursuant to 52 Pa. Code §1.54.

Service by first class mail addressed as follows:

Honorable John H. Corbett, Jr.,
Administrative Law Judge
Pa. Public Utility Commission
1103 Pittsburgh State Office Building
360 Liberty Avenue
Pittsburgh, PA 15222-1210

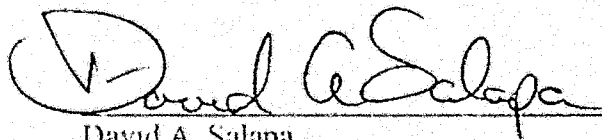
Benjamin C. Dunlap, Jr., Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North 3rd Street, 18th Floor
P O Box 840
Harrisburg, PA 17108-0840

Spawn N. Gallagher, Esquire
Springer, Bush & Perry PC
2 Gateway Center, 15th Floor
Pittsburgh, PA 15222-1402

Jason D. Sharp, Esquire
Pennsylvania Department of Transportation
Commonwealth Keystone Building
2nd Floor
P O Box 8212
Harrisburg, PA 17105-8212

P O Box 3265
Harrisburg, PA 17105-3265
(717) 783-2841

Dated: March 25, 2004



David A. Salapa
Assistant Counsel
Law Bureau

SECRETARY'S BUREAU

MAR 25 2004



Friday, March 26, 2004

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

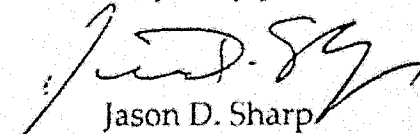
ORIGINAL

RE. Hamar Township v. Norfolk Southern
DOT-2003-SLAP-0031173
Main Brief C-20030526

Dear Secretary McNulty:

Enclosed please find an original and nine (9) copies of the Department's Main Brief in the above captioned matter. The Brief has been served on the parties of record in the manner indicated in the attached certificate of service. If you have any further questions, please feel free to give me a call. Thank you for your attention to this correspondence.

Very truly yours,

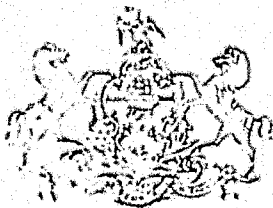


Jason D. Sharp
Assistant Counsel

DOCUMENT
FOLDER

220/JDS/be
jsharp@state.pa.us

cc: Administrative Law Judge John Corbett
Gary C. Fawver, P.E., Chief, R/W & Util. Div., 7th Flr., CKB
Malek A. Francis, District 11-0
Parties of Record



GOVERNOR'S OFFICE OF GENERAL COUNSEL
TELEPHONE 717 787 3128
FAX 717.772.2741
www.dot.state.pa.us

SECRETARIAT'S BUREAU

2004 MAR 25 PM 1:27

REC'D 11:20

15

Pennsylvania Department of Transportation

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township
Complainant

v.

Norfolk Southern Railway Company
Respondent

Commonwealth of Pennsylvania,
Department of Transportation

Additional Respondent

Docket No. C-20030526

SECRETARIAT'S BUREAU

RECEIVED
MARCH 26 11:27

RECEIVED

ORIGINAL

MAIN BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION

DOCUMENT
FOLDER

DOCKETED
MAR 30 2004

Jason D. Sharp
Assistant Counsel
Supreme Court I.D. Number 80488

Commonwealth of Pennsylvania
Department of Transportation
400 North Street
PO Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128

Friday, March 26, 2004

STATEMENT OF THE QUESTIONS PRESENTED

- I. DOES THE PENNSYLVANIA PUBLIC UTILITY COMMISSION HAVE JURISDICTION OVER THE SUBJECT PEDESTRIAN CROSSING?

Suggested answer: No.

- II. SHOULD THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION BE ALLOCATED ANY OF THE COSTS OR RESPONSIBILITIES RELATED TO THE MAINTENANCE, REHABILITATION OR POTENTIAL RECONSTRUCTION OF THE SUBJECT PEDESTRIAN CROSSING?

Suggested answer: No.

PROCEDURAL HISTORY

By letter dated February 27, 2004, Administrative Law Judge John Corbett directed the parties to file Main Briefs on or before March 26, 2004. This is the main brief of the Pennsylvania Department of Transportation.

The Pennsylvania Department of Transportation adopts by reference, as if set forth at length, the procedural history set forth in the main brief of the Public Utility Commission's Bureau of Transportation and Safety.

SUMMARY OF THE ARGUMENT

The Pennsylvania Public Utility Commission (Commission) lacks jurisdiction over a purely pedestrian crossing. A prior Pennsylvania Public Service Commission order directed that a rail-highway crossing be converted into a pedestrian crossing. Because the crossing here is strictly for the use of pedestrians and is not a "highway" as defined by the Commission, the Commission lacks jurisdiction under 66 Pa. C.S. §§ 2702, 2704.

The Commission may enforce the terms and conditions of prior orders. In this case, the prior order of the Pennsylvania Public Service Commission assigns crossing maintenance responsibility and the related costs to parties other than the Pennsylvania Department of Transportation (Department). Therefore, any enforcement action is only properly directed at those parties subject to the prior Pennsylvania Public Service Commission order.

The Department has no responsibility for the maintenance, rehabilitation or reconstruction of the subject pedestrian crossing. The crossing is of no benefit to the State highway system. The Commission has allocated maintenance responsibility to parties other than the Department in the past for this crossing. The Commission must

continue to look to parties other than the Department to perform maintenance in the future.

ARGUMENT

The Commission has exclusive jurisdiction over rail-highway crossings in Pennsylvania. 66 Pa. C.S. §§ 2702, 2704; *County of Bucks v. Pa. P.U.C.*, 684 A.2d 678 (Pa. Cmwlth. 1996). The Commission may allocate costs related to the alteration, maintenance, repair or removal of a crossing. *Id.* The Commission's decision is not governed by any fixed rule, only that its decision must be just and reasonable. *City of Philadelphia v. Pennsylvania PUC*, 676 A.2d 1298, 1301 (Pa. Cmwlth 1995), *alloc. denied* 684 A.2d 558 (1996), *cert. denied* 117 S.Ct. 1334; 137 L.Ed.2d 494 (1997). The Commission's paramount goals in regulating crossings are to prevent accidents and promote public safety. 66 Pa. C.S. § 2702 (b).

I. THE PUBLIC UTILITY COMMISSION LACKS JURISDICTION OVER THE SUBJECT PEDESTRIAN CROSSING.

The Commission has jurisdiction over rail highway crossings pursuant to 66 Pa. C.S. §§ 2702, 2704. The Public Utility Code (Code) defines the term "highway" as a "way or place of whatever nature opened to the use of the public as a matter of right for purposes of *vehicular* traffic." 66 Pa. C.S. § 102 (emphasis added). A "highway" must be open to the use of the public for vehicular traffic as a matter of right. *See Consolidated Rail Corp. v. Pa. PUC*, 463 A.2d 90, 92 (Pa. Cmwlth. 1983).

The key question of jurisdiction centers on whether or not the subject crossing is a pedestrian only crossing, or if it is a crossing that was meant to accommodate "vehicles" under the Code, thus making it the crossing of a railroad and a "highway." In *Consolidated Rail Corporation*, a local township proposed to create a seven mile long bikeway, intended for the use of persons riding bicycles, other non-motorized vehicles and for pedestrians. Conrail argued that the Commission had no jurisdiction in the case, claiming that the crossing of the bikeway and the rail line was not a public crossing. However, the Commonwealth Court rejected this view, finding that the Commission had jurisdiction because numerous bicycles and other "non-motorized means of conveyance in motion" would constitute vehicular traffic under the Code. *Id.*

However, in *County of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678 (Pa. Cmwlth. 1996), the Commonwealth Court held that the Commission does not have jurisdiction over a pedestrian-only crossing. The Court distinguished *Conrail v. PUC, supra*, stating:

Although bicycle travel is considered vehicular traffic, a bridge constructed solely for pedestrian use is not a highway as defined by the Code because no "vehicular traffic" was intended or permitted.

Id. at 681-682. Therefore, it must be determined if the subject crossing was more like that crossing in *County of Bucks* (pedestrian only) or *Consolidated Rail Corporation* (a dedicated bikeway open to the public).

All of the evidence in this case suggests that the crossing is for pedestrian use only. Indeed, there was only scant reference to use by cyclists, and even those accounts revealed that cyclists ride up to the crossing and carry their bicycles over the crossing. NT 29, 77. Moreover, the physical configuration of the crossing itself discourages all but pedestrian activity. The approach to the crossing from Freeport Road is steep and has a set of stairs installed to traverse the embankment. Township Exhibit # 8G, 8H, 8I; NS Exhibit # 1; NS Exhibit # 3. Clearly, the presence of stairs indicates that a pedestrian use was contemplated.

Moreover, the 1930 order specifically converted the crossing from a vehicular crossing to a pedestrian crossing. Township Exhibit #4. The order appears to limit the use of the crossing to pedestrians only. Taking the order and the evidence of record together, it is just and reasonable for the Commission to conclude that the crossing was ordered to be altered with the intent that it be a pedestrian crossing only.

Although the subject crossing is not a rail-highway crossing, the Commission does have the ability to enforce its prior orders. 66 Pa. C.S. §§ 501-503, 701. However, it must be noted that while the Commission may modify prior orders, the Commission here is without the independent jurisdiction to reallocate any of the responsibilities as set forth in the 1930 order, because it lacks the specific subject matter jurisdiction over the crossing. Indeed, the Commission could not seek to impose new crossing related costs or responsibilities where it maintains no current jurisdiction over the crossing. Its sole power here is to enforce the prior order, if the request by Hamar Township is ultimately deemed to have merit.

II. ANY ALLOCATION OF COSTS OR MAINTENANCE RESPONSIBILITY AGAINST THE DEPARTMENT FOR THE SUBJECT CROSSING IS UNWARRANTED BECAUSE THE DEPARTMENT DERIVES NO BENEFIT FROM THE CROSSING.

The Department has no interest in, and receives no benefit from, the subject crossing. Any allocation of costs or maintenance responsibility for a crossing must be just and reasonable and based upon substantial evidence. *City of Phila. v. Pa. PUC*, 822 A.2d 94, 102 (Pa. Cmwlth. 2003). In this case, there is no substantial evidence that would support an allocation to the Department for this pedestrian crossing.

The pedestrian crossing provides no benefit to the general state transportation network. There is no evidence that any State highway traffic uses the crossing at all. Rather, testimony revealed that motor vehicles cannot utilize the crossing. NT 50. The crossing is utilized by pedestrians and the occasional cyclist who must carry his or her bicycle over the crossing because of the steps at the location. NT 29, 77.

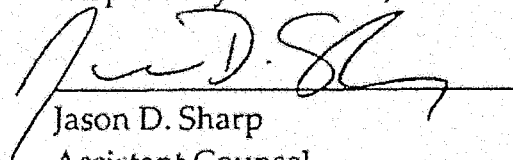
Under the facts of this case, no allocation - not even a even a token allocation - would be warranted because there is no evidence that the Department derives even the most minimal benefit from the crossing. The pedestrian crossing is not necessary or useful to the State highway system. Rather, when the Commission last visited the issue,

it allocated maintenance responsibility as between the operating railroad and the Township, not to the Department. Township Exhibit # 4.

CONCLUSION

The Commission has allocated maintenance responsibility to parties other than the Department in the past, and the Commission must continue to look to those parties to perform maintenance in the future. Because the Commission only has the power to enforce its prior order, and not to modify it, the Department cannot be held responsible for any of the costs or work associated with the repair and upkeep of this crossing.

Respectfully submitted,



Jason D. Sharp

Assistant Counsel

Office of Chief Counsel

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF TRANSPORTATION

Keystone Building - 9th Floor

P.O. Box 8212

Harrisburg, PA 17105-8212

Telephone No. (717) 787-3128

Friday, March 26, 2004

PROPOSED FINDINGS OF FACT

1. These are no intersections of State highways and the subject rail line in the area of the pedestrian crossing. NT 55; Township Exhibit # 1.
2. The Pennsylvania Department of Transportation has not been allocated any responsibility for the maintenance of the subject pedestrian crossing. Township Exhibit # 4 (Public Service Commission Order, 1930, Docket # A 21870-1930).
3. Hamar Township has not received any transportation funding for the subject crossing. NT 46.
4. Hamar Township has no knowledge of the receipt of any Liquid Fuels Funds for the Guys' Run Road Crossing. NT 51.
5. The area of the subject pedestrian crossing is not an active area for vehicles. NT 50.
6. Guys' Run Road has been an unpaved gravel road since at least 1950. NT 104-105.
7. Norfolk Southern is not requesting that the Pennsylvania Department of Transportation be held responsible for any costs or maintenance responsibilities associated with the crossing. NT 122.
8. The Public Utility Commission's Bureau of Transportation and Safety is recommending that the 1930 Public Service Commission be enforced. NT 139.
9. To the extent that the Pennsylvania Department of Transportation was not a party to the 1930 order, the Public Utility Commission's Bureau of Transportation and Safety would not support an allocation against the Pennsylvania Department of Transportation. NT 139.

PROPOSED CONCLUSIONS OF LAW

1. The Commission does not have jurisdiction over the subject matter and the parties in this proceeding pursuant to 66 Pa. C.S. §§ 2702, 2704.
2. The Commission has the authority to enforce prior orders and compel compliance with such orders. 66 Pa. C.S. §§ 501-503, 701.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township	:	
<i>Complainant</i>	:	
	:	
v.	:	
	:	
Norfolk Southern Railway Company	:	
<i>Respondent</i>	:	Docket No. C-20030526
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation	:	
	:	
<i>Additional Respondent</i>	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Department's Main Brief* was served upon the parties listed below by first-class mail, postage-prepaid this day, Friday, March 26, 2004:

Honorable John H. Corbett, Jr.,
Administrative Law Judge
Pa. Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222-1210

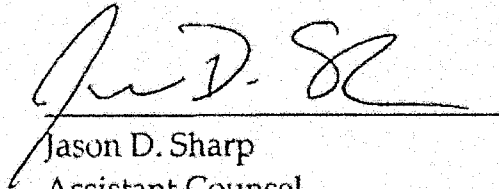
RECEIVED
MAR 26 PM 1:27
SECRETARIAT BUREAU

Benjamin C. Dunlap, Jr., Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North 3rd Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840

Shawn N. Gallagher, Esquire
Springer, Bush & Perry PC
2 Gateway Center, 15th Floor
Pittsburgh, PA 15222-1402

David A. Salapa, Esquire
Pennsylvania Public utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Jason D. Sharp
Assistant Counsel
Office of Chief Counsel
Keystone Building - 9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128

DATED: Friday, March 26, 2004

SECRETARIAT BUREAU

2004 MAR 25 PM 1:21

RECEIVED

LAW OFFICES
NAUMAN, SMITH, SHISSLER & HALL, LLP

18TH FLOOR
200 NORTH THIRD STREET

P. O. Box 3265

HARRISBURG, PENNSYLVANIA 17105-3265

TELEPHONE

(717) 236-3010

TELEFAX

(717) 234-1925

ORIGINAL

SPENCER G. NAUMAN, JR.
J. STEPHEN FEINOUR
CRAIG J. STAUDENMAIER
BENJAMIN C. DUNLAP, JR.
DENNIS E. BOYLE

L. RENEE LITJAK
LUCINDA C. GLINN

COUNSEL
DAVID C. EATON
JOHN C. SULLIVAN
GUY P. BENEVENTANO

DIRECT E-MAIL ADDRESS
NSSH@NSSH.COM
WEBSITE ADDRESS
WWW.NSSH.COM

March 26, 2004

HAND DELIVERED

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

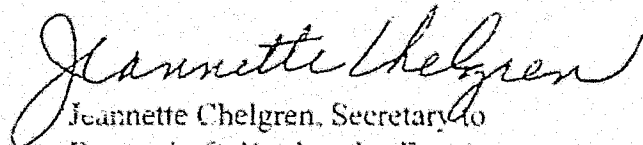
DOCUMENT
FOLDER

**In Re: Harmar Township v. Norfolk Southern Railway Company; Allegheny County;
and Commonwealth of Pennsylvania, Department of Transportation. PUC
Docket No. C-20030526; Our File No. 14077**

Dear Sir:

I enclose an original and ten (10) copies of the Main Brief of Norfolk Southern Railway Company for filing in the above-referenced matter. As evidenced by the Certificate of Service attached, copies of the Main Brief have been provided to all active parties of record. Once the Brief is filed, please return a time-stamped copy to our messenger. If you have any questions, please advise.

Sincerely yours,


Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Enclosures

cc: Judge John H. Corbett, Jr. (w/enc.)
All Parties of Record (w/enc.)
Randal S. Noe, Esquire (w/enc.)
B. Terrance Sullivan (w/enc.)

SECRETARY'S BUREAU

RECEIVED
MAY 25 PM 2:11
50

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmer Township v. Norfolk
Southern Railway Company.
Complainant wants the company to
take responsibility for the
maintenance of a Pedestrian
crossing over the tracks of
Norfolk Southern Railway Company,
per report and order of the
Public Service Commission of
Pennsylvania, Application Docket
Number 21878-1930.

Docket Number

C-20030526

SECRETARY'S BUREAU

MAR 26 PM 2:11

RECEIVED

ORIGINAL

MAIN BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

DOCUMENT
FOLDER

DOCKETED
MAR 30 2004

NAUMAN, SMITH, SHISSLER & HALL, LLP
Benjamin C. Dunlap, Jr., Esquire
Supreme Court I.D. #66283
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
717-236-3010
Attorneys for Norfolk Southern Railway
Company

TABLE OF CONTENTS

I HISTORY OF THE CASE 1

II STATEMENT OF QUESTIONS INVOLVED 2

III SUMMARY OF ARGUMENT 3

IV ARGUMENT 4

 A. The Pennsylvania Public Utility Commission Lacks Jurisdiction
 Over the Subject Pedestrian Crossing 4

 B. The Commission Should Not Enforce the Prior PSC Order
 Because of the Substantial Safety Hazards the Crossing
 Presents to the Public 8

PROPOSED ORDERING PARAGRAPHS 11

TABLE OF CITATIONS

Cases	Page(s)
<i>Commonwealth v. American Ice Co.</i> , 406 Pa. 322, 178 A.2d 768 (1962)	4, 8
<i>Consolidated Rail Corporation v. Pa. Pub. Util. Comm'n</i> , 76 Pa. Cmwlth. 25, 463 A.2d 90 (1983)	5
<i>County of Bucks v. Pa. Pub. Util. Comm'n</i> , 684 A.2d 678 (Pa. Cmwlth. Ct. 1996)	5, 6, 8
<i>Delaware, Lackawanna & Western R.R. Co. v. Shuman</i> , 382 Pa. 452, 115 A.2d 161 (1955)	5
<i>Feingold v. Bell of Pennsylvania</i> , 477 Pa. 1, 383 A.2d 791 (1977)	4, 5
<i>North Huntingdon Township v. Consolidated Rail Corp.</i> , Pa. Pub. Util. Comm'n, Opinion and Order, C-00913746 (Aug. 10, 1993)	6, 7, 8
<i>North Huntingdon Township v. Consolidated Rail Corp.</i> , Pa. Pub. Util. Comm'n, Recommended Decision, C-00913746 at 22-23 (Jan. 26, 1993)	7, 8
<i>PECO Energy Co. v. Pa. Pub. Util. Comm'n</i> , 568 Pa. 39, 791 A.2d 1155 (2002)	4
<i>Peoples Natural Gas Co. v. Pa. Pub. Util. Comm'n</i> , 664 A.2d 664 (Pa. Cmwlth. Ct. 1995)	5
<i>Swatara Township v. Pa. Pub. Util. Comm'n</i> , 312 A.2d 809 (Pa. Cmwlth. Ct. 1973)	5
<i>United Telephone Co. of Pa. v. Pa. Pub. Util. Comm'n</i> , 676 A.2d 1244 (Pa. Cmwlth. Ct. 1996)	7
<i>Western Pa. Water Co. v. Pa. Pub. Util. Comm'n</i> , 471 Pa. 347, 370 A.2d 337 (1977)	4
 Statutes	
66 Pa.C.S.A. § 102	5
66 Pa.C.S. § 2702(b)	4
Public Service Company Law, Act of July 26, 1913, P.L. 1374, Art. I, Section 1 and Art. V, Section 12	6
Public Utility Law of 1937, Act of May 28, 1937, P.L. 1053	6

I. HISTORY OF THE CASE

Harmar Township ("Township") filed a Complaint with the Pennsylvania Public Utility Commission ("Commission") on June 11, 2003 concerning the maintenance of a pedestrian crossing that was the subject of a 1930 Report and Order by the Commission's predecessor, the Public Service Commission ("PSC"). The Township requested that the Commission order Norfolk Southern Railway Company ("Norfolk Southern") to comply with the PSC Order by repairing the subject pedestrian crossing and maintaining it in the future.

The Pennsylvania Department of Transportation ("PennDOT") filed an answer to the Complaint on July 18, 2003, requesting that the Commission schedule the matter for a field conference. On July 18, 2003, Norfolk Southern filed a Praecipe for Entry of Appearance, an Answer to the Complaint, and a Preliminary Motion to Dismiss Complaint for lack of jurisdiction. Norfolk Southern filed an Addendum to its Preliminary Motion to Dismiss Complaint on July 22, 2003, and the Township served its Reply to the Motion and Addendum on July 30, 2003.

A Hearing was held on January 29, 2004, before Administrative Law Judge John H. Corbett, Jr. In a letter dated February, 27, 2004, ALJ Corbett ordered Main Briefs to be submitted by March 26, 2004.

II. STATEMENT OF QUESTIONS INVOLVED

- (1) Does the Pennsylvania Public Utility Commission have jurisdiction over a pedestrian crossing ordered by its predecessor, the Pennsylvania Public Service Commission, despite the express language in the applicable enabling statute limiting its jurisdiction to highway-rail crossings?

(Suggested answer in the negative)

- (2) If the Pennsylvania Public Utility Commission is found to have jurisdiction over the subject pedestrian crossing, should the prior Public Service Commission Order establishing a pedestrian crossing be enforced where the crossing presents a significant safety hazard to the public by having no safety warning devices and by being located adjacent to a bar/tavern?

(Suggested answer in the negative)

III. SUMMARY OF ARGUMENT

The pedestrian crossing at issue falls outside of the jurisdictional bases provided to the Pennsylvania Public Utility Commission ("Commission") under its enabling statute. The Commission's jurisdiction is limited to highway-rail crossings, which requires that the crossing be used by "vehicular traffic." This jurisdictional basis extends to crossings utilized by bicycles only if a crossing was initially intended for that purpose. However, because of the steep six-foot rise leading up to the subject crossing, it was clearly intended for pedestrian use only. While the Commission has previously decided that it retains enforcement jurisdiction over prior Public Service Commission ("PSC") orders, its opinion may not supercede court decisions to the contrary. The Pennsylvania Commonwealth Court has held that, regardless of any prior assertions of jurisdiction, the Commission's jurisdiction is limited to highways *intended* for vehicular traffic.

Even if the Commission is found to have enforcement jurisdiction over the subject pedestrian crossing, the 1930 PSC Order should not be enforced because of the significant safety hazards it presents to the public. Not only does the pedestrian crossing lack any safety warning devices, it is also located adjacent to a bar/tavern.

IV. ARGUMENT

A. The Pennsylvania Public Utility Commission Lacks Jurisdiction Over the Subject Pedestrian Crossing.

The power of the Pennsylvania Public Utility Commission ("Commission") is statutory, arising either from the express words contained in the enabling statutes or by a strong and necessary implication from those words, and the legislative grant of power in any particular case must be clear. *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 568 Pa. 39, 791 A.2d 1155 (2002); *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Western Pa. Water Co. v. Pa. Pub. Util. Comm'n*, 471 Pa. 347, 353, 370 A.2d 337, 339 (1977). If a particular statutory provision is unclear or ambiguous, it is an appellate court's interpretation of the law that governs, not an agency's opinions. *Commonwealth v. American Ice Co.*, 406 Pa. 322, 332, 178 A.2d 768, 773 (1962). Agency opinions may, however, aid in the interpretation of unclear or ambiguous statutory provisions, but "if they do not accord with governing legal principles they may not supplant the *responsibility of the courts* to interpret statutes and declare their applicability to existing facts and situations " *Id.* (emphasis added).

Under the pertinent statutory authority.

The [C]ommission is . . . vested with exclusive power to appropriate property for any such crossing . . . and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. . . .

66 Pa.C.S. § 2702(b). Section 2702(b) of the Public Utility Code ("Code") limits the Commission's authority to "such crossings," a term that relates back to the "highway" crossings

over which the Commission has jurisdiction referenced in subsection (a) of Section 2702. *Delaware, Lackawanna & Western R.R. Co. v. Shuman*, 382 Pa. 452, 115 A.2d 161 (1955). A "highway" is defined in the Code as "[a] way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular traffic." 66 Pa.C.S.A. § 102 (emphasis added). The definition of "highway" has been extended to include bikeways that are also open to pedestrians, but not motor vehicles. *Consolidated Rail Corporation v. Pa. Pub. Util. Comm'n*, 76 Pa. Cmwlth. 25, 463 A.2d 90 (1983) (reasoning "that numbers of bicycles and other non-motorized means of conveyance in motion constitute vehicular traffic"). However, a bridge constructed solely for pedestrian use does not constitute a "highway" because vehicular traffic was neither intended nor permitted. *County of Bucks v. Pa. Pub. Util. Comm'n*, 684 A.2d 678, 681-82 (Pa. Cmwlth. Ct. 1996) ("*County of Bucks*").

In *County of Bucks*, the county sought judicial review of a Commission order directing it to bear a significant portion of the cost to close an above-ground pedestrian bridge. *Id.* at 680. In 1917, the Pennsylvania Public Service Commission ("PSC") ordered that an at-grade crossing be abolished and that an above-ground pedestrian bridge be constructed. *Id.* The Commission asserted jurisdiction over the bridge based on the fact that its predecessor, the PSC, ordered the bridge to be built. *Id.* The Commonwealth Court rejected that assertion because administrative agencies have "only those powers expressly conferred upon it by statute or those powers which are necessarily implied from its express powers." *Id.* at 682 (citing *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977); *Peoples Natural Gas Co. v. Pa. Pub. Util. Comm'n*, 664 A.2d 664 (Pa. Cmwlth. Ct. 1995)). The court held that the Commission lacked jurisdiction over the subject pedestrian bridge because its jurisdiction is expressly limited to highways for "vehicular traffic." *Id.* at 682; see also *Swatara Township v. Pa. Pub. Util*

Comm'n, 312 A.2d 809 (Pa. Cmwlth. Ct. 1973) (recognizing that its jurisdiction over three above-grade pedestrian bridges crossing a railroad yard was "questionable," the Commission instead based its jurisdiction on its power to furnish employees of public utilities reasonably safe access to their place of employment).

It was questionable whether the PSC initially had jurisdiction to order a pedestrian crossing in *County of Bucks*. However, because the PSC's enabling statute failed to define "highway," jurisdiction "may have been assumed by the Public Service Commission because it determined that the pedestrian bridge could be required as a condition of the abolishment of the highway crossing." *Id.* at 682, citing Public Service Company Law, Act of July 26, 1913, P.L. 1374, Art. I, Section 1 and Art. V, Section 12, repealed by the Public Utility Law of 1937, Act of May 28, 1937, P.L. 1053.¹ Once the highway crossing was abolished, however, there was no basis for the Commission's assertion of jurisdiction based on any "purported jurisdiction" of the PSC. *Id.* "Even if the Public Service Commission had been given jurisdiction over pedestrian bridges by the 1913 law," the Court held, "it is within the powers of the General Assembly to narrowly redefine the PUC's jurisdiction as it sees fit." *Id.*

Three years prior to the Commonwealth Court's decision in *County of Bucks*, the Commission decided a similar case involving jurisdiction over both a pedestrian bridge spanning a stream and a pedestrian tunnel under railroad tracks. *North Huntingdon Township v Consolidated Rail Corp.*, Pa. Pub. Util. Comm'n, Opinion and Order, C-90913746 (Aug. 10,

¹ Article I, Section 1 and Article V, Section 12 of the 1913 Public Service Company Law were also the relevant statutory provisions in effect at the time of the PSC's 1930 Report and Order at issue in this proceeding. For the convenience of the Commission, copies of those former statutory provisions are attached hereto as Exhibit "A".

1993), submitted into the record as PUC Staff Exhibit No. 1.² The Commission was denied jurisdiction with regard to the pedestrian bridge because its construction was not mandated by the 1936 PSC Order at issue in the case. *Id.* at 13. The pedestrian tunnel, however, was included in the PSC Order. While noting that the Commission lacks jurisdiction over pedestrian crossings, an exception was made "for the limited purpose of enforcing a prior [PSC] Order" based on the Section 502 enforcement provision in the Code. *Id.* at 11, 12.

However, Conrail's sole concern in the *North Huntingdon Township* case was the pedestrian bridge spanning the stream; it failed to argue that the Commission lacked jurisdiction over the pedestrian tunnel.³ Rather, the Commission's jurisdiction over the pedestrian tunnel was presumed. *North Huntingdon Township v. Consolidated Rail Corp.*, Pa. Pub. Util. Comm'n, Recommended Decision, C-00913746 at 22-23 (Jan. 26, 1993). The threshold jurisdictional question as to the tunnel was not raised by Conrail or any other party in the *North Huntingdon Township* proceeding, and the ultimate decision was not appealed to the Commonwealth Court.

The Code grants extensive general power to the Commission; however, this broad power must be read in light of the enumerated powers set forth in the Code. *United Telephone Co. of Pa. v. Pa. Pub. Util. Comm'n*, 676 A.2d 1244 (Pa. Cmwlth. Ct. 1996). While the PSC was allowed to assume jurisdiction over pedestrian crossings because of the lack of legislative guidance in its enabling statute, the present Commission does not have that luxury. Section

² The Bureau of Transportation and Safety, Rail Safety Division's opinion that the 1930 PSC Order at issue should be enforced is based on this PUC Order and Opinion. N.T. at 135.

³ Conrail presented one witness during the August 18, 1992 hearing, whose testimony concerned only the pedestrian bridge spanning the stream. See *North Huntingdon Township v. Consolidated Rail Corp.*, Pa. Pub. Util. Comm'n, Recommended Decision, C-00913746 at 9-11 (Jan. 26, 1993). A copy of the Recommended Decision in that proceeding is attached hereto as Exhibit "B".

2702(b) of the Code expressly limits the Commission's jurisdiction to rail-highway crossings. In *North Huntingdon Township*, the Commission interpreted this enabling statute to include enforcement jurisdiction over prior PSC orders despite the express limiting language. However, following the *County of Bucks* decision, that interpretation no longer "accord[s] with governing legal principles" and may not supplant the Commonwealth Court's responsibility to interpret statutes. See *American Ice Co.*, 406 Pa. at 332, 178 A.2d at 773. It is now established that "the present Code limits the PUC's jurisdiction to highways for vehicular traffic . . . without regard to any prior assertion of jurisdiction." *County of Bucks*, 684 A.2d at 682.

Vehicular traffic was clearly not intended when the pedestrian crossing at issue was established as a condition of closing the highway crossing pursuant to the 1930 PSC Report and Order. See Township Exhibit No. 4. This is evidenced by the steep six-foot rise within a seven-foot distance leading up to the pedestrian crossing. N.T. at 110-15; Norfolk Southern Exhibits No. 1, 3-B. As previously discussed, a bridge constructed solely for pedestrian use does not constitute a "highway" because vehicular traffic was neither intended nor permitted. *County of Bucks*, 684 A.2d at 682. Therefore, the fact that people occasionally carry their bicycles across the pedestrian crossing is irrelevant. N.T. 77. In fact, it would be irrelevant even if skilled mountain bikers frequently scaled the steep rise with ease because this was not the intended use of the crossing.

B. The Commission Should Not Enforce the Prior PSC Order Because of the Substantial Safety Hazards the Crossing Presents to the Public

Even if the Commission is found to have jurisdiction over the 1930 PSC Order, it should not be enforced because of the significant safety hazards the crossing presents to the public. The pedestrian crossing at issue crosses one track, which is owned by Pennsylvania Lines LLC and

operated by Norfolk Southern. N.T. at 108. The track speed is forty (40) miles-per-hour, with a traffic volume of sixteen (16) trains per day. *Id.* The average train length is 130 cars, which extends more than one mile. *Id.* This combination of track speed and train length, in addition to the three-degree rail curvature and limited sight distance caused by heavy vegetative growth and inclement weather conditions, creates a serious safety risk to pedestrians utilizing the crossing. N.T. at 82-83, 85, 109, 118-119; Township Exhibits 8C, 8D and 8G. It would take a train on this track approximately one mile to stop, which eliminates any possible avoidance of a collision should an emergency arise across the pedestrian crossing. N.T. at 109.

The Township elicited testimony claiming that the public "extensively" uses the area for recreational purposes and that residents "frequently" utilize the crossing to access business establishments and public transportation. N.T. at 21, 29-30, 75. However, the daily pedestrian traffic at the crossing was estimated to be approximately twelve (12) people each day, with more volume during the warm weather months. N.T. 33, 89. This volume may increase in the future because of both the Pennsylvania Fish Commission's development plans and the potential development of other property along Wenzel Drive. N.T. at 34-35.

Even though there have been no known accidents at the subject crossing, the risk to public safety is substantial. The safety hazards of at-grade pedestrian crossings are so great that there are no other such crossings known to exist within the entire Pittsburgh Division of Norfolk Southern, which encompasses Southern New York, Western Pennsylvania, Eastern Ohio, and Northern West Virginia. N.T. at 117-18. The risk to public safety is especially significant where, as here, there are no warning devices and where the crossing is adjacent to a tavern that serves only a limited amount of food and where "people basically come to drink." N.T. at 87; Norfolk Southern Exhibit No. 3-A. There is a significant safety concern when people, inebriated

or not, stand close to the railroad tracks. It is not uncommon for debris to be hanging from the side of a train or for loads to shift, thereby presenting a risk that a pedestrian will be struck. N.T. at 118-20.

Enforcing the PSC Order will only encourage more people to utilize the at-grade pedestrian crossing and further increase the risk that a serious accident will occur. Therefore, the Commission should "effectuate the prevention of accidents and the promotion of the safety of the public" by not ordering the reestablishment of this hazardous pedestrian crossing. The safety risks of maintaining this crossing substantially outweigh any convenience it provides.

PROPOSED ORDERING PARAGRAPHS

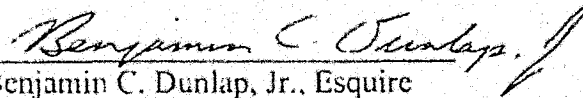
- 1) That the Complaint of Harmar Township is dismissed, as the Pennsylvania Public Utility Commission lacks subject matter jurisdiction over the pedestrian crossing at issue.

- 2) Alternatively, that the Pennsylvania Public Utility Commission shall not enforce the 1930 Public Service Commission Order because of the significant safety hazards the subject crossing presents to the public.

Respectfully Submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By



Benjamin C. Dunlap, Jr., Esquire
Supreme Court I.D. #66283
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
717-236-3010
Attorneys for Norfolk Southern Railway
Company

ARTICLE I.

Definitions.

Section 1. Be it enacted, &c, That this act shall be known, and may be cited, as "The Public Service Company Law."

The Public Service Company Law.

The term "Public Service Company," when used in this act, includes all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, pipe line corporations, ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations, telegraph corporations, telephone corporations, natural gas corporations, artificial gas corporations, electric corporations, water corporations, water-power corporations, heat corporations, refrigerating corporations, sewage corporations, doing business within this State, and also all persons engaged for profit in the same kind of business within this Commonwealth: Provided, however, Such persons and corporations shall not be subject to the provisions of this act, with respect to any business transacted or any property owned by them outside of the Commonwealth of Pennsylvania; nor shall the provisions of this act be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate, or which the Congress has, under said Constitution, in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States. And provided further, That none of the provisions of this act shall apply to the generation, transmission, or distribution of electricity; to the manufacture or distribution of gas; to the furnishing or distribution of water; or to the production, delivery, or furnishing of steam, or any other substance for heat or power, by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others.

"Public Service Company."

Proviso

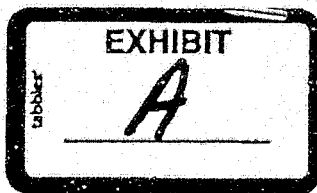
Proviso.

The term "Corporation," as used in this act, shall be construed to include all bodies corporate, joint stock companies, or associations, domestic or foreign, their lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, and shall not include municipal corporations, except as otherwise provided in this act.

"Corporation"

SECRETARY'S BUREAU

11 28 PM '13



"Municipal
corporation."

The term "Municipal Corporation," as used in this act, shall include all cities, boroughs, towns, townships, or counties, created or organized under any general or special law of this Commonwealth.

"Person."

The term "Person," as used in this act, means all individuals, partnerships, or associations, other than corporations.

"Railroad
corporation."

The term "Railroad Corporation," as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any railroad for public use within this Commonwealth.

"Railroad."

The term "Railroad," as used in this act, includes every railroad other than a street railway, by whatsoever power operated, for public use in the conveyance of passengers or property, or both, with all bridges, ferries, tunnels, facilities, plant, and equipment thereof.

"Street
railway
corporation."

The term "Street Railway Corporation," as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any street railway within this Commonwealth.

"Street
railway."

The term "Street Railway," as used in this act, includes every railroad and railway, by whatsoever power operated, or any extension or extensions thereof, for public use in the conveyance of passengers or property, or both, being mainly or in part located upon, over, above, below, across, through, or along any street, avenue, road, highway, bridge, or public place, including the facilities, plant, and equipment thereof.

"Common
carrier."

The term "Common Carrier," as used in this act, includes any and all common carriers, whether corporations or persons, engaged for profit in the conveyance of passengers or property, or both, between points within this Commonwealth, by through, over, above, or under land or water, or both.

"Conveyance of
passengers or
property."

The term "Conveyance of passengers or property," as used in this act, includes any and all service in connection with the receiving, transportation, elevation, transfer in transit, ventilation, refrigeration, icing, storage, handling, and delivering of property, baggage, or freight, as well as any and all service in connection with the transportation or carrying of passengers.

"Service."

The term "Service" is used in this act in its broadest and most inclusive sense, and includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and all and every the facilities used or furnished or supplied by public service companies in the performance of their duties to their patrons, employes, and the public as well as the interchange of facilities between two or more public service companies.

"Facilities."

The term "Facilities," as used in this act, includes all plant and equipment of a public service company, which includes all tangible real and personal prop-

erty, buildings, materials, easements, rights of way, rights of trackage, subways, tunnels, railroads, street railways, tracks, canals, and all animals, locomotives, apparatus, appliances, devices, instruments, appurtenances, freight cars, refrigerator cars, baggage cars, express cars, passenger cars, drawing room cars, parlor cars, sleeping cars, dining cars, rolling stock, carriages, cabs, hansom, taxicabs, vehicles, boats, ships, vessels, bridges, barges, cables, conduits, converters, transformers, condensers, wires, poles, structures, telegraph lines, telephone lines, crossbars, engines, machines, dynamos, boilers, motors, storage batteries, switchboards, waterfalls, water power stations, power stations, pumping stations, reservoirs, purifiers, oil tanks, gas tanks, holders, retorts, ducts, pipes, pipe galleries, pipe lines, mains, meters, lamps, scrubbers, wharves, piers, docks, ferries, incline planes, side tracks, spurs, turn outs, switches, systems, stations, depots, terminals, terminal facilities, water or gas jet, wells, and any and all other means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public service company. Provided, however, That no property owned by the Commonwealth of Pennsylvania, or municipality thereof, at the date when this act becomes effective, shall be subject to the Commission or to any of the terms of this act, except as elsewhere provided herein.

The term "Commission," when used in this act, means the Public Service Commission created by this act.

The term "Commissioner," when used in this act, means one of the members of such commission.

ARTICLE II.

Duties and Liabilities of Public Service Companies.

Section 1. It shall be the duty of every public service company—

(a). To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the commission.

(b). To render and furnish all such service at prices, charges, rates, tolls, fares, or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

(c). To make all such repairs, changes, alterations, and improvements in or to such service, including

Proviso

Commission

Commissioner

Service

Rates

Repairs, alterations, etc.

is this
ships,
rail or

ns all
than

n this
over-
id for

udes
haso
yance
edges,
ere of
ed in
ising,
rail

t, in-
power
t, for
erty
over,
treet,
clud

t, in-
pora-
ance
ants
ave,

ety,"
con-
tion,
ing,
age,
tion

dest
accs
ings
ities
om-
pa-
ter
ser

ides
my,
pop-

mission of conversations, jointly, over the several lines, can reasonably be made, and an efficient service can be obtained without injustice to either company, and without substantial impairment or detriment to the service to be rendered by either company, and that a public necessity exists therefor; or shall find that any two or more telephone companies have failed to establish just and reasonable joint rates or charges for through service, by or over their several lines so connected, and that such joint rates or charges ought to be established, in order to supply a through traffic and communication between different localities not otherwise provided for, or proffered by the companies in question, or either of them,—the commission may by its order require that such connection be made and facilities supplied, and that through conversations be transmitted thereby; and may prescribe the through line and joint rates and charges to be made and to be used and in force in the future; and shall appoint or approve necessary and proper conditions, rules, and regulations for the joint through traffic, and an equitable apportionment between the several companies of the costs and revenues in connection therewith, and the commission may fix the same by its order, to be duly served upon the company or companies affected.

Joint
through
traffic.

Section 10. Where the public service companies entitled to share in any joint rate or charge shall be unable to agree upon the division thereof, or shall make any unjust, unreasonable, or unduly discriminatory or preferential division or apportionment thereof, the commission may, after hearing, upon its own motion or upon complaint, fix the proportion to which every such public service company shall be entitled.

To fix
proportions
of joint
rates.

Section 11. The commission may investigate the rates or interstate traffic facilities or service of common carriers within this Commonwealth, and when such rates, facilities, or service are, in the determination of the commission, unjust, unreasonable, or unjustly discriminatory, or unduly or unreasonably preferential, or in violation of the interstate commerce law, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply by petition to the said Interstate Commerce Commission for relief, or may present to the said Interstate Commerce Commission all facts coming to its knowledge as to the violation of the rules, orders, or regulations of that commission, or as to the violation of the interstate commerce law.

Interstate
Commerce
Commission.

Section 12. Except in cases in which grade crossings are in process of abolition at the time of the passage of this act, under agreement or contract with a municipality, as set forth in the proviso of section

Crossings.

five of
have ex
in acco
proved
ing the
or othe
be con
of any
or belo
in whic
corpor
constru
any of
poratio
above
may be
of any
tion a
nine,
instal
tion,
after
men
block
device
may
sary,
may
wcte
the a
tifica
five
the e
com
essu
com
sam
rule
such
tain
of f
T
upo
ben
ties
erty
sai
or l
alb
spe
sor
con

Compensation for damages

The compensation for damages which the owners of adjacent property, taken, injured, or destroyed, may sustain in the construction, relocation, alteration, or abolition of any such crossing specified in this section (for which compensation the said owners are hereby invested with warrant of authority, upon appeal from the determination of the commission to sue the Commonwealth), shall, after due notice and hearing, be ascertained and determined by the commission; and such compensation, as well as the expense of the said construction, relocation, alteration, or abolition of any such crossing, shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such proper proportions as the commission may, after due notice and hearing, in due course, determine, unless the said proportions are mutually agreed upon and paid by those interested as aforesaid.

Payment

Terms and conditions

In prescribing the terms and conditions, upon which any such crossing may be constructed or relocated, or altered or abolished, and the proportionate contributions to the expense thereof, including the damages or compensation to the owners of adjacent property, as aforesaid, the commission may, among other things, take into consideration the relative importance to the public of the services rendered by the public service companies concerned, as well as the priority of location: Provided, That where any portion of the cost and expense thereof shall have been or shall be borne in the future by the Commonwealth or any municipal corporation, such portion shall not be taken into account by the commission in fixing any valuation, for any purpose, under any of the provisions of this act: And provided further, That where the order of the commission shall, as part of the regulation of the construction, relocation, alteration, or abolition of any crossing aforesaid, require, as incidental thereto, a relocation, changes in or the removal of any adjacent structures, equipment or other facilities of any telegraph, telephone, gas, electric light, water-power, water pipeline, or other public service company, said company shall, at its own expense, relocate, change, or remove such structures, equipment, or other facilities, in conformity with the order of the commission; and, in default of compliance with such order, the commission shall cause the work and materials to be done and furnished in accordance with the said order, and may recover the cost and expense thereof from the said public service company.

Proviso

Cost and expense borne by Commonwealth, etc.

Proviso

Relocation or change of structures equipment

Public highway or street

Before the commission shall make any final order relative to the construction, relocation, alteration, or

abolition of any way or street, the commission shall have power to reach of the municipalities the plans and grades, and, in default thereof, shall exercise the powers conferred by this section, to complete the plans and grades, and may permit the municipalities to do the same, or the municipalities may, in their own discretion, otherwise, the commission may, in its contracts, to the lowest bidder, award the said plans.

The said commission shall cause the cost of the construction, relocation, alteration, or abolition of any such crossing, as determined by the commission, to be paid by the municipalities, or by the Commonwealth, or by the public service companies, or by the municipalities and the public service companies, or by the municipalities and the Commonwealth, or by the municipalities, the public service companies, and the Commonwealth, in such proportions as the commission may determine, unless the said proportions are mutually agreed upon and paid by those interested as aforesaid.

The commission shall cause the work and materials to be done and furnished in accordance with the said order, and may recover the cost and expense thereof from the said public service company.

abolition of any crossing involving any public highway or street, an effort shall be made by the commission to reach an agreement with the proper officials of the municipal corporations concerned, determining the plans and specifications governing such crossings; and, in default of such agreement, the commission shall exercise the exclusive power vested in it under this section, and shall finally determine and adopt the complete plans and specifications, and locate all lines and grades in said public highways and streets, and may permit the public service company or companies, or the municipal corporation, to do the whole or any portion of the work in accordance therewith; otherwise, the commission shall do the work by contract or contracts, to be awarded, after due advertisements, to the lowest responsible bidder in accordance with the said plans and specifications.

Final order.

The said contractor shall be authorized, in the name of the commission, to collect by due process of law from the public service company or companies, or the said municipal corporations, or from the Commonwealth, either severally or proportionately as may be determined by the commission, the amount which may be justly due him under the terms of his said contract with the commission; and any amount so determined to be paid the said contractor by the Commonwealth, as well as the amount of damages or compensation determined and awarded to be paid the owners of adjacent property, as aforesaid, shall in each instance be paid by the State Treasurer, on a warrant drawn by the Auditor General, upon the presentation to that officer of a statement setting forth the amount determined to be paid as aforesaid, duly certified by the commission; said payments to be paid out of any funds specifically appropriated for such purpose, or generally appropriated for the improvement of the roads or highways of the Commonwealth; and in case of a verdict and judgment thereon for the damages or compensation, recorded by any such adjacent property owners upon appeal, the same shall be paid out of any funds appropriated as aforesaid; and any court of common pleas hearing and determining said appeal is hereby authorized and empowered to issue a writ of mandamus to said commission, the Auditor General, and the State Treasurer, or any of them as the case may require, for the payment of such judgment.

Rights of contractor.

Payment.

The commission shall have the right to recover, for and on behalf of the Commonwealth, by due process of law, as debts of like amount are now by law recoverable, from the public service company or companies, or municipal corporations, in such amounts or proportions against each as may be determined by the

Recovery by the commission.

ners of
d, may
ion, or
section
by in-
om the
amon-
; ascer-
d such
id con-
of any
matter
panies
e Com-
er pro-
ice and
e said
aid by

i which
ited, or
atribu-
ages or
erty, as
things,
nce to
lic ser-
vity of
of the
hall be
or any
not be
ng any
; provi-
where
ie regu-
602. or
as inci-
the re-
or other
electric
public
own ex-
netures,
with the
pliance
be work
ordance
and ex-
many.
al order
tion, or

commission, as aforesaid, the amount of the damages or compensation awarded to the owners of adjacent property by the commission, or by the court of the proper county on appeal, and the amounts so received shall be paid into the State Treasury for the improvement of the roads of the Commonwealth.

Standard of
service, etc.

Section 13. The commission may, after hearing had upon its own motion or upon complaint, establish such standards of facilities and service of public service companies as shall be reasonably necessary for the safety, accommodation, or convenience of its patrons, employees, and the public; and require, by an order to be served in the manner hereinafter provided upon every public service company affected thereby, the facilities or service of such public service companies to conform to such standards. The commission shall also have power, after hearing had upon its own motion or upon complaint, to require public service companies to make all such repairs, changes, alterations, additions, extensions, and improvements, in and about their facilities and service, as shall be reasonably necessary and proper for the safety, accommodation, convenience, and service of their patrons, employees, and the public.

Investigations
of issue of
stocks, bonds,
etc.

Section 14. The commission shall have power, of its own motion or upon complaint, to institute any inquiry or investigation, and to determine, upon hearing or rehearing had for that purpose, whether any public service company has, after the date when this act shall become effective, issued or made any increase in the issue of any stocks, trust certificates, bonds, notes, or other evidences of indebtedness or other securities, whether such bonds, notes, or other evidences of indebtedness, or other securities be payable at periods of more or less than twelve months, in violation of any of the provisions or requirements of this act; and, if so, to determine and find the nature and extent of such violations, and, subject to the provisions for rehearing and appeal, shall certify the record of such hearing and finding to the Attorney General to institute, in the name of the Commonwealth, such proceedings in equity or law, civil or criminal, as shall be necessary or proper to enforce the provisions of this act, and to restrain and prevent such public service company from consummating or continuing any act or acts alleged to have been done or to be contemplated in violation of the provisions or requirements of this act or of the laws or Constitution of the Commonwealth.

System of
accounts.

Section 15. The commission may, and shall after hearing had upon its own motion or upon complaint, establish, by an order to be served as hereinafter provided upon every public service company affected

thereby, a system of public service accounts, prescribe the records, and the public service companies memoranda of every, and a system of account, as well as money. And the public service companies to be adopted shall be kept to the volume. And the commission, to relieve the duty of carrying

The commission as aforesaid, shall make regular outlays and be credited.

The commission require that the operating accounts of the capital and every public service company and various accounts

The commission accounts, including public service companies or employees to inspect and memoranda. The commission making and documents of the same, or to carry out. That where rendering of the kind of public service company apply to such public service, any public service of the Inter of accounts, the commission the Interfa

Section 16 prescribe the required to be

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SECRETARY'S OFFICE
JAN 27 1993

North Huntingdon Township :
v. :
Consolidated Rail Corporation, :
Pennsylvania Department of :
Transportation and Westmoreland :
County :

Docket No.
C-00913746

**DOCUMENT
FOLDER**

RECOMMENDED DECISION

Before
Larry Gesoff
Administrative Law Judge

History of the Proceeding

By complaint filed December 5, 1991, North Huntingdon Township (the Township) alleges that in 1936 the Commission directed that an at-grade crossing in the Village of Larimer be eliminated and replaced by a vehicular subway and pedestrian subway under the tracks of the Pennsylvania Railroad Company. As a result, the wooden bridge leading from the at-grade crossing over Brush Creek towards Brownstown Road was replaced by a narrower footbridge. The Township further alleges that in May 1991 Consolidated Rail Corporation (Conrail) closed the footbridge which not only crosses Brush Creek, but also leads to the pedestrian subway under the tracks of Conrail in the Township.

DOCKETED
JAN 26 1993

EXHIBIT
B

The Township also alleges that the Public Service Commission Order assigned maintenance responsibility for the pedestrian subway, but not the footbridge. The Township alleges that the Pennsylvania Railroad Company, Conrail's predecessor, installed and maintained the footbridge and that Conrail has maintained the subway and footbridge. According to the Township, the footbridge is essential to the citizens of Larimer who use it to travel from one side of the village to another because the village was cut in half when the rail line was constructed. The Township alleges that the following use the subway and footbridge: fire fighters, school children traveling to their bus stops and residents visiting the post office, church, etc. Since the footbridge was closed, residents have had to walk along Route 993, which is heavily traveled and not designed for pedestrians. The Township requests the Commission to assign maintenance responsibility for the footbridge to Conrail.

Westmoreland County filed an answer to the Complaint. The Commission held a field investigation and conference at the site of the footbridge on February 5, 1992.

The Commission held a hearing on August 18, 1992. The following parties were represented by counsel and participated in the hearing: the Township, Conrail, Pennsylvania Department of Transportation (PennDOT), Westmoreland County (the County), the Commission's Law Bureau (the Law Bureau) and the Peoples Natural

Gas Company (Peoples). The Township presented 14 witnesses and produced 19 exhibits which were admitted into evidence. Conrail, PennDOT, the Law Bureau and Peoples presented one witness each. Peoples produced one exhibit which was admitted into evidence. No one testified on behalf of the County. One witness testified on behalf of The Municipal Authority of Westmoreland County (MAWC), which was not represented by counsel. The record in this proceeding consists of the above-referenced exhibits and a 109 page transcription of the notes of testimony.

The Township, Conrail, PennDOT and the Law Bureau filed Main Briefs. The Township filed two Reply Briefs, one in response to the Law Bureau's Main Brief and one in response to Conrail's Main Brief.

Summary of Testimony

The Township

Katherine Petrosky is the township manager. Tr. 6. Ms. Petrosky sponsored Exhibits A through R-2, which were either prepared by the township engineer, or are a part of the official Township files. Tr. 6-19. An index of the exhibits appears at pages 2A through 2C of the transcript. The Township did not construct the barricades on the footbridge. Tr. 80.

Donald Michael Glenn is the township engineer. Exhibit A describes the general location of the rail crossing. Mr. Glenn described the general type of the pedestrian bridge, the number of spans, principle dimensions and the general physical condition of the bridge. Tr. 24. The witness stated the nature, type, extent, date and cost and other pertinent details regarding recorded items of maintenance and repairs performed on the bridge by the Township or its contractor. Tr. 24-25. Mr. Glenn described how important a separated crossing at this location is to the Township's residents and businesses. Tr. 25.

Mr. Glenn opined that there is no safe or adequate detour to cross the railroad tracks if the pedestrian bridge remains closed. Tr. 25. The pedestrian bridge is not adequate for the safety of the public. It can be replaced with a new bridge, but an in-depth analysis of the substructure would have to be performed to determine if it can hold a new deck. A cost analysis should be performed to determine if replacing the deck or the entire structure is the more feasible option. Tr. 26-27.

The Township has not prepared plans or costs regarding the work necessary because it is a railroad structure maintained by the Pennsylvania Railroad and Conrail. The footbridge is railroad property and the Township cannot enter private property. The Township does not agree to perform any work. Tr. 28-29.

Upon cross-examination, the witness stated that Exhibit E, a letter written by the regional engineer for the Pennsylvania Railroad in 1957, indicating that an examination of the bridge railings showed no needed repairs, indicates that Conrail has maintenance responsibility for the pedestrian bridge. While the witness was employed by the Pennsylvania Railroad, Pennsylvania Railroad performed physical work on the pedestrian bridge. Tr. 29-31.

The witness indicated on Exhibit A the distances pedestrians must detour to cross Brush Creek from Point A on the exhibit (the beginning of the pedestrian bridge) to Point B on the exhibit (at the bend on Railroad Street which is on the other side of the bridge and the subway under the railroad tracks). Tr. 31-32.

Upon further cross-examination, the witness stated that the Commission's Order at Exhibit C leads him to believe that the current pedestrian bridge was constructed where the vehicular bridge was located at the at-grade crossing. Tr. 35. Brush Creek is 20 to 40 feet wide in the area in question depending on the environment, and the water is about waist deep. Tr. 105.

Margaret Kattren lives on Scotch Hill No. 1, Larimer. Because the footbridge is closed, she must walk along Route 993 to go to the post office, her church or anything else on the

southern side of Larimer. Thirty-five to forty children come from Scotch Hill every day to go to school, the post office and other destinations on the south side of Larimer daily. Travelling on Route 993 is dangerous because there is no sidewalk. Tr. 84-85. About 25 to 30 percent of the congregation of St. John's United Church of Christ, located south of the railroad tracks, live on the north side of the railroad tracks. Several elderly people, children and youths walk to the church. Since the footbridge closed, youths walk on the railroad tracks as a short cut to the vehicle underpass on Route 993. The only playground in Larimer is located on the south side of Larimer and children from both sides use it. Tr. 85-86.

Margaret Kettren lives at 2261 Scotch Hill No. 1, Larimer. She does not drive, so the pedestrian bridge was a blessing for her. She has grandchildren on the other side of the tracks. She is concerned about the children coming down Scotch Hill to school because the traffic on Route 993 is bad. Tr. 86-87.

Francis Hynes lives at 1070 Brownstown Road, Larimer. He lives a quarter of a mile from the footbridge and if firemen cannot use it to get pressure to his residence, he will be in bad shape. Tr. 87.

Brian Wolfe lives at 11751 Railroad Street, Larimer. When he was about 12 years old, a man who worked for the railroad gave him paint to paint the subway and to clean the subway up to the railroad tracks. Individuals from Conrail trucks replaced boards on the footbridge. Tr. 88-89.

Lou Chruscial lives on Railroad Street, Larimer. His wife used the footbridge for twenty years, but now has to walk down Railroad Street or wait for him to drive her down Route 993. Tr. 90.

Karen Mochar lives at 19 Franklin Avenue in North Irwin. She represents State Representative Allen Kukovich and is his legislative assistant. Representative Kukovich supports the efforts of the citizens of Larimer to restore the pedestrian bridge over Brush Creek and the pedestrian subway under Conrail's tracks. The service area of the North Huntingdon Township Volunteer Fire Company No. 2, located in Larimer, is bisected by the main line of the Pittsburgh Division of Conrail. The footbridge and subway are needed to run large diameter hoses over and under the main line. Without the footbridge, the protection afforded by the fire company is severely compromised. Also, without the use of the footbridge, the safety of the congregation

of St. John's United Church of Christ and of children going to their school bus stop on Maple Lane is compromised. Tr. 91-92.

Don Loutsenhizer lives at 12701 June Street in Ardera and is the president of the Larimer Volunteer Fire Company. The 30-inch line along the north side of the railroad tracks is vital to the fire company because the 6-inch line from Brownstown Road will not supply its trucks with the amount of water needed to fight fires. The fire hose would extend from the 30-inch hydrant and be laid through the subway and over the pedestrian bridge to fight a fire on Maple Lane, Armstrong Street, Shannon Street or Brownstown Road, all on the southern side of the railroad tracks in Larimer. It takes too long to lay hose from the hydrant on the southern side of the railroad track around 993 and up Brownstown Road. Tr. 93-95.

Nancy Chruscial lives at 12040 Lee Drive, North Huntingdon and is the postmaster at the Larimer Post Office. When she lived on Railroad Street (on the north side of Larimer) she used the underpass and footbridge to go to school and church. Larimer does not have home delivery of mail, so residents must rent a post office box and come to the post office to get their mail. This affects about forty homes on the north side of Larimer. Elderly residents living on Scotch Hill and Blair Lane

must walk to the post office daily to get their mail and walk to Church Sundays. Also, the playground is in the church yard. This means elderly residents and children must walk along Route 993. Tr. 95-97.

Mary Jean Adair lives at 12061 Larimer Avenue, North Huntingdon. She reiterated the testimony of the other witnesses. Tr. 98.

Theodore Colinear is chairman of the Home Owner's Association. He talked about the history of Larimer related to installation of the railroad tracks and the footbridge and subway. Tr. 99-104.

Nancy Crew is the Seventh Ward Commissioner in North Huntingdon. School children and elderly people should not have to walk along Route 993. Tr. 106.

Conrail

Richard J. Cantwell is an assistant chief engineer for Conrail. He gave the corporate name of the owners and operators of the railroad line located at the crossing, including the number of tracks and the volume, class and approximate speed of all trains operated daily on the line and whether any significant

changes to the railroad operations are contemplated in the foreseeable future. Tr. 41. Mr. Cantwell described the general type of the existing structure, number of spans, principle dimensions and the general physical condition of the structure. Tr. 42.

The witness believes that the pedestrian bridge is not capable of rehabilitation because visual inspection and photographs suggest that the bridge has outlived its useful life and is beyond repair. Tr. 42. The witness stated the approximate date of construction of the existing pedestrian bridge and significant changes made which affected or altered the structure. Tr. 42-43.

Mr. Cantwell is not aware of any legal obligations upon Conrail or its predecessors to maintain the bridge. In the interest of public safety and because of its civic duty, Conrail has performed some repairs to the pedestrian bridge to correct the hazardous condition. Tr. 43-44.

If pedestrian passage is provided at this location, the bridge should be replaced. Replacement is not necessary now because existing roadways can be used to cross the railroad safely. Route 993, a state highway, can be used to cross under the railroad and over Brush Creek. Tr. 45.

Conrail will not do any work or perform any construction. Instead of performing construction, it would agree

to provide a contribution towards replacement of the structure that is commensurate with whatever benefit the Commission may decide that Conrail derives owing to the existence of the structure. The witness does not perceive any future benefits to Conrail owing to the existence of the structure. Tr. 45-46, 49.

Upon cross-examination, the witness stated that Conrail does not have maps or surveys indicating where the railroad right-of-way is located in relationship to the pedestrian bridge. Tr. 46-47. Conrail's maintenance of the structure consists of such things as cleaning out drains and replacing light bulbs. Tr. 48.

Upon further cross-examination, the witness stated that the pedestrian bridge was closed owing to a mutual decision reached by Conrail and the local police. The bridge is barricaded with steel members, resembling a rigid fence, welded in place with 2-inch wire mesh stretched over the members. Tr. 51. He agreed that Route 993 carries considerable vehicular traffic in the area in question. Tr. 52. It would be adequate for a walkway if a paved sidewalk was constructed. The further the sidewalk would be from the road, the safer the condition, but the witness does not know the right-of-way available for Route 993. Tr. 53.

Upon recross-examination, the witness stated that Brush Creek was relocated when the railroad was constructed. Tr. 56.

PennDOT

Kenneth A. Sharp is the acting grade crossing administrator for PennDOT. He stated PennDOT's current obligations regarding maintenance of the existing structure or any work which might be required. PennDOT has no opinion of the adequacy of the crossing because it is used only as a pedestrian footbridge over Brush Creek and as a subway under Conrail's tracks. PennDOT will not perform work or bear any costs or future maintenance for the crossing. Tr. 58-59.

Upon cross-examination, the witness stated that PennDOT abandoned the roadway at the location of the former at-grade crossing. Tr. 60.

Peoples

John M. Harim is supervisor of field engineering and liaison services for Peoples. He described the pipeline laying on and to the eastern side of the footbridge. The pipeline serves 20 to 30 customers. The pipeline was installed in about 1932 on a public right-of-way. If the Commission directs an alteration, relocation or restructuring of its facilities, Peoples would have to determine if it was in its and the community's best interest to continue service in the current

location because Peoples has no other gas supplies on the northern side of the railroad. Tr. 64-66.

Upon cross-examination, the witness stated that Peoples does not pay an occupancy or lease fee to PennDOT to have its facilities on the bridge. Tr. 66. Peoples' pipeline would have to have some kind of dead weight support during construction if the existing bridge is replaced with a new one. Tr. 69.

MAWC

Michael Kenney is the operations manager of MAWC's distribution system. MAWC owns a six inch cast iron pipeline located on the deck of the pedestrian bridge. The pipeline is a one-way feed to the north side of Larimer. MAWC does not agree to assume any costs for any project and would have the same dead weight concerns for its pipeline that Peoples has for its pipeline if the existing bridge is replaced. Tr. 72-73.

Law Bureau

David A. Fischer is a civil engineer in the Commission's Bureau of Safety and Compliance. The footbridge is in poor condition, and timbers are missing from the deck. A pedestrian must make a 90-degree turn from the footbridge and traverse a bituminous paved walkway and then make another 90-

degree turn to go down the stairway to the subway under the tracks. Tr. 76.

The footbridge deck should be replaced. An inspection of the steel structure should be performed to determine if it needs to be replaced or if it cannot be repaired enough to support the timber deck. The inspection would determine if rust on the members caused enough section loss to require replacement and whether the pin connections are rusted enough to require replacement. Tr. 77-78.

The underpass is in good condition structurally. Lights have been smashed and are not operable and some of the stairways steps are in disrepair. Tr. 76-77. The underpass needs to be cleaned out. Drainage should be open and operable. The stairway steps need to be re-concreted. The light fixtures should be repaired and protected with wire cages, but continuing maintenance is needed to replace missing lights if the cages are broken. Tr. 78-79.

The only alternate access for pedestrians is along State Route 993 which is not adequate for pedestrians because there is no curb or paved sidewalk except for the sidewalk across the bridge over Brush Creek and the underpass under the railroad. Tr. 79.

Findings of Fact

1. The present pedestrian bridge was constructed in about 1888 as a vehicular bridge over Brush Creek. Tr. 43.

2. On April 14, 1936, at Complaint Docket No. 7238, the Public Service Commission abolished the crossing where Irwin-Trafford Road crossed four main tracks of the Pennsylvania Railroad in the Village of Larimer. The at-grade crossing was replaced with a grade separated crossing at a new location. The Commission directed that the Department of Highways (now PennDOT) construct a pedestrian subway at the location of the at-grade crossing. So there would be a continuous walkway from one side of the tracks and across Brush Creek into the other side of the Village of Larimer, the vehicular bridge over Brush Creek was converted to a pedestrian bridge by removal of one of the three trusses. Since then, the Pennsylvania Railroad Company and Conrail made minor modifications to the handrails of the pedestrian bridge and replaced some deck timbers. Tr. 43, 54, 58; Exs. A, C.

3. The Public Service Commission Order of April 14, 1936 assigned to the Pennsylvania Railroad Company maintenance responsibility for the pedestrian subway, including the concrete stairways, the lighting facilities therein and the walk leading to the subway. Ex. C.

4. The bridge in question is a pedestrian bridge over Brush Creek in North Huntington Township. It is a single span, wood deck bridge about 75 feet long. The bridge has a steel railing and a steel substructure. The pedestrian bridge is structurally unsound and not safe for pedestrian traffic. The handrail needs to be repaired. Several cross members of the wood deck are missing because they are decayed or rotten and cannot be safely attached to the steel decking. The abutments are adequate. Active gas and water lines are attached to the pedestrian bridge. Tr. 24, 34, 38, 42; Ex. B at 5-7, 13.

5. The track near the bridge in question is Conrail's Pittsburgh Line. Conrail operates about 30 to 35 trains daily at this location. An average of four Amtrak trains daily operate over the same track. There are two main tracks. The maximum authorized speed for a passenger train is 70 miles per hour and for a freight train, 60 miles per hour. Conrail contemplates no changes at this location. Tr. 41-42.

6. The pedestrian bridge does not cross above or below a railroad track or right-of-way. Tr. 32, 43, 55; Ex. A.

7. Conrail closed the pedestrian bridge on April 23, 1991. Ex. L. The bridge is barricaded with steel members, resembling a rigid fence, welded in place with 2-inch wire mesh stretched over the members. The Township did not erect the barricades. Tr. 51, 80; Ex. B at 3, 5-7, 13.

8. The pedestrian underpass is in good condition structurally. Lights have been smashed and are not operable and some of the stairways steps are in disrepair. Tr. 76-77; Ex. B at 1, 4, 10-12.

9. Conrail repaired the pedestrian bridge to correct hazardous conditions. It has cleaned out drains and replaced light bulbs in the pedestrian underpass. Tr. 43-44, 48.

10. Neither the Township nor its contractor has performed maintenance on the pedestrian bridge. The Pennsylvania Railroad constructed and maintained it and Conrail has maintained it. Tr. 24-25, 44-45, 80, 88-89.

11. While Donald Glenn, the current Township engineer, was employed by the Pennsylvania Railroad Company, the railroad performed physical work on the pedestrian bridge. Tr. 30-31.

12. PennDOT has no maintenance obligations regarding the structures being used as a pedestrian crossing under the railroad and over Brush Creek. Tr. 58.

13. To travel from the south side to the north side of Larimer using the pedestrian tunnel, a pedestrian uses the pedestrian footbridge to cross Brush Creek, makes a 90-degree left turn, traverses a bituminous paved walkway, makes a 90-degree right turn to go down the stairway to the pedestrian tunnel under the tracks, and exits the pedestrian tunnel near Railroad Street. Tr. 76; Ex. C.

14. The only alternative route from the south to the north side of Larimer is a detour of about 2,000 feet. This route takes pedestrians along State Route 993, where vehicular traffic travels at a high rate of speed. Route 993 is not adequate for pedestrians because there is no curb or paved sidewalk except for the sidewalk across the vehicular bridge over Brush Creek and the vehicular underpass under the railroad tracks. Tr. 31-32, 79; Ex. A.

15. Larimer does not have home delivery of mail, so residents must rent a post office box and come to the post office (on the southern side of Larimer) to get their mail. This affects about forty homes on the north side of Larimer. Elderly people living on Scotch Hill and Blair Lane (on the northern side of Larimer) walk to the post office daily to get their mail and walk to Church Sundays. Also, the playground is in the church yard. Without the pedestrian bridge, children catching a school bus, residents going to get their mail and residents going to church must cross the railroad tracks or walk along Route 993 to cross from the north to the south side of Larimer. Tr. 25, 95-97.

16. The 30-inch water line along the north side of the railroad tracks is used to fight fires on the south side of Larimer because the 6-inch line on Brownstown Road (on the south side of Larimer) does not supply sufficient pressure. The fire

company lays hose from the 30-inch hydrant through the subway and over the pedestrian bridge to fight fires on Maple Lane, Armstrong Street, Shannon Street or Brownstown Road, all on the south side of the railroad tracks in Larimer. Tr. 25, 93-95; Ex. B at 6, 13.

17. A Peoples Natural Gas Company three-inch welded steel natural gas line providing service to the northern portion of Larimer is on and to the eastern side of the footbridge. It lays outside of the railing area on a one foot wide ledge. The line serves 20-30 customers and Peoples has no other gas supplies on the northern side of the railroad. If the pedestrian bridge is replaced, Peoples' pipeline would need dead weight support during construction. Tr. 64-65, 69; Peoples Ex. 1.

18. The Municipal Authority of Westmoreland County owns a six inch cast iron pipeline located on the deck of the pedestrian bridge. The pipeline is a one way feed to the north side of Larimer. MAWC would have the same dead weight concerns for its pipeline that Peoples has for its pipeline if the existing bridge is replaced. Tr. 72-73; Ex. B at 13.

Discussion

Burden of Proof

Section 332(a) of the Public Utility Code ("Code"), 66 Pa. C.S. §332(a), provides that the party seeking affirmative

relief from the Commission has the burden of proof. In this proceeding, Complainant has requested that the Commission direct Conrail to maintain the pedestrian footbridge. It is clear, therefore, that Complainant is the party seeking affirmative relief from the Commission, and, therefore, is the party with the burden of proof.

In Se-Ling Hosiery v. Marquies, 364 Pa. 54, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the complaint. Feinstein v. Philadelphia Suburban Water Company, 50 Pa. PUC 300 (1976).

Also, in determining whether the Complainant has satisfied the burden of proof, care must be exercised to insure that the decision of the Commission is supported by substantial evidence in the record. See, e.g., Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. The term "substantial evidence" has been defined by the Pennsylvania

Supreme, Superior and Commonwealth Courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. P.U.C., 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).

Jurisdiction

The Law Bureau, PennDOT and Conrail argue that the Commission lacks jurisdiction over the pedestrian footbridge, whereas the Township maintains that the Commission has jurisdiction.

Conrail argues that the pedestrian bridge does not span railroad tracks and is not adjacent to a railroad right-of-way. Furthermore, it is significantly removed from the pedestrian tunnel, which does constitute a crossing, and does not carry highway traffic. For this reason, Conrail concludes, the footbridge does not constitute a railroad crossing or an approach thereto, and the commission lacks jurisdiction over it. Conrail Main Brief (the pages of Conrail's Main Brief are not numbered).

The Law Bureau argues that the Commission's jurisdiction under Section 2702 is limited to highway crossings and that the Commission does not have jurisdiction over the pedestrian footbridge because it is not a highway. Law Bureau Brief at 3-7.

PennDOT argues that the structure in question is a pedestrian bridge over a creek. The structure does not cross above or below the railroad right-of-way or railroad tracks. For these reasons, a railroad-highway crossing is not involved and the matter is beyond the scope of the Commission's jurisdiction. PennDOT Brief at 1-3.

The Township notes that the footbridge is a necessary approach to the pedestrian subway which is under the Commission's jurisdiction. It leads immediately to the pedestrian subway which does "cross" the Conrail tracks. The subway is useless without the footbridge. Closing it amounts to an abolition of the pedestrian subway, which is a crossing. Township Main Brief at 1-2.

In response to the Law Bureau, the Township maintains that the pedestrian bridge is a public way under the Commission's jurisdiction because it is used by Larimer Village residents and by the fire department. Township Reply Brief to the Law Bureau at 2.

In response to Conrail, the Township notes that Conrail admits that the pedestrian tunnel is a crossing and that the footbridge is on the approach to the tunnel because the footbridge leads immediately into the tunnel. Also the Township's exhibits reveal that at least the northern portion of the footbridge is within the railroad right-of-way. Finally, the Township notes that Mr. Cantwell testified that the footbridge was originally an at-grade vehicular crossing. Township Reply Brief to Conrail at 1-2.

The Commission has exclusive jurisdiction over public rail-highway crossings in the Commonwealth. 66 Pa. C.S. §2702. Section 2702(a) reads as follows:

(a) General Rule. No public utility engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway, at-grade or above or below-grade, or at the same or different levels; and no highway without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

That jurisdiction has been extended to the approaches of a crossing by case law. Department of Transportation v. Pa. P.U.C., 64 Pa. Commonwealth Ct. 299, 440 A.2d 657 (1982); Springettsbury v. Pa. P.U.C., 5 Pa. Commonwealth Ct. 102, 289 A.2d 762 (1972).

The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. 66 Pa. C.S. §2702(b).

Additionally, the Commission has the exclusive authority to assess the costs of any work ordered performed upon the parties to this proceeding in such proper proportions as it may determine. 66 Pa. C.S. §2704(a). In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes into consideration all relevant factors, the only requirement being that its order be just and reasonable. East Rockhill Township v. Pa. P.U.C., 115 Pa. Commonwealth Ct. 228, 540 A.2d 600 (1988).

To determine if the Commission has jurisdiction over the footbridge, it is necessary to determine whether the footbridge is part of a public rail-highway crossing, one basis for Commission jurisdiction here. Although the Law Bureau argues to the contrary at page 4 of its Brief, the Commission's jurisdiction under Section 2702 is not limited to highway crossings. The Township is correct that the cases cited by the

Law Bureau do not mention or establish that the Commission's jurisdiction is so limited. The Commission's jurisdiction includes the crossing of the facilities of one railroad over or under the facilities of another railroad. 66 Pa. C.S. §2702(a).

Even so, the footbridge is not a highway. As the Law Bureau notes, Brief at 4, "highway" is defined at Section 102 of the Public Utility Code, 66 Pa. C.S. §102, as follows:

"Highway." A way or place of whatever nature opened to the use of the public as a matter of right for purposes of vehicular traffic.

Whether or not the pedestrian footbridge is open to public use as a matter of right, it does not carry, nor is it designed to carry, vehicular traffic. Although in Consolidated Rail Corporation v. Pa. P.U.C., 75 Pa. Commonwealth Ct. 25, 463 A.2d 59 (1983), the Commonwealth Court ruled that bicycles using a road or path constitutes vehicular traffic, no such vehicular traffic uses the pedestrian footbridge.

The Public Service Commission Order

But for the existence of the Public Service Commission Order of April 14, 1936, (Butler, et al. v. Pennsylvania Railroad Company, et al., 15 P.S.C. 48 (1936) (hereafter, the April 14 Order, or Butler)) the Township's Complaint would be dismissed

for lack of jurisdiction. The Commission can, however, enforce the Public Service Commission Order under Section 502 of the Public Utility Code, 66 Pa. C.S. §502, which gives the Commission the power to enforce any lawful order it has entered.

Conrail notes that the Public Service Commission failed to exercise jurisdiction over the footbridge when it issued the April 14 Order.

The Law Bureau maintains that the Commission retains authority over the abolished crossing only to enforce the provisions of the Public Service Commission Order. The Law Bureau notes that the Order directed the Pennsylvania Railroad to maintain the pedestrian subway, but did not direct any party to maintain the footbridge over Brush Creek. Acknowledging that the portion of the Public Service Commission Order directing the railroad to maintain the pedestrian subway is valid and enforceable, the Law Bureau argues that the Order does not create subject matter jurisdiction over the crossing or over the pedestrian bridge because the Order abolished the crossing. The Law Bureau concludes that the Commission can enforce only the provisions of the April 14 Order which directs the railroad to maintain and repair the pedestrian subway. Law Bureau Brief at 7-8.

PennDOT maintains that it would not be just and reasonable to assign it any maintenance responsibilities for the

footbridge. The structure has been maintained by the railroad and PennDOT has neither been assigned nor has it assumed maintenance responsibilities. After the Commission abolished the crossing, PennDOT abandoned the road. No vehicular traffic can use the structure, so PennDOT does not receive any benefit from it.

According to the Township, the footbridge is an adjacent structure to the pedestrian subway because the foot bridge leads directly to it. Since neither structure serves a purpose without the other, maintenance of the pedestrian subway is absurd without a bridge across the creek. The Township asserts, therefore, that the April 14 Order encompassed the footbridge. In support of this it quotes the following language from the April 14 Order to show that the Commission assigned responsibility for the structure to the railroad:

IT IS FURTHER ORDERED: That any relocation of, changes in, or removal of any adjacent structures, equipment or other facilities of any public service company, which may be required as incidental to the execution of this improvement be made by said public service company at its own expense in such manner as will not interfere with the construction of the improvement.

Butler at 51. It is not necessary, however, to determine whether the pedestrian bridge is a facility of the railroad.

The Commission does have the authority to enforce the April 14 Order for the reasons given above. The Commission also

can interpret its own orders. As the Pennsylvania Superior Court observed in W. J. Dillner Transfer Co. v. Pa. P.U.C., 175 Pa. Super. 472, 107 A.2d 164, 167 (1954), alloc. denied (1954):

Ordinarily, a court will not invalidate a construction by an administrative agency of its own orders unless the result is clearly erroneous, arbitrary, or unsupported by evidence....As an administrative body issuing a certificate of public convenience the Commission is especially qualified to interpret and construe the original grant. The Commission is naturally cognizant of the factual and technical matters upon which such construction depends. (citations omitted)

Although the decisions citing Dillner pertain to construing certificates of public convenience, the principle applies here. The Commission is "especially qualified to interpret and construct" the April 14 Order of the Public Service Commission, its predecessor, abolishing the crossing and directing the railroad to construct and maintain the pedestrian subway. This Commission is "naturally cognizant of the factual and technical matters upon which such construction depends." This interpretation includes giving full force and effect to the Order of the Public Service Commission.

The April 14 Order altered a dangerous at-grade crossing by abolishing the grade crossing, constructing a pedestrian subway at about the point of the at-grade crossing, and constructing a vehicular underpass about 800 feet southeast of the at-grade crossing. The Department of Highways assumed the

construction costs and performed the work. Regarding the pedestrian underpass, the Public Service Commission directed the Pennsylvania Railroad Company to:

...maintain the substructure and superstructure of the vehicular and pedestrian subways, including the concrete stairways and walk leading to the pedestrian subway, and the lighting facilities therein....

Butler at 52-53. The Department of Highway plans, which were approved, provided for the "construction of a new bridge at the southerly end of the vehicular subway to carry the southerly highway approach over Brush Creek." Butler at 49.

It is clear that the Public Service Commission was aware of the need to carry vehicular traffic under the railroad tracks and over Brush Creek. The improvement in the April 14 Order provided for such a vehicular traffic flow. It is also clear from the April 14 Order that the Public Service Commission provided for a pedestrian underpass of the railroad tracks at the sight of the former at-grade crossing. The April 14 Order, however, is silent regarding how pedestrians would complete their journey from one side of Larimer to the other by means of the pedestrian underpass. It does not mention the pedestrian footbridge because it did not exist when the Order was issued.

Conrail witness Cantwell explains why. At the time of the April 14 Order, there was a vehicular bridge across Brush Creek where the pedestrian bridge is now located. It was

constructed by the Pennsylvania Railroad Company in about 1888. When the improvement directed by the Public Service Commission was implemented by the Department of Highways, the vehicular bridge was converted to the pedestrian bridge at issue here. Tr. 43. This was done "to offer a continuous walkway from one side of the tracks and across Brush Creek into the village (of Larimer)." Tr. 54. (emphasis added)

Although the April 14 Order does not mention the vehicular bridge constructed over Brush Creek in about 1888, it is obvious, as Conrail witness Cantwell points out, that if it had not been converted to a pedestrian bridge, pedestrians would not be able to pass from one side of Larimer to the other by use of the pedestrian subway which the Public Service Commission directed PennDOT to construct and the railroad to maintain.

It is clear from this record how important the pedestrian bridge over Brush Creek is to the residents of Larimer. As the Township points out, the pedestrian subway leads to the pedestrian bridge and is useless without it. That is, without the pedestrian bridge, residents cannot travel from one side of Larimer to the other because the pedestrian has no way of getting across Brush Creek. Currently, children and other residents of Larimer, including the elderly, travel along State Route 993 to get from one side of Larimer to the other to go to

school, to go to church, to get their mail and for other purposes.

The portion of the April 14 Order directing the railroad to maintain the pedestrian subway under the railroad tracks has no force and effect unless the pedestrian footbridge across Brush Creek is maintained. This is so even though the pedestrian footbridge did not exist when the April 14 Order was issued. The Township alleges that the pedestrian bridge is on Conrail's property, but the record is not clear on this point. Conrail witness Cantwell testified that Conrail does not have maps or surveys indicating where the railroad right-of-way is located in relationship to the pedestrian bridge. Tr. 46-47. While this information would be helpful, it is not dispositive. It is doubtful that the Township would object to Conrail repairing or replacing the bridge if it is located on Township property.

The footbridge was created from the vehicular bridge across Brush Creek as a result of the improvement directed by the Public Service Commission. The Pennsylvania Railroad built the vehicular bridge in about 1888 and converted it to the pedestrian bridge in 1939. The Pennsylvania Railroad and Conrail have maintained the pedestrian bridge since 1939. Conrail closed and barricaded the footbridge. Conrail benefits from the pedestrian bridge because it is connected to the pedestrian tunnel.

Together, the bridge and tunnel provide pedestrian transit under its tracks. As the bridge in question does not carry vehicular traffic, PennDOT derives no benefit from it.

Based upon this record, to give full force and effect to the April 14 Order of the Public Service Commission, it is necessary to direct Conrail, at its sole cost and expense, to maintain the pedestrian bridge. Conrail will be directed to perform an in depth inspection of the substructure and superstructure of the pedestrian bridge to determine if the substructure can carry the load of a new deck and to submit plans for the rehabilitation or replacement of the footbridge, depending on the results of the inspection.

Owing to the condition of the footbridge, it must remain closed until Conrail submits the results of its inspection to the Commission. Conrail will be directed, however, to repair the concrete steps of the pedestrian tunnel and the lights in the tunnel.

Conclusions of Law

1. The Commission has jurisdiction over the parties to and the subject matter of this proceeding.
2. The Commission has the authority to enforce the April 14, 1936 Order of the Public Service Commission at Complaint Docket No. 7238, 15 P.S.C. 48 (1935).

3. The Commission can interpret and construe the orders of the Public Service Commission, its predecessor.

4. Without maintenance of the pedestrian bridge, the April 14, 1936 Order of the Public Service Commission at Complaint Docket No. 7238, 15 P.S.C. 48, has no force and effect.

5. Conrail benefits from the pedestrian bridge and should maintain it at its sole cost and expense.

RECOMMENDED ORDER

THEREFORE;

IT IS ORDERED:

1. That the Complaint of North Huntingdon Township against Consolidated Rail Corporation, Pennsylvania Department of Transportation and Westmoreland County at Docket No. C-99013746 is sustained.

2. That Consolidated Rail Corporation, at its sole cost and expense, furnish all materials and do all work necessary to maintain the pedestrian bridge across Brush Creek in the Village of Larimer, North Huntingdon Township.

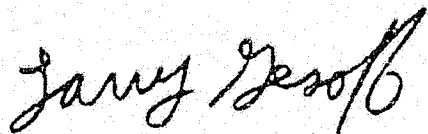
3. That Consolidated Rail Corporation, at its sole cost and expense, furnish all materials and do all work necessary to repair the concrete steps of the pedestrian tunnel and the lights in the tunnel, and that the repairs be completed within six months from entry of the Commission's Order.

4. That Consolidated Rail Corporation, at its sole cost and expense, conduct an in depth inspection of the superstructure and the substructure of the pedestrian bridge.

5. That Consolidated Rail Corporation, at its sole cost and expense, within six months from entry of the Commission's Order, submit to the Commission and all interested parties the results of the inspection referred to in paragraph four of this Order, along with plans and cost estimates for the rehabilitation or replacement of the footbridge, depending on the results of the inspection.

6. That further hearing be held upon receipt of the results of the study and the plans and cost estimates referred to in paragraph five of this Order.

Date: January 7, 1993



LARRY GESOFF
Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township,
Complainant

vs.

Norfolk Southern Railway Company;
Allegheny County; and Commonwealth of
Pennsylvania, Department of Transportation,
Respondents

Docket No. C-20030526

SECRETARY'S BUREAU
MARCH 26 PM 2:12

RECEIVED

CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of the "Main Brief" of Norfolk Southern Railway Company, in the above action, by electronic mail and by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

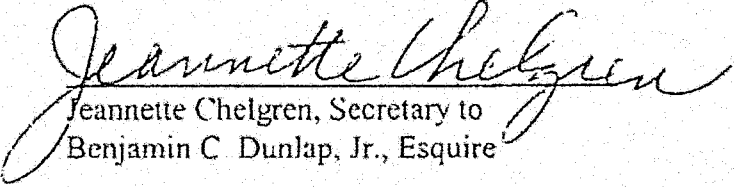
Harmar Township
701 Freeport Road
Cheswick, PA 15024-1208
harmar701@comcast.net

Howard M. Louik, Esquire
Assistant County Solicitor
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
smagheco@county.allegheny.pa.us

Jason D. Sharp, Esquire
PA Department of Transportation
Office of Chief Counsel
P. O. Box 8212
Harrisburg, PA 17105-8212
jsharp@state.pa.us

Shawn N. Gallagher, Esquire
Springer, Bush & Perry
Two Gateway Center, 15th Floor
Pittsburgh, PA 15222
sgallagher@springerlaw.com

Date: March 26, 2004


Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

PROCEDURAL HISTORY

On June 11, 2003, Harmar Township ("Township") filed a formal complaint with the Public Utility Commission ("Commission") against Norfolk Southern Railway Company ("Norfolk") requesting that the Commission order Norfolk to take responsibility for the maintenance of a crossing ("Guys Run Road Crossing") as per the 1930 report and order of the Public Service Commission of Pennsylvania, Application Doc. No. 21878-1930 ("Order"). A field investigation and conference was held at the site where the Guys Run Road Crossing crosses the tracks of Norfolk in the Township on August 21, 2003. On January 29, 2004, a hearing before the Honorable John H. Corbett, Jr. was held to receive testimony and exhibits for the purpose of determining the Commission's jurisdiction and assignment of future maintenance responsibilities.

SUMMARY OF ARGUMENT

The Public Service Commission had subject matter jurisdiction to order the alteration of the Guys Run Road Crossing from a "vehicular and pedestrian" crossing to a "pedestrian" crossing, as Guys Run Road was a "public highway" that crossed the tracks of the Pennsylvania Railroad Company ("Pennsylvania Railroad"), pursuant to Article III, § 5, and Article V, § 12 of the Public Service Company Law (the "Act") of July 26, 1913, P. L. 1374, as amended (a full copy of which is attached hereto as Exhibit "A"). The Public Service Commission Order requiring Pennsylvania Railroad to perpetually maintain the Guys Run Road Crossing as a condition to its approval was also a proper exercise of authority as it was based on the safety and convenience of the public after an investigation pursuant to Article V, §§ 12, and 19 of the Act.

The Commission retains subject matter jurisdiction to enforce the Order in this proceeding pursuant to Section 2702 of the Public Utility Code (the "Code"), 66 Pa.C.S.A. § 101 *et seq.*, 66 Pa.C.S.A. § 2702, since Guys Run Road is a "highway" as defined by Section 102 of the Code, 66 Pa.C.S.A. § 102. Irrespective of the volume and classification of vehicles that utilize the crossing, there are various reasons why it is a "highway" under Section 2702 of the Code.

As the 1930 Docket indicates, the relief sought from Pennsylvania Railroad was not the same as the relief it was granted by the Public Service Commission. The subject crossing was not abolished by the Public Service Commission as requested, it was altered. The abolishment of a crossing necessarily requires the vacation of the "highway" portion of the road at the crossing. The alteration of a crossing does not. Moreover, the Public Service Commission refers to the disputed portion of Guys Run Road in the future

tense as a township highway in the same instrument that ordered its alteration expressing its intent to retain jurisdiction. Also, the public's right in a highway can only be taken away by the Commonwealth, or agency so delegated. The only two bodies capable of vacating the disputed portion of Guys Run Road are the Commission and the Township, neither of which have done so. Notwithstanding its legal classification, there is frequent bicycle use at the crossing, especially by the children of the Township as the Guys Run Road Crossing is the only safe access to the Allegheny River in the area.

As the Order indicates, the approval of the Public Service Commission in granting Pennsylvania Railroad its Certificate of Public Convenience was conditioned upon continued maintenance, and having failed that condition the approval of the alteration is without effect.

The Guys Run Road Crossing is also within the jurisdiction of the Commission under Section 2702 because it is so interrelated to the crossing at Wenzel Drive that they must be viewed as one crossing. The two crossings serve as the only means of ingress and egress for the public in the area, and each has its own defined purpose: one is vehicular only, the other is pedestrian only. And, assuming *arguendo*, that it was not a "highway" within the meaning of Section 2702 after 1930, it would have become one by prescription over the past 70 years.

Notwithstanding the issue of jurisdiction under Section 2702 and the enforceability of the Order, with the broad powers granted to the Commission under Section 1501 of the Code, 66 Pa.C.S.A. § 1501, to require utilities to maintain safe service and facilities for the public, the Commission could require Norfolk to maintain the Guys Run Road Crossing.

Additionally, the Commission can enforce the Order based on its general powers to carry out the full intent of the Code. 66 Pa.C.S.A §§ 103, 501, 502, 503.

ARGUMENT

I. THE PENNSYLVANIA PUBLIC UTILITY COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE SUBJECT CROSSING PURSUANT TO 66 Pa.C.S.A. § 2702.

A. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE CROSSING PURSUANT TO 66 Pa.C.S.A. § 2702 BECAUSE THE PUBLIC SERVICE COMMISSION NEVER ABOLISHED THE SUBJECT CROSSING, THE SUBJECT ROAD WAS NEVER VACATED, AND THE ROAD IS STILL USED AS A HIGHWAY.

Relying on *County of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678 (Pa.Cmwlth. 1996), Norfolk alleges that the Commission has no jurisdiction to enforce the Order because the Guys Run Road Crossing was "formally abolished" by the Pennsylvania Railroad and therefore any assignment of maintenance for the remaining pedestrian portion of the crossing to the railroad is without effect. While this is a convenient interpretation to circumvent its responsibility to provide a safe passageway for the public over its rail line, it is also an erroneous one for several reasons.

To begin with, a brief review of the 1930 docket clearly illustrates that the Guys Run Road Crossing was never formally abolished. As Pennsylvania Railroad's December 14, 1929 Petition to the Public Service Commission ("Petition") indicates, it may well have been the intention of Pennsylvania Railroad to abandon the Guys Run Road Crossing:

In the matter of the application of the Pennsylvania Railroad Company for a certificate of public convenience evidencing the Commission's approval of the abandonment of public vehicular crossing immediately west of Harmarville Passenger Station, Harmar Township, Allegheny County, and continued maintenance at that point of a four foot pedestrian crossing; evidencing the Commission's approval of the abandonment and closing of existing vehicular and pedestrian crossing approximately 850 east of Harmarville Passenger Station and the construction of a new vehicular and

pedestrian crossing approximately 250 feet westwardly from the present crossing and evidencing the Commission's approval of the dedication of an approximate 33 foot strip of property to Harmar Township, Allegheny County, on which Petitioner is to construct a 20 foot roadway of granulated slag.

The petition of The Pennsylvania Railroad Company respectfully represents:

3. That said line of railroad crosses at grade in said Borough a public highway immediately west of Harmarville Passenger Station, . . .

4. That your petitioner proposes to abandon and close the public crossing immediately west of the Harmarville Passenger Station identified as point "A" on the attached blueprint but proposes to maintain at this point a four foot crossing to accommodate pedestrian travel . . .

Wherefore, Your petitioner prays your Honorable Commission to issue a certificate of public convenience evidencing its approval of the abandonment of public vehicular crossing immediately west of Harmarville Passenger Station, Harmar Township, Allegheny County, . . . and the construction of a new vehicular and pedestrian crossing approximately 250 feet westwardly from the present crossing and evidencing the Commission's approval of the dedication of an approximately 33 foot strip of property to Harmar Township, Allegheny County, on which petitioner is to construct a twenty foot roadway of granulated slag.

Petition (emphasis added).

The first crossing mentioned in the Petition is the Guys Run Road Crossing, the last crossing is the crossing that exists presently at the intersection of Norfolk's railroad and Wenzel Drive ("Wenzel Drive Crossing") (Twp. Ex. 1; Tr. 11). While it may have been Pennsylvania Railroad's intention to abolish the Guys Run Road Crossing, that was not the relief that it was accorded by the Public Service Commission, as demonstrated in its September 23, 1930, Certificate of Public Convenience ("Certificate"), which states as follows:

In the matter of the application of the Pennsylvania Railroad Company, under Section 5, Article III, and Sections 12, 18 and 19, Article V, of the Public Service Company Law, for the approval of the alteration of an existing crossing at grade from a vehicular to a pedestrian crossing, at point where tracks of said railroad company cross a township highway in Harmar Township, Allegheny County, Pennsylvania, immediately west of Harmarville Passenger Station, said railroad company; and, also for the abolition of another crossing, at grade, where township highway crosses tracks of the said railroad company, approximately eight hundred and fifty (850) feet east of Harmarville Passenger Station; and, also for the construction of crossing, at grade, at point where new connecting highway will cross tracks of the said railroad company and the tracks of the Allegheny Valley Street Railway Company, approximately six hundred feet east of Harmarville Station.

Certificate (emphasis added).

The Public Service Commission did not approve the Petition as submitted. The Petition requested to abandon and close two separate public crossings used for vehicular and pedestrian traffic. The Public Service Commission approved the abolition of the public crossing used for vehicular and pedestrian traffic 850 feet east of the Harmarville Passenger Station. The Public Service Commission did not approve the "abandonment" of the Guys Run Road Crossing, it approved for its "alteration", citing to Article III, § 5, and Article V, § 12, 18 and 19 of the Act as its enabling statutory authority. The relevant sections of Article III, Section 5, and Article V, Section 12 of the Act are stated as follows:

Section 5. Upon the approval of the commission, evidenced by its Certificate of Public Convenience first had and obtained, and not otherwise, it shall be lawful for any railroad corporation or street railway corporation to construct its tracks or other facilities across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade; or for any public highway to be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or for any public service company to construct any of its facilities across the facilities of any other public service company at the same or different levels. And it shall be lawful,

upon like approval first had and obtained, and not otherwise, for any public service company to alter, relocate, remove, or abolish any such crossing.

Article III, Section 5 (emphasis added).

Section 12. Except in case in which grade crossings are in process of abolition at the time of the passage of this act, under agreement or contract with a municipality, as set forth in the proviso of section five of article three of this act, the commission shall have exclusive power to determine, order and prescribe, in accordance with plans and specifications to be approved by it, the just and reasonable manner, including the particular point of crossing, in which the tracks or other facilities of any public service company may be constructed across the tracks or other facilities of any other public service company at grade, or above or below grade, or at the same or different levels; or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade; or in which any public highway may be constructed across the tracks or other facilities of any other railroad corporation or street railway corporation at grade, or above or below grade; and to determine, order and prescribe the terms and conditions of installation and operation, maintenance and protection, of all such crossings which may now or hereinafter be constructed, including the stationing of watchmen thereat, or the installation and regulation of lights, block or other system of signaling, safety appliances, devices, or such other means or instrumentalities as may to the commission appear reasonable and necessary, - to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. No such crossing shall be constructed without the approval of the commission, evidenced by its "Certificate of Public Convenience," as provided in section five article three of this act; but in no case shall the approval or consent of any court, board, or other commission or officer, of any municipality, be necessary therefor. It shall be proper, however, for the commission, by general rule or order, whenever the same can be properly regulated by suitable general rule, to prescribe the terms and conditions under which such crossing may be constructed, operated, maintained, or protected, without the particular approval of the commission.

The commission shall also have exclusive power, upon its own motion or upon complaint, and after hearing as hereinafter provided (of which all the parties in interest, including the owners of adjacent property, shall have due notice), to order any crossing aforesaid, not existing or hereafter constructed at grade, or at the same or different levels, to be relocated or altered, or to be abolished, according to plans and specifications to be

approved, and upon just and reasonable terms and conditions to be prescribed, by the commission.

In determining the plans and specifications for any crossing herein mentioned, the commission may lay out, establish, and open such new public highways as, in its opinion, may be necessary to connect said crossing with any existing highways or to make said crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any said crossings. . . .

Before the commission shall make any final order relative to the construction, relocation, alteration, or abolition of any crossing involving any public highway or street, an effort shall be made by the commission to reach an agreement with the proper officials of the municipal corporations concerned, determining the plans and specifications governing such crossings. . . .

Article V, Section 12.

These sections gave the Public Service Commission exclusive jurisdiction over the regulation and elimination of railroad grade crossings intersecting with a public highway, and hence proceedings for eliminating such crossings were required to be instituted before the Public Service Commission. *Bartron v. Northampton County*, 19 A.2d 263 (1941). As admitted by Pennsylvania Railroad in its Petition, and evidenced by the Certificate, Pennsylvania Railroad's tracks crossed a township highway, Guys Run Road, and as such, the Public Service Commission had the requisite jurisdiction in 1930 to order the altering of the Guys Run Road Crossing. This is also the same reason why the Commission retains exclusive jurisdiction over the Guys Run Road Crossing. The enabling statutory authority for Public Service Commission jurisdiction in Article III, Section 5, and Article V, Section 12 of the Act is now embodied in Section 2702 of the Code, 66 Pa.C.S.A. § 2702.

The Commission has exclusive jurisdiction over public rail-highway crossings in the Commonwealth. 66 Pa.C.S.A. § 2702; *Pittsburgh Railways Co. v. Pennsylvania Public Utility Commission*, 182 A.2d 80 (Pa.Super. 1962) (the Commission's jurisdiction over railroad-highway crossings is not unlimited, but when it attaches, it is exclusive). That jurisdiction has been extended to the approaches of a crossing by case law. *Department of Transportation v. Pennsylvania Public Utility Commission*, 440 A.2d 657 (Pa.Cmwlth. 1982). The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. 66 Pa.C.S.A. § 2702; *SEPTA v. Pennsylvania Public Utility Commission*, 592 A.2d 797 (Pa.Cmwlth. 1991). The Commission is also empowered to order the abolition of crossings upon such reasonable terms and conditions as it prescribes. 66 Pa.C.S.A. § 2702(c).

Additionally, the Commission has the exclusive authority to assess the costs of any work ordered performed upon the parties to this proceeding in such proper proportions as it may determine. 66 Pa.C.S.A. § 2704(a). The Commission also determines what parties are concerned within the meaning of 2702 and 2704 of the Code. *County of Chester v. Pennsylvania Public Utility Commission*, 408 A.2d 552 (Pa.Cmwlth. 1979). In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. *East Rockhill Township v.*

Pennsylvania Public Utility Commission, 540 A.2d 600 (Pa.Cmwlt. 1988); *Municipality of Monroeville v. Pennsylvania Public Utility Commission*, 600 A.2d 655 (Pa.Cmwlt. 1991); *Greene Twp. v. Pennsylvania Public Utility Commission*, 668 A.2d 615 (Pa.Cmwlt. 1995).

In the instant matter, under a Section 2702 analysis, the Commission's jurisdiction is determined by whether the Guys Run Road Crossing constitutes a rail-highway crossing within the Commission's jurisdiction. For a rail-highway crossing to be within the Commission's jurisdiction, the road or street involved must be a highway as defined by Section 102 of the Code, 66 Pa.C.S.A. § 102. If a road or street is open to the use of the public, as a matter of right, it is a highway as defined by Section 102 regardless of the number of people who use it. If a road or street is not open to the use of the public as a matter of right, it is not a highway as defined at Section 102. *City of Bethlehem v. Pennsylvania Public Utility Commission*, 627 A.2d 244 (Pa.Cmwlt. 1993); *Township of Swatara v. Pennsylvania Public Utility Commission*, 312 A.2d 809 (Pa.Cmwlt. 1973); *Reading Company v. Pennsylvania Public Utility Commission*, 333 A.2d 525 (Pa. Cmwlt. 1975); *Delaware, Lackawanna and Western Railway Company v. Shuman*, 115 A.2d 161 (Pa. 1955); *SEPTA v. Pennsylvania Public Utility Commission*, 505 A.2d 1046 (Pa.Cmwlt. 1986).

It is clear from the Petition and Certificate that Guys Run Road was a highway within the meaning of Article III, Section 5, and Article V, Section 12 of the Act, and despite Norfolk's contrary contention, it is still a highway under Section 2702 of the Code since the Guys Run Road Crossing was never formally abolished by the Public Service Commission. In *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa.Super.

1951), the Superior Court addressed the law in Pennsylvania concerning abandonment as follows:

The consent of the Commonwealth may be evidenced by an Act of the General Assembly, or by an official authorized by it to act on its and the State's behalf. The legislature's supervisory power in respect of railroads has been committed and delegated to the Public Utility Commission which is 'an administrative arm of the Legislature', whose members are 'deputies of the General Assembly to perform legislative work'. It is the representative of the legislature to the extent of its statutory powers. The Public Utility Law of May 28, 1937, P.L. 1053, § 202, as amended, 66 P.S. § 1122, authorizes it to grant a certificate of public convenience: 'For any public utility to dissolve, or to *abandon* or surrender, in whole or in part, any service, right, power, franchise, or privilege'. The Commission is thereby abundantly empowered, on behalf of the Commonwealth, to consent to an abandonment, whether of service or of essential rights and privileges, and except for the legislature itself, is the only organ of government which may grant the Commonwealth's consent. The Commission's certificate of public convenience is the authoritative token of the formal consent of the Commonwealth to an abandonment or surrender.

Lacy A.2d at 708-709 (citations omitted) (emphasis in original.).

The issue in *Lacy* concerned the abandonment of a railroad right of way. Nevertheless, it is submitted that the rationale for the holding of the case is much broader and encompasses the principal that the abandonment or abolishment of any kind cannot occur without the consent of the Commonwealth. The mechanism for granting this consent is through the certificate of public convenience procedure. *Lacy*; see also *A. D. Graham & Co. v. Pennsylvania Turnpike Commission*, 33 A.2d 22 (Pa. 1943); *CSX Transp., Inc. v. Pennsylvania Public Utility Com'n*, 558 A.2d 902 (Pa. Cmwith. 1989).

Since the Guys Run Road Crossing was not abandoned or abolished by the Public Service Commission, it remains a township road. Further evidence of the Public Service Commission's intention to leave Guys Run Road a Township road for purposes of retaining jurisdiction is found in the Order as follows:

In re: Application of the Pennsylvania Railroad Company, for the approval of the alteration of an existing crossing, at grade, from a vehicular to a pedestrian crossing, at point where tracks of said railroad company cross a township highway in Harmar Township, Allegheny County, Pennsylvania, immediately west of Harmarville Passenger Station, said railroad company; and, also for the abolition of another crossing, at grade, where township highway crosses tracks of the said railroad company, approximately eight hundred and fifty (850) feet east of Harmarville Passenger Station. . .

The tracks and right-of-way of the Pennsylvania Railroad Company cross at grade in the vicinity of its Harmarville Passenger Station in Harmar Township, Allegheny County, two township highways connecting with State Highway Route 70, locally known as Freeport Road. The street railway tracks of the Allegheny Valley Street Railway Company parallels said State Highway Route 70 on the east side. The first crossing is immediately west of Harmarville Passenger Station, and the second township crossing is approximately eight hundred and fifty (850) feet east of said station. . . . It is proposed by this proceeding to alter or change first grade crossing west of Harmarville Station from a vehicular and pedestrian crossing to a four foot pedestrian crossing at grade, and to abolish the second crossing about eight hundred and fifty (850) feet east of the Harmarville Passenger Station. Under the plan submitted, a new connecting township highway (Wenzel Drive) is to be constructed from the township road west of the station (Guys Run Road) to the township road eight hundred and fifty (850) feet east of the Station. . .

Now, to-wit, September 23, 1930, IT IS ORDERED: That the following highways be, and the same are hereby laid out and established and opened:

(a) A new highway beginning at a point in the township highway extending across the tracks of The Pennsylvania Railroad Company west of its station approximately 180 feet southeast of said crossing, and extending thence in a general northeasterly direction for a distance of approximately 900 feet to a junction with a township highway extending northwesterly to the crossing to be abolished; alignment, width and grade to be as shown on the approved plan.

IT IS FURTHER ORDERED: That effective upon the completion of new highways and new grade crossing that portion of the township highway approximately eight hundred and fifty feet east of Harmarville Station between the property line of the Allegheny Valley Street Railway

Company on the north side of its track and the southerly property line of the Pennsylvania Railroad Company be, and is hereby vacated;

IT IS FURTHER ORDERED: That a certificate of public convenience issue evidencing the Commission's approval of this application as above determined.

Order (emphasis added).

Of particular importance in the Order, is that the Public Service Commission refers to Guys Run Road still being a township highway after the alteration, and specifically, that portion of Guys Run Road extending from Freeport Road to the Allegheny River where it intersects with the new township highway, Wenzel Drive. See (Twp. Ex. 1). Moreover, of the crossing that was formally abolished, the portion of the township highway in between the rail lines was expressly vacated, therefore ceasing to be a part of the Township road system or a highway under the Act. If it was the intention of the Public Service Commission to do the same when it altered the Guys Run Road Crossing the Public Service Commission could have similarly vacated that portion of Guys Run Road.

This proposition was stated by the Superior Court in *City of Erie v. Public Service Commission*, 74 Pa.Super. 265 (Pa.Super. 1920), as follows:

Section 12 of article V, defines with great detail the powers to be exercised by the commission in regard to grade crossings. . . The jurisdiction given is exclusive. It was evidently the intention of the legislature that the whole subject of grade crossings be put under the control of the commission. . . . Necessarily when crossings are abolished, the part of the street which crosses the railroad tracks can no longer be part of a thoroughfare. . . Three words are used in the act, "relocate," or "alter," or "abolish." We must presume that each of these words has some distinctive meaning. They are plainly distinguishable. The commission has power to "relocate" a grade crossing by closing it and providing another in its stead somewhere else. It has a right to "alter" it, that is to change it from a grade crossing to one overhead or underground, or it can "abolish"

it, that is do away with it entirely. The last word is clear, and means that the crossing is to be eliminated.

We are then met with the argument that the act provides such crossings are to be relocated or altered, or abolished according to the plans and specifications to be approved and upon just and reasonable terms to be prescribed by the commission, and that the employment of the words, "according to plans and specifications" bound the commission to such acts as required plans and specifications to accomplish. We can see nothing in this argument. The words are not used to limit the powers of the commission but in amplification of them. In other words the commission cannot only order the relocation, alteration, or abolition of grade crossings but they have also control of the methods to be employed in so doing and all the details involved in the work must be approved by them.

City of Erie at 268, 269 (emphasis added).

Norfolk's assertion that the Guys Run Road Crossing was abolished is incorrect. The Certificate unmistakably states that "this certificate is issued evidencing its approval of the said application as set forth in said report and order", not as set forth in the application itself. The Public Service Commission specifically changed the terminology used by Pennsylvania Railroad. Pennsylvania Railroad sought to "abandon" two crossings, the Public Service Commission approved the "alteration" of one and the "abolition" of the other. The term "alteration" does not have the same legal connotations as the terms "abandon" or "abolition". The term alteration means the reconstruction of an existing crossing. *See City of Philadelphia v. Pennsylvania Public Utility Commission*, 458 A.2d 1026 (Pa.Cmwlt. 1983) (city filed applications for Commission approval of the alteration and reconstruction of the street-railroad crossings, citing as their purpose the necessity for improving the circulation of traffic); *Petition of Allegheny County*, 76 A.2d 184 (Pa. 1950); *Department of Highways v. Pennsylvania Public Utility Commission*, 138 A.2d 143 (Pa.Super 1958); *Schuylkill County v. Pennsylvania Public Service Commission*, 77 Pa.Super 504 (Pa.Super. 1921).

As provided in the Petition, Certificate and Order, Guys Run Road was a township highway in 1930, and at the very least, since 1897 (Twp. Ex. 12). It has long been the law of Pennsylvania that a municipality cannot relinquish public rights in dedicated land without legislative authority. *In re Osage Street*, 90 Pa. 114 (Pa. 1879)(the exclusive jurisdiction to open and vacate borough streets, even those once dedicated to public use, is in its councils); *Murray v. Allegheny*, 136 F. 57 (3d Cir. Pa. 1904); *Pittsburg v. Epping-Carpenter Co.*, 45 A. 129 (Pa. 1900); *Summerhill v. Sherbine*, 88 Pa. Super. 419 (Pa. Super. 1926); *In re Petition of Freeland*, 66 Pa. D. & C.2d 179 (1974); *see generally White v. Twp of Upper St. Clair*, 799 A.2d 188 (Pa. Cmwlth. 2002)(dedication of real property, like a contract, requires both offer and acceptance, in whatever form it takes, dedication is irrevocable).

Section 2304 of the Second Class Township Code, 53 P.S. § 65101 *et. seq.*, provides that the only way a township can renounce the public right in a dedicated street is by a vacating ordinance. 53 P.S. § 67304. Section 2321 of the Second Class Township Code further provides that “[a]ny crossing of a railroad by a road or any vacation of any road crossing a railroad shall be made only under the jurisdiction of the Pennsylvania Public Utility Commission.” 53 P.S. § 67321. The Township never vacated Guys Run Road, and as per *Lacy, A. D. Graham and CSX Transp., supra*, neither the Public Service Commission nor the Commission ever vacated Guy’s Run Road (Tr. 37).

Therefore, Guys Run Road is still a highway under Section 2702 of the Code, irrespective of its current condition, or whether cars, trucks or buses can access Wenzel Drive from Guys Run Road. *See Pittsburgh v. Epping-Carpenter Co.*, 45 A. 129 (Pa. 1900) (when dedication and acceptance of public property is shown, no part is lost

because it is not used through its entire width); *Gailey v. Wilkinsburg Real Estate & Trust Co.*, 129 A. 445 (Pa. 1925) (public rights in property dedicated to the public use and accepted cannot be lost by non-user); *In re Warnock Street*, 152 A.2d 789 (Pa. Super. 1959); *Twibill v. Lombard & S. S. P. R. Co.*, 3 Pa. Super. 487 (Pa. Super. 1897); *In re Altoona*, 388 A.2d 313 (Pa. 1978) (dedication does not impose upon a municipality a duty to maintain the roadway in perpetuity; rather, it requires only that municipality make proper and conforming use of dedicated land for as long a period as its designated use continues to serve the public interest); *Commonwealth v. Moorhead*, 12 A. 424 (Pa. 1888) (acceptance of a street or way by user is accordingly not affected by the failure of the municipality to do any work to maintain or improve it).

In a factually similar case, the Commonwealth Court in *Reading Co. v. Pennsylvania Public Utility Commission*, 333 A.2d 525 (Pa. Cmwlth. 1975), held that a 1900 docket entry of the Court of Quarter Sessions declaring a road on an otherwise pedestrian only bridge, a public road, was competent evidence from which the Commission could find that the bridge was a public highway within the meaning of Section 2702 of the Code, and that the failure of the township to maintain the bridge denominated as a public highway did not constitute an abandonment thereof. The Court stated the following with regard to the issue of abandonment:

In Pittsburgh v. Epping-Carpenter Co., 194 Pa. 318, 323, 45 A. 129, 131 (1900), the Supreme Court affirmed on the lower court opinion which stated: '(i)n Pennsylvania a highway is the property of the people, not of a particular district, but of the whole state, who, constituting as they do the legitimate sovereign, may dispose of it by their representatives and of their pleasure . . . [a] municipality may be charged with the care of a public highway . . . but cannot dispose of it or relinquish the rights of the public unless specifically authorized by the legislature so to do.' (Citations omitted.) . . . We have searched in vain to find authority for Reading's position. Decisional and statutory law on the subject of abandonment and

vacation of the public use is voluminous, but nowhere have we found support for the proposition that failure to maintain alone constitutes abandonment.

Reading A.2d at 528 (emphasis in original).

The facts surrounding Guys Run Road are stronger than those in *Reading*. The Township has continuously maintained the disputed portion of Guys Run Road (Tr. 22, 23, 38, 47, 48, 63, 70), the 1930 docket of the Public Service Commission demonstrates that it was and is a public road, and even Pennsylvania Railroad's own official documentation categorizes it as such, as shown in the record as follows:

Direct Examination of Georgene Kidzuz

- Q. Do you recognize this document?
A. I do.
Q. And can you tell me what it is?
A. It's a map of Wenzel Drive. It shows the pedestrian crossing.
Q. Down in the right-hand corner, can you read that portion? . . .
A. Lease of property to Joseph H. Meyers, June 6, 1950.
Q. Who is leasing the property to Joseph Meyers?
A. The Pennsylvania Railroad Company, Central Region.
Q. How did you come across this document?
A. My father bought all of the rest of the railroad property that was available, including that track, and he was, Meyers was still renting it. . . .
Q. What year was this?
A. June 6, 1950.
Q. And there are two public roads listed on here. Would the public road on the bottom right here, would this be currently what is Wenzel Drive?
A. Yes it is.
Q. And there is a public road right here; what would this be?
A. Guys Run Road.
Q. There is a rail line here, the Conemaugh Division?
A. Right.
Q. Is that the current rail line right now?
A. Yes it is.
Q. And it says public road going all the way through the entire portion?
A. Right.

(Twp. Ex. 16; Tr. 101, 102).

Moreover, in addition to the regular pedestrian traffic at the Guys Run Road Crossing, there is also constant vehicular/bicycle use. The most frequent vehicular/bicycle use at the crossing is by the children of the Township in order to access the river and the residents of Wenzel Drive (Twp. Ex.1; Tr. 33, 34, 76, 77). Other vehicles that have used the crossing have included motorcycles and three wheel all terrain vehicles (Tr. 24, 30, 50, 51, 71). This use of vehicles at the Guys Run Road Crossing is not necessary to confer jurisdiction upon the Commission under Section 2702, however, it does constitute another reason why the Commission has jurisdiction.

In *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 463 A.2d 90 (Pa.Cmwth. 1983), the Commission had jurisdiction to approve the construction of a crossing, at grade, over the tracks of Conrail for a bikeway because it was within the statutory definition of a "highway" under 66 Pa.C.S.A. §§ 102, 2702(a). Similar to Guys Run Road, the proposed bikeway in *Conrail* was four feet in width at the crossing of Conrail's tracks and wider at other places. The pathway was also intended for pedestrians, and vehicles wider than four feet were disallowed at the crossing.

In addition to arguing that the Commission lacked jurisdiction because a bikeway was not a highway, Conrail also argued that the proposed bikeway was not "open to the use of the public," as required by the Code's definition of a highway because it was restricted to bicycles, tricycles, and pedestrian traffic. In refuting this argument, the Court stated:

This contention fails because the word public refers to persons not to the means by which persons get about. The unlimited public may use this crossing so long as they pass on foot or in the vehicles for which its use is intended. The Commonwealth's public highways are for the use of the

whole people, but the size, weight, length, width, and indeed, the kinds of vehicles which may be used on particular highways are regulated by the Commonwealth for the safety, convenience and pleasure of all.

Consolidated Rail Corp. A.2d at 92 (emphasis added).

The use of bicycles and other vehicles four feet or less in width at the Guys Run Road Crossing is completely in line with that of the proposed bikeway in *Conrail*. The fact that other vehicles cannot access the crossing is immaterial in determining jurisdiction under 2702, since the crossing is open to the public. Predominantly pedestrian traffic with intermittent bicycle use is sufficient to establish jurisdiction under Section 2702. *See Application of Danville Area School District*, Docket No. A-00118478 (Order entered March 19, 2002) (order approving the construction of a proposed pedestrian crossing, at grade, over a single track where some children may use bicycles).

Any argument that Norfolk may make regarding the "four foot pedestrian crossing" language in the Petition, Certificate, and Order, barring the applicability of *Conrail*, should not be given any credence. An order of the Commission does not have to state "four foot pedestrian and bicycle crossing" for jurisdiction purposes under Section 2702. *See Application of Danville* ("Application of Danville Area School District & Borough of Danville for approval of the construction of a pedestrian crossing at grade on the tracks of SEDA-COG Joint Rail Authority, located in the Borough of Danville, Montour County") (emphasis added). Furthermore, Norfolk should be estopped from arguing that the grade and stairs at the Guys Run Road Crossing preclude the consideration of bicycles under a Section 2702 analysis. As the record indicates, Norfolk's maintenance at the Guys Run Road Crossing since 1930 is the reason why the public has to carry their bicycles up 5 steps:

Direct Examination of Georgene Kidzuz

- A. I remember when you could come across Guys Run Road and walk across the crossing, which was Guys Run Road, clear to the river. I recall the time the railroad has a ballast and raised it, and as it got higher, it was no longer able to up with cars and they moved the crossing twice so far.
- Q. So the railroad tracks were not always this height?
- A. No.

(Twp. Ex. 8H; Tr. 100).

Cross Examination of James Reckney, Norfolk

- Q. From time to time does the railroad add ballast to the tracks as a track improvement process over time?
- A. Yes they do.
- Q. During the '73, '74 years since the Commission has entered an Order, the last order that we know of concerning this crossing, would you expect that this crossing would be built up over this time with ballast eroding?
- A. Yes, I would say that would be a correct summation.

(Tr. 130).

The Certificate that Norfolk so heavily relies on does not affect the Commission's jurisdiction over the Guys Run Road Crossing. The Public Service Commission had jurisdiction pursuant to Art, III, § 5 and Art V, § 12, and the Commission retains jurisdiction under Section 2702 because Guys Run Road is a public road. Because Guys Run Road was not officially abolished under the proceeding at Doc. No. 21878-1930, it is proper for the Commission to enforce the Order now.

- B. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE CROSSING PURSUANT TO 66 Pa.C.S.A. § 2702 BECAUSE THE PUBLIC SERVICE COMMISSION'S APPROVAL OF THE ALTERATION OF THE CROSSING WAS CONDITIONAL.**

Since the Public Service Commission's jurisdiction over the present matter was proper under Art, III, § 5 and Art V, § 12 of the Act, and this exclusive jurisdiction is still

retained by the Commission under Section 2702 of the Code, it follows that the conditions of maintenance were proper in 1930, and are enforceable today. Once jurisdiction attaches, it is exclusive, giving the Commission the exclusive power to dictate the conditions in or under which crossings shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of public safety. *Pittsburgh Railways Co. v. Pennsylvania Public Utility Commission*, 182 A.2d 80 (Pa.Super. 1962).

In addition to granting jurisdiction, Art V, § 12 of the Act also provides the scope of conditions that could be placed on railroads in crossing proceedings.

[T]he commission shall have exclusive power to determine, order and prescribe, . . . the terms and conditions of installation and operation, maintenance and protection, of all such crossings which may now or hereinafter be constructed, including the stationing of watchmen thereat, or the installation and regulation of lights, block or other system of signaling, safety appliances, devices, or such other means or instrumentalities as may to the commission appear reasonable and necessary, - to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. . . . The commission shall also have exclusive power, upon its own motion or upon complaint, and after hearing as hereinafter provided (of which all the parties in interest, including the owners of adjacent property, shall have due notice), to order any crossing aforesaid, not existing or hereafter constructed at grade, or at the same or different levels, to be relocated or altered, or to be abolished, according to plans and specifications to be approved, and upon just and reasonable terms and conditions to be prescribed, by the commission. . . . In prescribing the terms and conditions, upon which any such crossing may be constructed or relocated, or altered or abolished, and the proportionate contributions to the expense thereof, including the damages or compensation to the owners of adjacent property, as aforesaid, the commission may, among other things, take into consideration the relative importance to the public of the services rendered by the public services companies concerned, as well as the priority of location: . . .

Article V, § 12 (emphasis added).

In making a determination of what was reasonable under the circumstances, the Public Service Commission had to follow the strictures of Article V, § 19 of the Act, provided as follows:

Section 19. For the purpose of enabling the commission to make such findings or determination it shall hold such hearings, which shall be public, and subpoena and examine such witnesses, and compel the production of and examine such books, papers, contracts, or other documents, and make such inquires, physical examinations, valuations and investigations as it may deem necessary or proper, in enabling it to reach a determination. Due notice of every such hearing shall be given, and in every case the commission shall make a finding or determination in writing, stating whether or not its approval is given and, if given, shall issue its certificate to be known as its Certificate of Public Convenience, under its seal, and file among its records a duplicate of every such certificate.

Article V, § 19 (emphasis added); *see now* 66 Pa.C.S.A. § 1103.

For conditions in an order to be reasonable in crossing cases, the Public Service Commission had to abide by Article V, §§ 12 and 19, as does the Commission today under Sections 1103 and 2702 of the Code, 66 Pa.C.S.A. §§ 1103, 2702. The Commission's order must be supported by findings of fact which are based on evidence. *West Penn Railways Co. v. Pennsylvania Public Utility Commission*, 4 A.2d 545 (Pa.Super. 1939). The evidence must be competent and relevant. *Aizen v. Pennsylvania Public Utility Commission*, 60 A.2d 443 (Pa.Super. 1948). In other words, the Commission's action must be predicated upon facts contained in the record. *Erie Lighting Co. v. Pennsylvania Public Utility Commission*, 198 A. 901 (Pa.Super. 1938). An order concerning a crossing is *prima facie* reasonable. *Buffalo & Lake Erie Traction Co. v. Public Service Commission*, 67 Pa.Super. 581 (Pa.Super. 1917).

If the Commission has exclusive power to prescribe how a crossing shall be constructed, it can direct the details of the construction. *Department of Highways v.*

Pennsylvania Public Utility Commission, 182 A.2d 267 (Pa.Super. 1962); see generally *Jennings v. Pennsylvania Public Utility Commission*, 14 A.2d 882 (Pa.Super. 1940) (in granting a certificate permitting the abandonment of a location the Commission has the power to attach reasonable conditions to its consent if the record permits). In imposing conditions, the Commission is not limited to just matters of service, but also has the power to impose conditions in the interest of public safety. *Pennsylvania Dept. of Highways v. Pennsylvania Public Utility Commission*, 98 A.2d 199 (Pa.Super. 1953).

The plain import of the provisions authorizing the Commission to impose conditions is to give authority to the Commission to impose conditions which will properly safeguard, under the particular circumstances, the public interest as to safety. The only limitation is that the conditions imposed must be just and reasonable. *West Penn Railways Co. v. Pennsylvania Public Utility Commission*, 15 A.2d 539 (Pa.Super. 1940).

As the Certificate indicates, the Public Service Commission properly followed the requisite procedures, therefore the accompanying conditions contained in the Order are *prima facie* reasonable and enforceable. The conditional approval of the Public Service Commission and the relevant conditions in the Order are as follows:

The Department of Highways; Township Supervisors of Harmar Township, and the Allegheny Valley Street Railway Company have approved the proposed improvement. The Pennsylvania Railroad Company will bear all expenses in connection with the entire improvement, and after construction the Allegheny Valley Street Railway Company will maintain the new highway crossing over its tracks; The Pennsylvania Railroad Company maintain crossings over its tracks, and the Township of Harmar will maintain the new connecting highways.

The Commission from consideration of the record finds and determines that the approval of the application in accordance with plan dated January 4, 1929, identified as Exhibit 3 at hearing of May 15, 1930, as modified with respect to lowering the tracks of Allegheny Valley Street Railway Company; the elevation of the concrete paving; State Highway

Route 70, and agreement of parties, and the issuance of a certificate of public convenience in evidence thereof, subject to the following conditions is necessary and proper for the service, accommodation and convenience of the public:

* * * *

THIRD: That the crossing immediately west of Harmarville Passenger Station altered and changed from vehicular to pedestrian crossing shall be planked or paved for a width of four feet.

* * * *

SEVENTH: That all costs and expenses in connection with the entire improvement shall be borne with and paid for by The Pennsylvania Railroad Company and the maintenance of the new crossing over tracks at Allegheny Valley Street Railway Company shall be borne and paid for by said company, and the maintenance of the new crossing of the tracks of the Pennsylvania Railroad Company as well as pedestrian crossing shall be borne by The Pennsylvania Railroad Company and the maintenance of the new connecting highway shall be borne and paid for the by the Township of Harmar.

Order (emphasis added).

The explanatory paragraph on page 2 of the Order expressly states that the Public Service Commission's approval was conditional. *See generally Andrews v. Public Service Commission*, 88 Pa.Super. 306 (Pa.Super. 1926) (Public Service Commission could conditionally grant certificate of approval to public service company applying for certificate of public convenience). The Order approved of the "alteration" of the crossing subject to the following two conditions: (1) that Pennsylvania Railroad pay all costs associated with the alteration, and (2) maintain the crossing once the alteration was completed. At the onset, Pennsylvania Railroad complied with the maintenance conditions, as did its successor in interest, Conrail (Tr. 13, 23, 39, 40, 43, 44, 104). However, this ongoing obligation has not been fulfilled by Norfolk, and as such, the current state of the Guys Run Road Crossing has placed the safety of the public in peril (Tr. 24, 25, 96, 78, 79).

Notwithstanding that the Guys Run Road is still a public highway for purposes of Section 2702, even after it was altered, it is also a public highway under the jurisdiction of the Commission because the Certificate was conditional. The approval of the alteration of the Guys Run Road Crossing from a "vehicle and pedestrian crossing to a four foot pedestrian crossing at-grade" was subject to the condition that Pennsylvania Railroad would continually maintain the subject crossing. Having failed this condition, the Public Service Commission's approval of the alteration is without effect and the subject crossing is still a vehicular and pedestrian crossing.

C. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE CROSSING PURSUANT TO 66 Pa.C.S.A. § 2702 BECAUSE ALL OF THE CROSSINGS IN THE AREA ARE INTERRELATED.

The powers of the Commission are plenary with regard to the crossing of railroad tracks of highways. *Department of Highways v. Pennsylvania Public Utility Commission*, 182 A.2d 267 (Pa.Super. 1962). The Commission exercises the police power of the Commonwealth in regulating such crossings. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 78 A.2d 46 (Pa.Super. 1951); *Erie R. Co. v. Pennsylvania Public Service Commission*, 114 A. 357 (Pa. 1921). As such, the Commission has been given the exclusive power to determine and prescribe the manner and conditions in or under which grade crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. *City of Erie v. Public Service Commission of Pennsylvania*, 176 A. 530 (Pa.Super. 1935).

It is the duty of a railroad company to seek, and the Commission to grant, the elimination of those services and facilities that are no longer needed or used by the public

to any substantial extent. *Reading Co. v. Pennsylvania Public Utility Commission*, 159 A.2d 61 (Pa.Super. 1960). However, the Commission has discretion to determine whether a service should be abandoned. *See generally Sherwood v. Pennsylvania Public Utility Commission*, 109 A.2d 220 (Pa.Super. 1954). The Commission should make its determination by viewing the entire system of the railroad as a unit. *See generally Commuters' Committee v. Pennsylvania Public Utility Commission*, 88 A.2d 420 (Pa.Super. 1952); *Borough of West Conshohocken v. Pennsylvania Public Utility Commission*, 5 A.2d 590, 593 (Pa.Super. 1939) (order of improvement viewed as integrated).

As previously mentioned, the Public Service Commission did not grant Pennsylvania Railroad's Petition as submitted. The Petition sought the abandonment of the Guys Run Road Crossing and the approval of a new "vehicular and pedestrian" crossing, the latter crossing being the Wenzel Drive Crossing. The ensuing Certificate approved the alteration of the Guys Run Road Crossing to a pedestrian crossing and also approved the construction of the Wenzel Drive Crossing, but made no mention of it being used for pedestrian purposes. The Certificate goes on to state that:

The Public Service Commission of the Commonwealth of Pennsylvania hereby certifies that after an investigation and/or hearing had on the above entitled application, it has, by its report and order made and entered, a copy of which is hereto attached and made a part hereof, found and determined that the granting of said application is necessary and proper for the service, accommodation, convenience and safety of the public, and this certificate is issued evidencing its approval of the said application as set forth in said report and order.

Certificate (emphasis added).

Likewise, the Order also fails to mention anything about a pedestrian crossing at Wenzel Drive. Other than the approval of its construction, the Order only provides the following with regard to the Wenzel Drive Crossing:

That the new grade crossings over tracks are the Allegheny Valley Street Railway Company and the Pennsylvania Railroad Company shall be planked solid or paved between rails for a distance of 18 inches outside of each rail for width of twenty-eight feet measured at right angles to the center line of the highway.

Order, First Ordering Paragraph.

Since the powers granted to the Commission are plenary at crossings, and it has the exclusive power to regulate the same to effectuate the prevention of accidents and the promotion of the safety of the public, the adjacent crossings located in the Guys Run Road area must be viewed as interrelated to one another. *Pennsylvania Public Utility Commission v. Borough of Souderton*, 231 A.2d 875 (Pa.Super. 1967).

In *Souderton*, the Commission issued an order requiring a comprehensive engineering study to determine the most economical means of alleviating traffic congestion in the borough, including the construction of additional crossings if necessary, and the feasibility of eliminating thirteen highway-rail crossings in and adjoining the borough by relocating six miles of railroad right-of-way. In affirming the Commission's order, the Court stated:

We think the commission had full power to order the highway crossing study it did in this case and allocate the costs thereof. The commission has broad powers under s 409, 66 P.S. s 1179, and, though it deals with construction of highway 'crossing,' this necessarily includes jurisdiction over more than one crossing. Here the crossings were adjacent and contiguous on a six mile stretch of appellant's right of way. Certainly the commission may consider these crossings as interrelated for the purpose of determining what crossings are necessary in a given area, within and adjacent to the Borough of Souderton. The commission properly found in this case that the Chestnut Street underpass was inadequate and that

'related' crossings, both within and outside the borough, 'are within the corridor of highway traffic necessarily considered in this investigation.' Under s 401 of the Public Utility Law, 66 P.S. s 1171, the commission may require appellant to furnish and maintain safe and adequate facilities for the accommodation, convenience and safety of the public. Section 413, 66 P.S. s 1183, gives the commission power to inquire into the safety, and adequacy of a utility's facilities and order such changes as it finds necessary: *Reading Co. v. Pa. P.U.C.*, 188 Pa.Super. 146, 149, 150, 146 A.2d 746 (1958); *Postal Telegraph- Cable Co. v. Pa. P.U.C.*, 154 Pa.Super. 340, 344--346, 35 A.2d 535 (1943).

Souderton A.2d at 879 (Section 409 (repealed), see, now, § 2702 of the Code, see also art. II, § 1, art. III, § 5, art. V, §§ 1, 12, 18 of the Act; Section 401 (repealed), see, now, §1501 of the Code, see also art. II, § 1, art. III, § 1, art. V, §§ 1, 2 of the Act; and Section 413 (repealed), see, now, § 1505 of the Code, see also art. II, § 1 of the Act).

In the Certificate, the Public Service Commission certified that it investigated the matter, and found and determined that the granting of the Petition was necessary and proper for the service, accommodation, convenience and safety of the public. The official record at Docket No. 21878-1930 is the only evidentiary documentation that is available to ascertain what the Public Service Commission found to be in the best interest of the public. As such, the official record at Docket No. 21878-1930 should be given great deference for what it expressly contains and what it does not.

As aforementioned, Pennsylvania Railroad sought to create a vehicular and pedestrian crossing at the Wenzel Drive Crossing, but the absence of the term pedestrian from the Wenzel Drive Crossing in the relief granted, coupled with the alteration of the Guys Run Road Crossing makes obvious that the Public Service Commission effectively combined the two in the interest of safety as one interrelated public crossing. It would require a forced or a strained interpretation to argue otherwise. *Blue Mountain Consol. Water Co. v. Pennsylvania Public Service Commission*, 189 A. 545 (Pa.Super. 1937). The nature of the interrelation between the two is clearly present in the Order. Not only were

the two crossings created on the same day in the same Order, but so was Wenzel Drive, the road that begins at one and ends at the other (Twp Ex. 1; Order p. 3).

Geographically, the subject area is a peninsula, with the Allegheny River to the south, a canal to the east, and a canal and lagoon to the west (the "Wenzel Peninsula") (Twp Ex. 1; Tr. 15, 56). In addition to the hundreds of residents that live in the area, the Township's primary business district and recreational areas are also located on the Wenzel Peninsula (Twp Ex. 1; Tr. 21, 22, 34, 35). The business district, the heart of which is centered around the Guys Run Road Crossing, is on the north side of the railroad and the recreational areas are on the south side of the railroad, with the only means of access from one side to the other being the Guys Run Road and the Wenzel Drive Crossings (Twp Ex. 1; Tr. 26-28, 30, 31).

Despite the verbiage of the Petition, the Wenzel Drive Crossing is for vehicular access only and not for pedestrians (Tr. 76, 87, 88, 96), as the record proves:

Direct Examination of Robert Seibert, Harmar Township

- Q. This is just a vehicular crossing (the Wenzel Drive Crossing)?
A. It is primarily a vehicular crossing, correct. There is no crossing established on Old Route 28, legislative 1001 at this point.
Q. Are there traffic lights at this location?
A. No there are not.
Q. Is there a crosswalk?
A. No, there is no crosswalk at that location.

(Tr. 18, 19).

Cross Examination of James Rockney, Norfolk

- Q. Are you familiar with the Wenzel crossing on Freeport Road?
A. Am I aware where it is at, yes.
Q. Would this be a pedestrian crossing?
A. No. I would not say it is a pedestrian crossing. It is a vehicular crossing.

(Tr. 125).

There are more than 35 residents that live on Wenzel Drive and more than a 100 residents that live on Twelve Mile Island that would be effectively cut off from the rest of the Township if the Guys Run Road Crossing did not exist (Tr. 73, 75). This is especially true for the residents of Twelve Mile Island, since there is no vehicular access from the Island to the Wenzel Peninsula. The only way back and forth from Twelve Mile Island to the Wenzel Peninsula is by boat, with the only docking points being the Pennsylvania Boat and Fish Commission and the Harmar Marina facility (Tr. 41, 42, 69). Similarly, the residents of Terrace Drive and Campbell's Run Road on the north side of the railroad would have no means of accessing the river as indicated by the following testimony of Robert Siebert:

Direct Examination of Robert Seibert, Harmar Township

- Q. And the streets that you are referring to off Guys Run Road, if they came down to the intersection of Freeport Road, would they have any safe means of accessing say the Pa. Fish and Boat Commission on foot?
- A. No. The only access is right there where it is fully signalized and a crosswalk is installed. That is a very active highway. You take your life in your hands to cross.
- Q. There is no safe pedestrian alternative?
- A. No, only at this location.

(Tr. 30).

The Guys Run Road Crossing is the only safe pedestrian passage for the public on the Wenzel Peninsula due to the lack of a fully signalized pedestrian crossing at the Wenzel Drive Crossing, coupled with the absence of sidewalks on either side of Freeport Road between the Wenzel Drive Crossing and Guys Run Road Crossing, and the impossibility of installing them in the future (Tr. 19, 26, 40).

Symbiotic relationships abound the Wenzel Peninsula. The public can only access the north and south side of the railroad by vehicle at the Wenzel Drive Crossing. Correspondingly, the same is true for pedestrians at the Guys Run Road Crossing. Moreover, the public on each side of the tracks are mutually dependent upon the other. The residents of Terrace Drive, Wise Hill Road, and Campbell's Run Road, and the patrons of the varied business on Freeport Road use the Allegheny River to fish and swim (Tr. 21, 30). The businesses located on both sides of the tracks rely upon both crossings for commerce (Tr. 21, 89, 90, 91). The residents of the south and Twelve Mile Island rely on the crossings as their only access to obtain the essentials of life, for health and exercise, and for recreational purposes, such as bowling and the theater (Twp. Ex. 1; Tr. 30, 76, 97). Furthermore, the residents of the Wenzel Peninsula and Twelve Mile Island depend on the Guys Run Road Crossing for public transportation and their livelihood (Tr. 23, 56, 57), as explained by the following resident of Wenzel Drive:

Direct Examination of James Anderson

- Q. Do you use the crossing on a daily basis?
A. Yes, I do. At least twice a day I catch a bus to the Eat 'n Park and in the afternoon I catch it back over to get to my residence.
Q. Is that the only way you can get to work?
A. I could drive to work but I am not rich enough to . . . pay the parking, so I take a bus.
Q. So you depend on the bus to get to work everyday?
A. Yes, that is correct.

(Tr. 75, 76)

The only bus stop on the Wenzel Peninsula is located at the Guys Run Road Crossing.

Direct Examination of Robert Seibert, Harmar Township

- Q. Is there a bus stop located anywhere in between the water locked area?
- A. No. The bus stop is located right here at the four foot pedestrian crossing area.

(Tr. 27).

If the Guys Run Road Crossing did not exist it would be impossible for the residents of Twelve Mile Island to access the only public transportation in the area since it is impossible for them to travel any other way than foot once they dock their boats on the Wenzel Peninsula. This is also true for the mainland residents of the Wenzel Peninsula due to the absence of a park and ride at the Guys Run Road bus stop (Tr. 45, 65, 66).

Cross Examination of James Rockney, Norfolk

- Q. And there was testimony earlier there was around 35 or 50 residents who live in this section of Wenzel Drive. If this pedestrian crossing at Guys Run Road didn't exist, how would they be able to access the bus stop across the street on Freeport Road?
- A. I would say by vehicle.
- Q. Is there a Park & Ride? . . . If a resident on Wenzel Drive didn't have a vehicle, how would they be able to get to that bus stop?
- A. I really think that would be something that, they would either have to carpool to get to that location presently, that would be the only other option.
- Q. If someone owned a vehicle to drive to the bus stop, where would they park?
- A. I am not sure of that.

(Tr. 125, 126).

Aside from Guys Run Road being a highway in itself for purposes of Section 2702, jurisdiction could also be assumed on alternate grounds. As demonstrated by the

record, the Wenzel Drive Crossing and the Guys Run Road Crossing are so closely related that they are effectively one.

D. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE CROSSING PURSUANT TO 66 Pa.C.S.A. § 2702 BECAUSE THE SUBJECT ROAD AT THE CROSSING IS A PUBLIC PRESCRIPTIVE EASEMENT.

Assuming *arguendo* that that the disputed portion of Guys Run Road ceased to be a Township highway upon alteration in 1930, it would nonetheless still be considered a highway conferring jurisdiction upon the Commission. In *Southeastern Pennsylvania Transportation Authority ("SEPTA") v. Pennsylvania Public Utility Commission*, 505 A.2d 1046 (Pa.Cmwlth. 1986), the Commission determined that a road became a public one by prescription, and as such, the rail crossing on the road was within its jurisdiction under Section 2702 of the Code. The Commission issued an order to SEPTA and a township that directed them to develop plans to improve the existing rail crossing. Even though SEPTA and the township successfully appealed the order, the Court did not reverse the Commission's order on the basis that a road acquired through prescription does not qualify as a highway under Sections 102 and 2702 of the Code, instead it reversed the order on the grounds that the road did not meet the requisite criteria of a public road by prescription.

In *SEPTA*, the road in question was bifurcated with neither section reaching the subject crossing. Only two witnesses testified to the use of the road linking the two established sections. One witness testified to the occasional use of the road from the mid-1920's through the early 1950's, and the other, an insurance agent, testified that he used the road from the early 1950's through the late 1950's to collect insurance premiums. The

Court determined that the factual circumstances were more akin to a private license than that of a public right. In making this determination, the Court set forth the necessary elements to establish a road by prescription as follows:

Properly stated, the issue before us is: Did the testimony establish, as a matter of law, a sufficient public use of the roadbed over a period of at least twenty-one years so as to establish a public road by prescription? We conclude that, as a matter of law, the evidence presented by those two witnesses does not establish such a public use. Rather, the testimony regarding usage is consistent with establishing a private use, as in a license or in an easement. There are three methods to establish the existence of a township road as a public one: . . . The third is by prescription, requiring uniform, adverse, continuous use of the road under claim of right by the public for twenty-one years. . . . Establishment by prescription is composed of two main elements: adverse and continuous public use and such use for a period of at least twenty-one years. Although various state courts accept the prescription concept, some states consider prescription actually as a dedication, a grant to the public. Other states base prescription on an estoppel theory which prevents the landowner from denying the existence of a public easement. Pennsylvania is in this latter group, with prescription analogized to the statute of limitations and not the fiction of a grant. The legal definition of what constitutes a "public use" is critical to our determination of whether a valid prescriptive status exists as to the disputed roadbed linking the two established sections of Snyder Avenue. Surprisingly, our research has revealed little Pennsylvania case law analyzing the criteria for defining public use; we have reviewed case law from other states and the appropriate treatises in developing our analysis here. Although the uninterrupted use of land as a roadway by a limited number of persons for a sufficient length of time may establish a private right-of-way, clearly no public easement would arise from such a use. In defining public use, we must look at the reasons why people use the road. A public use is not made out by proof of the use of a road merely by those having business with the concerns to whose establishments the road provides access, or by any one individual. The use must be by the public in general, as against a limited segment of the public. . . . Although continuity of use is established if the evidence shows a settled course of conduct indicating an attitude of mind on the part of the user or users that the use is the exercise of a property right, here the use established by the testimony is more in line with a private use than a public use. In establishing a public use, the use must be more than an occasional trespass. A public use must be substantial rather than casual and the scope and continuity of that use must be great enough to clearly indicate to the owner that his property is in danger of being prescriptively used.

SEPTA A.2d at 1048, 1049 (citations omitted) (emphasis added); *Commonwealth v. Philadelphia & R. R. Co.*, 19 A. 1051 (Pa. 1890) (the public acquires a right of user in a street or highway when it has, for a period of twenty-one years, under a claim of right, used the street or way adversely to the landowner under a claim of right).

Despite the adverse decision with regard to jurisdiction under Section 2702 in *SEPTA*, the holding demonstrates that if all of the elements are satisfied, a public passageway gained through prescription can constitute a highway under Section 2702. As it relates to the disputed portion of Guys Run Road, the record in this matter makes it abundantly clear that all of the requisite criteria set forth in *SEPTA* to prove prescription have been satisfied.

The section of Guys Run Road from Freeport Road to Wenzel Drive has been used by the public, under a claim of right, uniformly, adversely and continuously for over 70 years (Tr. 22, 23, 37, 38, 47, 48, 63, 88, 89, 100, 101). Norfolk has more than been put on notice of the use of Guys Run Road as the testimony of James Anderson indicates:

Direct Examination of James Anderson

- Q. [H]ave you ever felt as though you were trespassing going over this pedestrian crossing at Guys Run Road?
- A. No. There has never been anyone there to tell us you can't go there. There has not been any wires stretched across. The United Methodist Church is right beneath Eat 'n Park on Guys Run Road and Sunday morning, it was routine that father drive us down, drop us off to visit grandpa. We would go over the tracks, as long as I remember, for 39 years. There has been no trespassing signs, no barriers, nothing to prohibit us from using that crossing.

(Tr. 77, 78).

Guys Run Road at the crossing is used by the public in general, and not just limited to those who live on Wenzel Drive, as evidenced by the testimony of Dolores Prasnikar:

Direct Examination of Dolores Prasnikar

- Q. Are you opposed to the closing of this crossing?
A. Yes, I am. I am very adamant about it.
Q. If you could turn to tab 14. Do you recognize this document?
A. Yes. That is a petition that I had circulated with the help of some of my good neighbors. We had circulated this last year.
Q. What was the reason for circulating this petition?
A. To keep the crossing opened.
Q. How many signatures did you get; do you know?
A. Approximately a hundred. They are not all here. Here they are.
Q. I see there are people who signed and put their address that don't live on Wenzel Drive, so I take it - -
A. Well, sometime people don't live on Wenzel Drive, but for example, some of them might go to the bowling alley and somebody comes to bowl, and they want to come over and have a drink or two, and they have to use the crossing.

(Twp. Ex. 14; Tr. 90, 91).

Since all of the requirements of prescription have been satisfied at the Guys Run Road Crossing, it follows that it is also a highway under Section 2702 of the Code, thereby conferring jurisdiction upon the Commission to enforce the Order.

II. THE COMMISSION CAN REQUIRE THE RAILROAD TO MAINTAIN SAFE SERVICE AND FACILITIES AT THE CROSSING REGARDLESS OF THE ORDER.

Even though Article III, § 5, and Article V, § 12 of the Act provided the Public Service Commission with express enabling statutory authority to order the alteration of the Guys Run Road Crossing and continued maintenance thereafter, as the Court in *Souderton* articulated, there are other statutory provisions that could have conferred the Public Service Commission with the requisite authority to order maintenance. For

instance, under former Section 401 of the Public Utility Law, 66 P.S. § 1171, the Commission could require a railroad to furnish and maintain safe and adequate facilities for the accommodation, convenience, and safety of the public. *Souderton* A.2d at 879.

With regard to the Public Service Commission, this grant of authority was provided for in Article II, § 1 of the Act which is stated in pertinent part as follows:

It shall be the duty of every public service company-

(a). To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the commission. . .

(c). To make all such changes, alterations, and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employees, and the public.

(t). To obey and abide by all lawful orders and regulations of the commission made under the provisions of this act, regulating the manner in which the tracks or other facilities of any railroad corporation, street railway corporation, or any other public service company, may be constructed across the tracks or other facilities of any other railroad corporation, street railway corporation, or any other public service company, at grade, or above or below grade, or at any prescribed level; or in which the tracks or other facilities of any railroad corporation, street railway corporation may be constructed across any public highway at grade, or above or below grade; or in which any public highway may be constructed across the tracks or other facilities of any railroad corporation or street railway corporation at grade, or above or below grade; or regulating the manner in which such crossings shall be operated, maintained, and protected, including the stationing of watchmen thereat, installation and regulation of lights, blocks, or other means or instrumentalities as the commission may prescribe; as well as to obey and abide by all lawful orders and regulations of the commission made under the provisions of this act, requiring the alteration, relocation, removal, or abolition of any such crossings, to the end, intent, and purpose that accidents may be prevented; and also to bear and pay the expenses, damages, or compensation incident thereto, either severally or in such proportions as the commission may determine under the provisions of this act.

Article II, § 1 of the Act (emphasis added).

The Act defines "service" and "facilities" as follows:

The term "Service" is used in this act in its broadest and most inclusive sense, and includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and all and every the facilities used or furnished or supplied by public service companies in the performance of their duties to their patrons, employes, and the public, as well as the interchange of facilities between two or more public service companies.

The term "Facilities," as used in this act, includes all plant and equipment of a public service company, which includes all tangible real and personal property, buildings, materials, easements, rights of way, rights of trackage, subways, tunnels, railroads, street railways, tracks, canals, and all animals, locomotives, apparatus, appliances, devices, instruments, appurtenances, . . . side tracks, spurs, turn outs, switches, systems, stations, depots, terminals, terminal facilities, water or gas jet, wells, and any and all other means and instrumentalities, in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public service company: Provided, however, That no property owned by the Commonwealth of Pennsylvania, or municipality thereof, at the date when this act becomes effective, shall be subject to the Commission or to any of the terms of this act, except as elsewhere provided herein.

Article I, § 1 of the Act (emphasis added).

This broad authority of the Public Service Commission over the control of a utilities service and facilities is now embodied in Section 1501 of the Code, 66 Pa.C.S.A. § 1501. This Section provides that: "every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public." 66 Pa.C.S.A. § 1501 (emphasis added). The definition of "facilities" includes "[a]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation,

and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility". 66 Pa.C.S.A. § 102 (emphasis added).

The powers granted to the Commission, to the effect that every public utility shall furnish safe service and facilities and make such changes as are necessary or proper for the safety of its patrons, employees and the public, and that the Commission shall have full power and authority to enforce the provisions of the governing public utility statute and the full intent thereof, were intended to be broad so that the legislative intent in the enactment of the law might be given effect. *Reading Co. v. Pennsylvania Public Utility Commission*, 146 A.2d 746 (Pa.Super. 1959); *Law v. Reading Co.*, 312 F.2d 841 (3rd Cir. Pa. 1963) (the Code must be broadly construed to accomplish its express object to provide such services and facilities as necessary or proper for accommodation, convenience and safety of patrons, employees and public); *Country Place Waste Treatment Co., Inc. v. Pennsylvania Public Utility Commission*, 654 A.2d 72 (Pa.Cmwlth. 1995) (statutory definitions of "service" and "facility," respecting statute granting Commission authority to regulate service and/or facilities of every public utility, are to be broadly construed).

The public, for whose convenience, accommodation, safety, and protection Section 1501 of the Code is concerned, includes not only persons served by the public utility, but also persons who may come into contact with the public utility's facilities. *Lower Chichester Twp. v. Pennsylvania Public Utility Commission*, 119 A.2d 674 (Pa.Super. 1956); *Postal Telegraph-Cable Co. v. Pennsylvania Public Utility Commission*, 35 A.2d 535 (Pa.Super. 1944); *West Penn Railways Co. v. Pennsylvania*

Public Utility Commission, 15 A.2d 539 (Pa.Super. 1940) (the word "public" can not be limited to those who use the services of a utility, since such limitation would render the word "patrons" superfluous and meaningless).

Section 1501 provides the Commission jurisdiction over railroad crossings in certain situations, irrespective of crossing a highway as defined in Section 102. The broad definition of facilities in Section 102 includes all property, "without limitation," which would necessarily include the easements, rights of way, and tracks of a railroad crossing other than a highway. Furthermore, if the public has a right to be present at those facilities, the Commission has the authority pursuant to Section 1501 to require that they be maintained for its accommodation, convenience, and safety. 66 Pa.C.S.A. § 1501.

The permissive crossing doctrine is one such example of the public's right to be present at the facilities of a railroad. A permissive crossing over a railroad track is an express or implied license to pass over railroad property, and to establish it the crossing must be shown to be used frequently, continuously and notoriously by the public. *Shaw v. Pennsylvania Railroad Co.*, 96 A.2d 923 (Pa. 1953). Generally, a permissive right of way over a railroad track must be confined within definite lines, and must not be spread out over open ground in many divergent directions, but if there is a defined and limited area of crossing which has been habitually used for many years, the rights of those using it cannot be impaired by the fact that other crossings, not so well defined or limited, may exist at other places along the track. *Estate of Zimmerman v. SEPTA*, 17 F. Supp. 2d 372 (E.D. Pa. 1998), *affd*, 168 F.3d 680 (3d Cir. Pa. 1999); *Hamley v. George*, 76 A.2d 181 (Pa. 1950); *Figard v. Pennsylvania Railroad Co.*, 65 A.2d 411 (Pa. 1949). It must be

restricted to a well-defined location. *Conn v. Pennsylvania Railroad Co.*, 136 A. 779 (Pa. 1927); *Koontz v. Baltimore & Ohio R. R. Co.*, 163 A. 212 (Pa. 1932).

If a street has been actually opened across a railroad and used to some extent, although it has not been fully improved and occupied by the public, it is nevertheless a public crossing. *Pennsylvania Co. v. Allen*, 3 Pennyp. 170 (Pa. 1882). A permissive crossing places upon a railway company the duty of care comparable to that required at a regular crossing. *Gaul v. Consolidated Rail Corp.*, 556 A.2d 892 (Pa.Super. 1989). Moreover, when a railroad company has for years, without objection, permits the public to cross its tracks at a given point, not in itself a public crossing, there arises the same legal obligation of reasonable care on the part of the railroad toward those using the crossing as the railroad owes to those using a public crossing. *Shaw v. Pennsylvania Railroad Co.*, 96 A.2d 923 (Pa. 1953); *Taylor v. Delaware & Hudson Canal Co.*, 8 A. 43 (Pa. 1886); *Lodge v. Pittsburgh & Lake Erie R. R. Co.*, 89 A. 790 (Pa. 1914); *Francis v. Baltimore & Ohio R. R. Co.*, 93 A. 490 (Pa. 1915); *Figard v. Pennsylvania Railroad Co.*, 65 A.2d 411 (Pa. 1949) (permissive crossing existed where, for a length of time, sufficient for the railroad to become aware of the practice, the people of a village adjoining a railroad track habitually and without objection crossed it at its junction). Where a permissive crossing is found to exist, the person using the crossing is said to be a licensee of the railroad company. *Gaul v. Consolidated Rail Corp.*, 556 A.2d 892, (Pa.Super. 1989).

As previously explained, the Guys Run Road Crossing has been used frequently, continuously and notoriously by the public for over 70 years (Tr. 22, 23, 37, 38, 47, 48, 63, 88, 89, 100, 101). It is restricted to a well-defined location (Twp. Ex. 8; Tr. 22, 23,

38, 47, 48, 50). The fact that Norfolk's trains signal their approach before the Guys Run Road Crossing demonstrates that it has acquiesced in its use (Tr. 31, 32, 78). As such, the public is entitled to have safe and adequate facilities provided for at the Guys Run Road Crossing.

Aside from the permissive use doctrine, there are other easement situations in which a person may be entitled to cross at the facilities of a railroad. For instance, when a person lays out his land in a plan of lots showing the lots fronting on streets and alleys, and the lots are conveyed according to the plan, he thereby conveys an easement to have all of the streets and alleys shown in the plan kept open for the use of the grantee and subsequent purchasers. *Bond v. Barrett*, 50 Pa.Super. 307 (Pa.Super. 1911); *People's Nat. Bank of Pittsburgh v. Liquid Carbonic*, 75 A. 677 (Pa. 1910); *Riek v. Binnie*, 507 A.2d 865 (Pa.Super. 1986) (rights of easement of individual property owners in a plan of lots to use a road cannot be extinguished); *Drusedum v. Guernaccini*, 380 A.2d 894 (Pa.Super. 1977); *Phillips v. St. Clair Incline Plane Co.*, 25 A. 735 (Pa. 1893). An easement also arises by implication when a street is used as a boundary in a deed. *Beechwood v. Reed*, 265 A.2d 624 (Pa. 1970); *Fidelity-Philadelphia Trust Co. Forster*, 29 A.2d 496 (Pa. 1943).

In this matter, the plan of homes at the subject area where laid out in a recorded plan in 1897 by Henry Wenzel (Twp. Ex. 12; Tr. 36, 37). In the plan, Guys Run Road is shown as the main access road for the lots. Accordingly, the owners of the lots in the plan have an irrevocable easement which extends over the tracks of Norfolk. *Bond*; *Liquid Carbonic*. Furthermore, the easement rights in the Guys Run Road Crossing are

further evidenced by the use of Guys Run Road as a descriptive boundary in the deeds in the subject area (Twp. Ex. 15; Tr. 91-92).

Thus, separate from the jurisdiction conferred by the Order, the Commission has the statutory authority to require Norfolk to maintain the Guys Run Road Crossing pursuant to Section 1501 of the Code.

III. THE COMMISSION CAN ENFORCE THE ORDER OF THE PUBLIC SERVICE COMMISSION BASED ON THE SAFETY OF THE PUBLIC.

The primary object of public service laws was, is and always has been, to serve the interests of the public at all times. *Pittston Gas Co. v. Pennsylvania Public Utility Commission*, 154 A.2d 510 (Pa.Super. 1959); *Hoffman v. Pennsylvania Public Service Commission*, 99 Pa.Super. 417 (Pa.Super. 1930). As such, notwithstanding the status of Guys Run Road, the Public Service Commission could have assumed continuing jurisdiction over the conditions in the Order through its broad legislative grant to protect the convenience and safety of the public. This authority is stated in the Act as follows:

Section 18. When application shall be made to the commission by any proposed public service for the approval by said commission of its incorporation, or . . . when application shall be made to the commission for the approval of the construction, alteration, relocation, or abolition of any crossing at grade, or above or below grade; or when application shall be made to the commission by any public service company for any approval under any of the provisions of this act; or when application shall be made to the commission by any municipal corporation for the approval required by the provisions of article three, section three (d), of this act, - such approval, in each and every such case, or kind of application, shall be given only if and when the said commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public.

Article V, § 18 (emphasis added).

Section 27. In addition to the foregoing expressly enumerated powers, the commission shall have full power and authority, and it shall be its duty, to enforce, execute, and carry out, by its orders, rulings,

regulations, or otherwise, all and singular the provisions of articles two and three of this act, relating respectively, to the duties and limitations, and to the creation and the powers, and limitations of the powers, of public service companies; and, all and singular, the other provisions of this act, and the full intent thereof. . .

Article V, § 27 (emphasis added).

The broad powers conferred upon the Public Service Commission by Article V, §§ 18 and 27, in conjunction with Article II, § 1, Article III, § 5, and Article V, § 12, would have given the Public Service Commission jurisdiction in 1930 to order the alteration of the Guys Run Road Crossing and the perpetual maintenance thereafter based on the safety and welfare of the public. These general powers have been passed on to the Commission through Section 501 of the Code, 66 Pa.C.S.A. § 501, which would allow for the continuing enforceability of the Order based on the safety and interest of the public. *Pennsylvania Builders Association v. Pennsylvania Public Utility Commission*, 483 A.2d 1025 (Pa.Cmwlth. 1984) (PUC has broad authority to supervise and regulate all utilities within the Commonwealth for the purpose of protecting the rights of the public).

The authority given the Commission should be liberally construed, and that which is incidentally necessary to a full exposition of the legislative intent must be upheld as being germane to the law. *Coplay Cement Mfg. Co. v. Public Service Commission of Pennsylvania*, 114 A. 649 (Pa. 1921); *Snyder v. Pennsylvania Public Utility Commission*, 144 A.2d 468 (Pa.Super. 1958) (the Commission has been granted broad authority to effect the legislative intent).

In the instant matter, the Commission has the broad authority to address the safety and convenience of the public at the approaches to the Guys Run Road Crossing, in

addition to the crossing itself. *Borough of Bridgewater v. Pennsylvania Public Utility Commission*, 124 A.2d 165 (Pa.Super. 1956).

The Pennsylvania Vehicle Code ("Vehicle Code"), 75 Pa.C.S.A. § 101 *et seq.*, regulates the rights and duties of pedestrians at crosswalks. 75 Pa.C.S.A. § 3541 *et seq.* The presence of pedestrians at a crosswalk is to be anticipated by motorists. *Smith v. Shatz*, 200 A. 620 (Pa. 1938). At a crosswalk, a motorist has the duty to heed to the position of pedestrians who are committed to crossing, and must give way to the prerogatives of the pedestrian. *Altsman v. Kelly*, 9 A.2d 423 (Pa. 1939); *Frisina v. Dailey*, 150 A.2d 348 (Pa. 1959). It has been held that the legal duty of a motorist is at its maximum when a pedestrian is at a crosswalk. *Rutovitsky v. Magliocco*, 147 A.2d 153 (Pa. 1959).

The Vehicle Code also makes provision with respect to traffic and pedestrian control signals, and vehicular traffic must yield the right of way to pedestrians who are lawfully crossing or who have started to lawfully cross a roadway on a traffic signal. 75 Pa.C.S.A. § 3112. Thus, a pedestrian who is crossing at an intersection controlled by a traffic signal has the right of way. *Frisina v. Dailey*, 150 A.2d 348 (Pa. 1959). However, the degree of care owed by operators of motor vehicles to pedestrians who are not crossing at regular street crossings is not as great as that owed to those who are crossing at regular street crossings. *Brown v. Jones*, 172 A.2d 831 (Pa. 1961).

Under the Vehicle Code, every pedestrian crossing a roadway at any point other than within a crosswalk at an intersection or any marked crosswalk must yield the right-of-way to all vehicles upon the roadway. 75 Pa.C.S.A § 3543(a). In other words, the rule which requires motorists to exercise extreme care at public crossings does not apply to

pedestrians crossing a road at a place where a regulated crossing does not exist. *Moore v. Esso Standard Oil Co.*, 72 A.2d 117 (Pa. 1950).

As previously described, the major approach to the Guys Run Road Crossing is Freeport Road, a four lane state highway (Tr. 27, 57, 58). Necessarily, this requires an examination of the existing pedestrian safeguards in the area. With regard to the existence of a crosswalk at the Guys Run Road intersection, Township Supervisor Seibert stated:

Direct Examination of Robert Seibert, Harmar Township

- A. Yes. In fact, there is a crosswalk. . . you can correctly see signalization devices that allow the pedestrians to cross to come over to the bus stop from the Wenzel Drive area to the bus across the road and across to the side of Eat 'n Park restaurant.

(Twp. Ex. 1, 9A-9C; Tr. 26).

When asked about the existence of a crosswalk at the Wenzel Drive intersection, Supervisor Seibert stated:

Direct Examination of Robert Seibert, Harmar Township

- A. No, there is not a crosswalk at that location. However, at the pedestrian crossing that we are here for, there is a crosswalk. There are signs there. There are walk and don't walk signs. It is regulated there and it's safe at that location, but this location is not safe to cross the highway. You would be taking your life in your hands at this location.

(Twp. Ex. 1, 6B-6D; Tr. 19).

One of the signs that Supervisor Seibert was referring to is the Pennsylvania Department of Transportation's R9-3 sign, "The No Pedestrian Crossing Sign" (Twp. Ex. 16B, 10C; Tr. 27, 28) 67 Pa.Code § 211.272. The purpose of this sign is "to prohibit pedestrians from crossing a roadway at a point which is considered to be hazardous". *Id.*

The Guys Run Road and Wenzel Drive Crossings are the only points of ingress and egress for the public to cross not only the railroad, but also its hazardous approach, Freeport Road.

The use of the Wenzel Drive Crossing as a pedestrian crossing was described by the residents of Wenzel Drive as follows:

Direct Examination of James Anderson

- Q. Do you feel that you can safely access that bus stop at any other point on this map aside from the pedestrian crossing at Guys Run Road?
- A. Are you asking can I get to that bus stop a safer way without going where I currently go?
- Q. Correct.
- A. In my opinion, no. Only because I have to go to the other end of Wenzel Drive to attempt to go to the Giant Eagle, and trying to drive across Wenzel drive is actually five lanes of traffic, and they are coming pretty good.

(Tr. 76).

Direct Examination of Kenneth Burkhart

- Q. Do you ever use the crossing at Wenzel Drive for pedestrian purposes?
- A. No, sir.

(Tr. 96).

Direct Examination of Dolores Prasnikar

- Q. Do you ever walk across the crossing at Wenzel Drive?
- A. No.
- Q. Why not?
- A. I don't want to dodge four lanes of traffic.

(Tr. 87, 88).

In considering the approaches to the two crossings, it is readily apparent that the Guys Run Road Crossing is the only safe path for pedestrians to cross Freeport Road. In addition to being a safe passage over Freeport Road, it is also as safe, if not safer, for

pedestrians to cross the railroad at the Guys Run Road Crossing as it is at any other railroad crossing in the area.

To illustrate this point, a review of the Allegheny Valley Joint Sewage Authority ("AVJSA") crossing in comparison with the Guys Run Road and Wenzel Drive Crossings is valuable (Twp. Ex. 1, 5). There has never been a pedestrian accident at the AVJSA crossing, which is a vehicular and pedestrian crossing located 1,012 lineal feet southwest of the Guys Run Road Crossing (Twp. Ex. 1, 5A; Tr. 15-17). There has never been a pedestrian accident in the 74 year existence of the Guys Run Road Crossing (Tr. 71, 133). The sight distance at the Guys Run Road Crossing (1,250' to the east and 800' to the west) is significantly greater than that of the AVJSA Crossing (AVJSA- 600' to the east and 800' to the west) (Twp Ex. 5B, 5C, 8C-F; Tr. 81, 82). Norfolk's trains sound off before the AVJSA Crossing, before the Guys Run Road Crossing, and before the Wenzel Drive Crossing to warn the public of their approach (Tr. 31, 32, 78). Interestingly enough, the only place that a pedestrian accident has ever occurred in the Wenzel Peninsula area was when a resident of Wenzel Drive was killed attempting to cross at the Wenzel Drive Crossing (Tr. 62). Despite this track record of perfect safety at the Guys Run Road Crossing, Norfolk contends that it is unsafe for pedestrians::

Direct Examination of James Rockney, Norfolk

- A. I don't feel the crossing is necessary at this location.
Q. Why is that, sir?
A. I think the safety issue is the biggest concern because of the speed of the track, the curvature of the rail, which is a three degree curve, and also the sight distance involved at this location. And that is my major worry, is the safety issue.

(Tr. 118, 119).

Norfolk's purported concern about the sight distance is of questionable import, given the sight distance for the nearby AVJSA crossing is significantly less (Twp. Ex. 5A). Moreover, the 16 trains a day that are sounding off the entire length of the Wenzel Peninsula at a mandatory maximum speed of 40 m.p.h. that pass by the Guys Run Road Crossing are the same 16 trains that pass by the AVJSA and Wenzel Drive Crossings (Tr. 31, 32, 78). Nevertheless, Norfolk would rather have the public dodge four lanes of heavy traffic on a hazardous state highway with a speed limit of 45 m.p.h., which limit is impossible for the Township and State Police to enforce 24 hours a day, at a place where there is no crosswalk or traffic signalization, instead of the Guys Run Road Crossing which is fully signalized and provides the public with the greatest safety protections (Twp Ex. 7C; Tr. 27, 57, 58).

In crossing cases, the basis for Commission action is the public interest and the standard to be applied is the prevention of accidents and promotion of the safety of the public. *Pittsburgh Railways Co. v. Pennsylvania Public Utility Commission*, 182 A.2d 80 (Pa.Super 1962). As such, it should be assumed that the Public Service Commission considered the safety of the public in the Order. Notwithstanding, the legal status of the disputed portion of Guys Run Road, the Commission should enforce the Order against Conrail based on the safety of the public alone. *North Huntingdon Township v. Consolidated Rail Corporation*, P.U.C. Opinion and Order, C-00913746 (1993).

IV. COUNTY OF BUCKS IS NOT APPLICABLE TO THIS PROCEEDING.

Norfolk's reliance on *County of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678 (Pa.Cmwlth. 1996), as authority for the proposition that the

Commission lacks jurisdiction over the Guys Run Road Crossing is misplaced for several reasons.

In *County of Bucks*, the Commission in 1994 issued an order, pursuant to Sections 2702 and 2704 of the Code, directing a county and township to pay for the closing of a pedestrian bridge that had been formally abolished. The county and township successfully appealed the Commission's order. The Court held that the Commission lacked jurisdiction over purely pedestrian bridge crossings under Section 2702 of the Code.

The pedestrian bridge in *County of Bucks* was ordered to be built and maintained in 1917 by the Public Service Commission as a condition to the formal abolishment of an at-grade highway crossing at the same site. As previously explained, the Guys Run Road Crossing was never formally abolished by Pennsylvania Railroad, in contrast to the pedestrian bridge in *County of Bucks*. *City of Erie* at 269 ("three words are used in the act, 'relocate,' or 'alter,' or 'abolish'. . . we must presume that each of these words has some distinctive meaning"); see also *CSX Transp., Inc. v. Pennsylvania Public Utility Commission*, 558 A.2d 902 (Pa.Cmwlt. 1989). Once the highway was abolished, it no longer existed, and as such, the Public Service Commission may have exceeded its jurisdiction to order the construction and maintenance of the pedestrian bridge. However, the Guys Run Road Crossing was never abolished, and necessarily, that portion of Guys Run Road never lost its legal status as a highway under Section 2702 of the Code.

Moreover, the bridge in *County of Bucks* was constructed solely for pedestrian use in lieu of an at-grade crossing. These were two separate and distinct passages over the railroad, one over which the Public Service Commission had jurisdiction, and one over

which it arguably did not. This duality is not present in this proceeding. The same Guys Run Road Crossing that was open to vehicular traffic before 1930 is the same thoroughfare that exists today. As the Court in *County of Bucks* stated: “[o]ur decision has no effect on the PUC’s regulation of pedestrian portions of highway crossings because where the PUC has jurisdiction, it is exclusive” (emphasis added). Accordingly, pursuant to Section 2702 it is within the Commission’s jurisdiction to enforce the Order requiring Norfolk to maintain the pedestrian portion of Guys Run Road.

Notwithstanding the status of Guys Run Road Crossing under Sections 102 and 2702 of the Code, *County of Bucks* would still not preclude the Commission from enforcing the Order. There were two significant orders in *County of Bucks*. The first was the 1917 Public Service Commission order for the construction and continued maintenance of the pedestrian bridge, and the second was the 1994 Commission order issued pursuant to Sections 2702 and 2704 of the Code, allocating the costs associated with the abolition of the bridge. The holding in *County of Bucks* did not concern the 1917 Order.

In this case, there is only one order, the 1930 Order, which is analogous to the 1917 order in *County of Bucks*. As such, *County of Bucks* is not applicable to these proceedings. The Township is not petitioning to construct, alter, relocate, suspend or abolish the Guys Run Road Crossing under Section 2702 of the Code. The Township is requesting the enforcement of the Order pursuant to Section 701 of the Code, 66 Pa.C.S.A. § 701. Irrespective of any analysis or argument under Section 2702, the Commission can enforce the Order under Sections 103, 501, 502 and 503 of the Code, 66

Pa.C.S.A §§ 103, 501, 502, 503, which give the Commission the power to enforce any lawful order it has entered.

V. THE RAILROAD IS BARRED FROM DENYING THE MAINTENANCE CONDITIONS OF THE ORDER.

Notwithstanding the foregoing, Norfolk is estopped from arguing that the Commission is without jurisdiction to enforce the Order based on the doctrine of *res judicata*. *Pittsburgh & L. E. R. Co. v. Borough of McKees Rocks*, 135 A. 227 (Pa. 1926). If the Order was unreasonable, or not issued within the strictures of the Act, it was incumbent upon Norfolk's predecessor in interest, Pennsylvania Road, to appeal the Order in a timely manner. Pennsylvania Railroad's failure to appeal the Order makes the conditions of the Order adjudicated facts, by which Norfolk is bound to abide by. *Bartron v. Northampton County*, 19 A.2d 263 (Pa. 1941).

CONCLUSION

The Commission retains jurisdiction over the Guys Run Road Crossing pursuant to Section 2702 of the Code because Guys Run Road is a highway that crosses the tracks of Norfolk. 66 Pa.C.S.A. § 2702. Notwithstanding the question of jurisdiction, the Commission can require Norfolk to maintain safe service and facilities for the public at the Guys Run Road Crossing pursuant to Section 1501 of the Code. 66 Pa.C.S.A. § 1501. The Commission can also enforce the Order based on its general powers to carry out the full intent of the Code and previous orders of the Commission. 66 Pa.C.S.A §§ 103, 501, 502, 503.

Accordingly, Norfolk should be ordered to pay for all of the costs and expenses associated with the maintenance at the Guys Run Road Crossing.

Respectively Submitted,

SPRINGER, BUSH & PERRY

By: 

Blaine A. Lucas, Esquire

I.D. # 35344

Shawn N. Gallagher, Esquire

I.D. # 88524

Two Gateway Center, 15th Floor

Pittsburgh, PA 15222

(412) 281-4900

Counsel for the Township

Dated: March 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, pursuant to 52 Pa. Code §1.54.

Service by first class mail addressed as follows:

Honorable John H. Corbett, Jr.,
Administrative Law Judge
Pa. Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222-1210

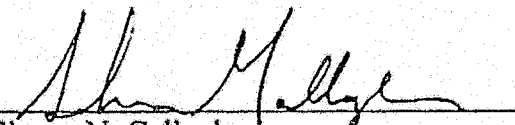
Benjamin C. Dunlap, Jr., Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North 3rd Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840

David A. Salapa, Esquire
Assistant Counsel
Law Bureau
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2841

Jason D. Sharp, Esquire
Pennsylvania Department of Transportation
Commonwealth Keystone Building
9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212

Springer, Bush & Perry PC
2 Gateway Center, 15th Floor
Pittsburgh, PA 15222-1402
(412) 281-4900

Dated: March 26, 2004


Shawn N. Gallagher

RECEIVED
MAR 26 2004
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

SPRINGER BUSH & PERRY P.C.

ATTORNEYS AT LAW

SHAWN N. GALLAGHER

WRITER'S DIRECT DIAL
(412)454-0124

sgallagher@springerlaw.com

WRITER'S DIRECT FAX
(412)338-9168

March 26, 2004

ORIGINAL

James N. McNulty, Secretary
Public Utility Commission
P.O. Box 3265
North Office Building
Harrisburg, PA 17105-3265

BTL

Re: *Harmar Township v. Norfolk Southern Railway Company*
Docket No.: C-20030526
Main Brief

Dear Mr. McNulty:


Please find enclosed an original and nine copies of the main brief of Harmar Township in the above captioned matter. Copies of the Township Brief have been served on the parties of record in the manner provided for in the attached certificate of service. If you have any questions or concerns regarding the enclosed please contact me at your earliest convenience.

Very truly yours,

SPRINGER BUSH & PERRY P.C.

DOCUMENT
FOLDER

By:


Shawn N. Gallagher

SNG/dln
Enclosures

cc: Harmar Township (w/o encl.)
Administrative Law Judge John Corbett
Benjamin C. Dunlap, Jr., Esquire
Jason D. Sharp, Esquire
David A. Salapa, Esquire

RECEIVED

MAR 26 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township,
Complainant

vs.

Norfolk Southern Railway Company;
Allegheny County; and Commonwealth of
Pennsylvania, Department of Transportation,
Respondents

Docket No. C-20030526

DOCKETED
APR 19 2004

SECRETARY'S OFFICE

AMENDED CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of the "Main Brief" of Norfolk Southern Railway Company, in the above action, in the manner indicated below, addressed to:

Electronic Mail and U.S. First Class Mail:

Harmar Township
701 Freeport Road
Cheswick, PA 15024-1208
harmar701@comcast.net

Howard M. Louik, Esquire
Assistant County Solicitor
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
smaglicco@county.allegheny.pa.us

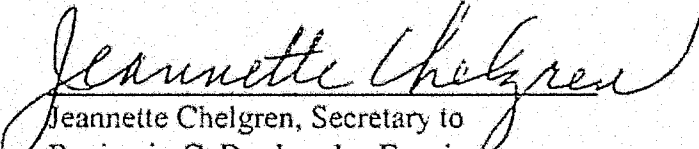
Shawn N. Gallagher, Esquire
Springer, Bush & Perry
Two Gateway Center, 15th Floor
Pittsburgh, PA 15222
sgallagher@springerlaw.com

Hand Delivery Only:

Jason D. Sharp, Esquire
PA Department of Transportation
Office of Chief Counsel
P. O. Box 8212
Harrisburg, PA 17105-8212

David A. Salapa, Esquire
PA Public Utility Commission
Bureau of Transportation & Safety
P. O. Box 3265
Harrisburg, PA 17105

**DOCUMENT
FOLDER**


Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Date: March 26, 2004

LAW OFFICES
NAUMAN, SMITH, SHISSLER & HALL, LLP

18TH FLOOR
200 NORTH THIRD STREET
P. O. Box 840

SPENCER G. NAUMAN, JR.
J. STEPHEN FEINOUR
CRAIG J. STAUDENMAIER
BENJAMIN C. DUNLAP, JR.
DENNIS E. BOYLE
L. RENEE LIEUX
LUCINDA C. GLINN

ORIGINAL

HARRISBURG, PENNSYLVANIA 17108-0840
TELEPHONE
(717) 236-3010
TELEFAX
(717) 234-1925

002

COUNSEL
DAVID C. EATON
JOHN C. SULLIVAN
GUY P. BENEVENTANO
DIRECT E-MAIL ADDRESS
NSSH@NSSH.COM
WEBSITE ADDRESS
WWW.NSSH.COM

April 12, 2004

HAND DELIVERED

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

**In Re: Harmar Township v. Norfolk Southern Railway Company; Allegheny County;
and Commonwealth of Pennsylvania, Department of Transportation. PUC
Docket No. C-20030526; Our File No. 14077**

Dear Sir:

I enclose an original and ten (10) copies of the Reply Brief of Norfolk Southern Railway Company for filing in the above-referenced matter. As evidenced by the Certificate of Service attached, copies of the Main Brief have been provided to all active parties of record. Once the Reply Brief is filed, please return a time-stamped copy to our messenger. If you have any questions, please advise.

Sincerely yours,

Jeannette Chelgren
Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Enclosures

- cc: Judge John H. Corbett, Jr (w/enc.)
- All Parties of Record (w/encs.)
- Randal S. Noe, Esquire (w/encs.)
- B. Terrance Sullivan (w/encs.)

RECEIVED
APR 13 2004
PUC

**DOCUMENT
FOLDER**

198

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township,
Complainant

vs.

Norfolk Southern Railway Company;
Allegheny County; and Commonwealth of
Pennsylvania, Department of Transportation,
Respondents

Docket No. C-20030526

ORIGINAL

COMMUNICATIONS SECTION
APR 13 2004

REPLY BRIEF OF
NORFOLK SOUTHERN RAILWAY COMPANY

I. INTRODUCTION

Norfolk Southern Railway Company ("Norfolk Southern") hereby replies to the Main Briefs of the Commission's Bureau of Transportation and Safety ("BTS"), the Pennsylvania Department of Transportation ("PennDOT") and Harmar Township ("Township").

Both BTS and PennDOT argue in their Main Briefs that the Commission has no jurisdiction over the crossing at issue, as it is a pedestrian crossing which does not fall within the Commission's jurisdiction over rail-highway crossings pursuant to 66 Pa.C.S. §§ 2702 and 2704. However, BTS and PennDOT take the further position that the Commission has the authority to enforce the 1930 Public Service Commission ("PSC") Order requiring Norfolk Southern's predecessor to maintain the pedestrian crossing (Township Exhibit No. 4), pursuant to 66 Pa.C.S. §§ 501 through 503 and 701. Norfolk Southern agrees that the Commission has no jurisdiction over the subject pedestrian crossing, but takes the further position that the Commission must have jurisdiction over the underlying subject matter of an Order in order for it to be enforceable.

DOCUMENT
FOLDER

DOCKETED
APR 13 2004

The Township makes a multitude of arguments in support of its position that the Commission has jurisdiction over the subject crossing. Some of these arguments rely on mischaracterizations of key facts in the record, while others rely upon creative but erroneous interpretations of the applicable law. In spite of the Township's many arguments to the contrary, the fact remains that the subject crossing was changed from a vehicular and pedestrian to a pedestrian only crossing pursuant to the 1930 PSC Order at issue in this proceeding and thereby falls outside the definition of a "highway" over which the Commission has jurisdiction. The Township's Complaint should therefore be dismissed.

II. ARGUMENT

- A. **If the Commission does not have jurisdiction over the subject crossing, as Norfolk Southern, BTS and PennDOT agree, then it has no authority to enforce an Order regarding the crossing.**

In their Main Briefs, BTS and PennDOT agree with Norfolk Southern that the Commission has no jurisdiction over the subject crossing pursuant to 66 Pa.C.S. §§ 2702 and 2704, as it is not a crossing of a railroad with a highway, as the term highway is defined under Section 102 of the Public Utility Code¹. In spite of this, BTS and PennDOT take the position that the Commission retains authority to enforce the 1930 Order regarding the subject crossing pursuant to 66 Pa.C.S. §§ 501 through 503 as well as authority to hear complaints regarding the violation of Commission Orders pursuant to 66 Pa.C.S. § 701.

¹ PennDOT takes the further position that the Commission lacks jurisdiction over the parties in this proceeding. See PennDOT Main Brief at 13, Proposed Conclusion of Law ¶ 1.

BTS contends that *County of Bucks v. Pa. Public Utility Commission*, 684 A.2d 678 (Pa.Cmwlth 1996), is inapplicable to the present case because, it contends, that case does not address the enforcement of prior Commission Orders. Because the Township is not requesting that the Commission order the pedestrian crossing altered pursuant to Section 2702 of the Code or to have the Commission allocate the costs of an alteration pursuant to Section 2704, but is instead alleging that Norfolk Southern is violating the provisions of the 1930 PSC Order, BTS contends that the *County of Bucks* case is not dispositive. Norfolk Southern disagrees with BTS in that regard.

The facts in *County of Bucks* are actually closer to those in the current case than the summary of that case by BTS would indicate. As in the present proceeding, the pedestrian crossing at issue in *County of Bucks* was created in 1917 upon the conversion of the crossing from an at-grade rail-highway crossing to a pedestrian bridge. The PSC assigned maintenance responsibilities for the new pedestrian crossing at issue in *County of Bucks* to the railroad, as in the present case. The only difference between the two cases is that the PSC stated that it "abolished" the highway crossing in *County of Bucks*, whereas it "altered" the crossing from highway/pedestrian to pedestrian only in the present matter. However, this is a distinction without a difference. The fact remains that the former highway crossing is no more, whether it was abolished or altered. The practical effect is the same. The Commonwealth Court explained the legal effect of that change as follows:

Once the highway bridge was abolished, as ordered by the Public Service Commission, there was no basis for the PUC's assertion of jurisdiction . . . Even if the Public Service Commission had been given jurisdiction over pedestrian bridges by the 1913 law, it is within the powers of the General Assembly to narrow or redefine the PUC's jurisdiction as it sees fit.

County of Bucks v. Pa. Public Utility Commission, 684 A.2d at 682.

The Commonwealth Court goes on to hold that the "plain language of the present Code limits the PUC's jurisdiction to highways for vehicular traffic which excludes the pedestrian bridge at issue here without regard to any prior assertion of jurisdiction." *Id.* A fair reading of the *County of Bucks* decision is that the PUC must have jurisdiction under Section 2702 or 2704 in order to take any present action in regard to a crossing, regardless of any prior Order on the matter. This reading of *County of Bucks* also comports with the basic premise of the law that an action formerly enforceable by a governmental entity cannot continue to be enforced where the underlying law has changed.

In *Fedor v. Borough of Dormont*, a mandamus proceeding was brought against the borough to require the purchase of paid-up life insurance policies for retired police officers from police pension funds as required under a borough ordinance. *Id.*, 487 Pa. 249, 409 A.2d 334 (1979). However, a subsequent borough ordinance did not provide for any life insurance benefits for retired police officers, based upon a report by the State Auditor General stating that the life insurance purchase provisions of the former ordinance were not authorized by the underlying Act. *Id.*, 487 Pa. at 252, 409 A.2d at 335-336. The Pennsylvania Supreme Court denied enforcement of the previous ordinance, stating that:

A settled principle of statutory construction is that whenever a statute sets up a general or exclusive system covering the entire subject matter of a former statute and is intended as a substitute for such former statute, such statute shall be construed to supplant and, therefore, repeal all former statutes upon the same subject.

Id., 487 Pa. at 253, 409 A.2d at 336 (citing 1 Pa.C.S. § 1971(a)).

The Public Utility Code is unquestionably an exclusive system covering an entire subject matter and, through former enactments, was intended to supplant the prior PSC enabling statute.² Just as the old ordinance in *Fedor* could not be enforced after the enactment of the new borough ordinance, an order under the questionably more expansive jurisdiction of the PSC could not be enforced by the PUC following the 1937 enactment of the Public Utility Law, which specifically limited the Commission's jurisdiction to rail-highway crossings -- not pedestrian crossings.

Similarly, in *Cirard Trust Co. v. City of Philadelphia*, an Act establishing a general system of elevator inspection throughout the Commonwealth divested the city of its previous power to inspect and license elevators and collect fees. *Id.*, 336 Pa. 433, 440, 9 A 2d 883, 886 (1939). The court stated that "[a] subsequent statute which sets up a general or exclusive system governing the entire subject matter of the former law and intended as a substitute for it, or one which establishes a uniform and mandatory system repeals the pre-existing enactments by implication." *Id.* at 436, 9 A 2d at 884.

BTS further contends that Norfolk Southern misstates the factual background of the 1930 PSC Order and fails to distinguish between Commission subject matter jurisdiction and its authority to order a particular result in regard to Norfolk Southern's position that the PSC Order assigning maintenance responsibilities for the pedestrian crossing to the Pennsylvania Railroad is without effect. See BTS Main Brief at 13-14. Norfolk Southern agrees with BTS that the PSC had

² When the Public Utility Law was enacted in 1937, it expressly repealed the former Public Service Company Law in effect in 1930 when the Order at issue (Township Exhibit No. 4) was made. See Act of May 28, 1937, P L. 1053, Section 1502. The Public Utility Law included substantively the same definition of "highway" as in the present Public Utility Code. See *id.* at Section 2.

jurisdiction to order an "alteration" of the subject crossing, but disagrees with BTS that the Commission retains jurisdiction to enforce a continuing maintenance Order over what was altered into a purely pedestrian crossing.³ Once the crossing was no longer a highway crossing, as that term is defined under the applicable law, there was no longer any basis for a current assertion of jurisdiction by the Commission "based on any purported jurisdiction of the Public Service Commission." *County of Bucks* at 682.

Norfolk Southern and BTS agree that it is questionable whether the PSC had the power to order a vehicular crossing converted to a pedestrian crossing. Therefore, it is arguable that the PSC exceeded its power by ordering a vehicular crossing converted to a pedestrian crossing in the 1930 Order. Where BTS and Norfolk Southern further part company is with the contention of BTS that even if the PSC "had no power to order a vehicular crossing converted to a pedestrian crossing, that lack of power does not render the Pennsylvania Public Service Commission Order without effect and unenforceable." BTS Main Brief at 15.

BTS relies upon the case of *Delaware River Port Authority v. Pa. Public Utility Commission*, 408 Pa. 169, 182 A.2d 683 (1962), in support of its argument that the terms "jurisdiction" and "power" are not interchangeable, a general premise with which Norfolk Southern agrees. However, as the Court in *Delaware River* makes clear in its holding, the issue in that case was not whether the Commission had jurisdiction to allocate the costs to relocate an electric company's facilities at the

³ In so stating, BTS mistakenly writes that the Pennsylvania Railroad requested approval of "the alteration of a vehicular crossing by converting it into a four foot wide pedestrian crossing," BTS Main Brief at 14, whereas in reality the Pennsylvania Railroad petitioned for the "abandonment" of that "public vehicular crossing." See Township Exhibit No. 2.

crossing, but whether it had the power to do so "since the legislature did not specifically abrogate the common law doctrine that non-transportation public utilities are not entitled to relocation costs."

Delaware River Port Authority, 182 A.2d at 686. As the Court further explained in that case:

Commission's error arose from incorrectly allocating these particular expenses upon Authority without necessary legislative permission. It did not arise because the Commission lacked the jurisdiction per se to make allocations but rather, because the Commission improperly interpreted the relevant statutory provisions in imposing the costs in question herein and thereby exceeded its power and authority.

Id.

In other words, in *Delaware River Port Authority*, the Commission had jurisdiction over the crossing and had jurisdiction to make cost allocations, but did not have power to allocate the non-transportation utility costs. It is implicit in the *Delaware River* case that the Commission must have jurisdiction over the subject matter of an Order in order to have the power to enforce the Order. In the present case, however, the Commission's jurisdiction over the subject crossing ended upon completion of its alteration from a vehicular/pedestrian crossing to a solely pedestrian crossing, or alternatively upon the enactment of the Public Utility Law with its limiting definition of "highway," regardless of whether the Commission had power to order such an alteration at that time.

Based upon its theory, BTS contends that the 1930 Order is subject to *res judicata* effect because it was not appealed at that time. However, Norfolk Southern is not contesting the alteration of the crossing from vehicular/pedestrian to pedestrian only in 1930, but the enforcement of that portion of the 1930 Order which requires Norfolk Southern to maintain the crossing at a point in time when Norfolk Southern, BTS and PennDOT all agree that the Commission has no jurisdiction over the crossing itself.

But for the semantic change of the term "abandonment" to "alteration" of the subject crossing, the Pennsylvania Railroad's petition was granted in full by the 1930 Order. The subject of jurisdiction was apparently not raised in the 1930 proceeding. Even so, lack of subject matter jurisdiction is a defense that cannot be waived. As quoted by our Supreme Court recently in affirming that portion of a Superior Court decision in the case below that subject matter jurisdiction can be raised even after the proceedings are concluded:

"[I]t is never too late to attack a judgment or decree for want of jurisdiction. That question is always open" *In re Simpson's Estate*, 253 Pa. 217, 215, 98 A. 35, 38 (1916). "Such a judgment is entitled to no authority or respect, and is subject to impeachment in collateral proceedings at any time by one whose rights it purports to affect." *Moskowitz's Registration Case*, 329 Pa. 183, 190, 196 A. 498, 502 (1938). "The want of jurisdiction over the subject matter may be questioned at any time. It may be questioned either in the trial court, before or after judgment, or for the first time in an appellate court, and it is fatal at any stage of the proceedings, even when collaterally involved. . . ." *In Re Paterson's Estate*. 341 Pa. 177, 180, 19 A.2d 165, 166 (1941) (emphasis added).

DeCoatsworth v. Jones. 536 Pa. 414, 639 A.2d 792, 796 (1994).

Both BTS and PennDOT agree that the Commission cannot order any present alteration of the crossing due to the Commission's lack of subject matter jurisdiction over the crossing, a position with which Norfolk Southern agrees. Therefore, if the Commission enforces the 1930 Order, it will lack jurisdiction to order any alterations to the crossing in the interests of safety. The assertion of jurisdiction to enforce the 1930 Order would therefore be contrary to the Commission's mandate to protect the public safety pursuant to 66 Pa.C.S. § 2702(b). Under these circumstances, it would promote the public safety for Norfolk Southern to determine whether a private pedestrian crossing

is to be permitted at this location, as the railroad does for every other purely pedestrian crossing in the state, and if so to determine what safety features are necessary.

Norfolk Southern suspects that both BTS and PennDOT have a concern about the enforceability of Orders which require the maintenance of rail-highway crossings following their abolition. See, e.g., *Friends of the Atglen-Susquehanna Trail, Inc. v. Pa. Public Utility Commission*, 717 A.2d 581 (Pa.Cmwlth. 1998) (affirming parties' settlement agreement that municipalities maintain certain crossings left in place following their abolition), *appeal denied*, 559 Pa. 695, 739 A.2d 1059 (1999). It is Norfolk Southern's position that a decision upholding the lack of Commission jurisdiction in this matter would have no effect on such Orders, in that the Commission had jurisdiction over the subject matter at the time that Order was entered and retains jurisdiction over such crossings, whereas here it ceased to have jurisdiction to enforce a continuing maintenance obligation once the crossing was "altered" from a vehicular to a pedestrian crossing.

As has been held on numerous occasions, the Commission, as an administrative agency created by statute, has only those powers expressly conferred upon it by statute or those powers which are necessarily implied from its express powers. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977); *County of Bucks*, 684 A.2d at 682; *Peoples Natural Gas Company v. Pa. Public Utility Commission*, 664 A.2d 664 (Pa.Cmwlth. 1995). Therefore, if the Commission lacks jurisdiction over the subject crossing, it lacks jurisdiction to Order the maintenance of that crossing. Since the Commission lacks jurisdiction over pedestrian crossings such as the one at issue, the Township's Complaint should be dismissed for lack of subject matter jurisdiction.

B. The Township's arguments that the Commission has jurisdiction over the subject pedestrian crossing have no basis in law or in fact.

Contrary to the positions of the other parties to this proceeding, the Township contends that the Commission has jurisdiction over the subject pedestrian crossing. It does so by setting forth a number of legal arguments, some based on a mischaracterization of the facts of record, and all of which are erroneous.

The Township first argues that the Commission has subject matter jurisdiction over the crossing pursuant to Section 2702 of the Code because the PSC did not abolish the crossing nor vacate the roadway and the road is still, the Township contends, used as a highway. As discussed above, it is true that the PSC used the word "alter" rather than "abolish" in ordering the conversion of the subject crossing from vehicular/pedestrian to pedestrian only. However, in this case that change in verbiage is purely a matter of semantics, which may have been made based upon the PSC's belief that it retained jurisdiction over the crossing following its alteration to a pedestrian crossing. Whether it did or did not retain jurisdiction at the time is irrelevant, as it clearly lost jurisdiction over the crossing once the term "highway" was defined in its present manner under the Public Utility Law of 1937. See *County of Bucks v. Pa. Public Utility Commission*, 684 A.2d at 682.

Furthermore, a highway does not need to be vacated in order for the Commission to effect the abolition of a crossing. See 66 Pa.C.S. § 2702(c) (the Commission *may* abandon or vacate such highways or portions of highways as, in the opinion of the Commission, may be rendered unnecessary for public use by the . . . abandonment of any of such crossings" (emphasis added)); *Application of Consolidated Rail Corporation regarding Whitehouse Lane*, A-00107458 (Opinion and Order entered December 24, 1996), a copy of which is attached hereto as Exhibit "A" (highway

crossing over railroad abolished but roadway not vacated). The Township's citation of *Lacy v. East Broad Top Railroad and Coal Company*, 77 A.2d 706 (Pa.Super. 1951) in support of its position in this regard is particularly interesting, in that *Lacy* concerned the abandonment of a railroad right-of-way, the Commission's jurisdiction over which has been preempted by federal law.

The Township relies upon the case of *Reading Company v. Pa. Public Utility Commission*, 333 A.2d 525 (Pa.Cmwlt. 1975), for the proposition that the PUC has jurisdiction over a pedestrian only bridge if the bridge carries a legally open public road. In that case, however, the issue of the Commission's jurisdiction over pedestrian crossings was not raised. Furthermore, the *Reading Company* case predates both the *County of Bucks* and the *Consolidated Rail Corporation v. Pa. Public Utility Commission*, 76 Pa.Cmwlt. 25, 463 A.2d 90 (1983) cases, which hold that the Commission lacks jurisdiction over pedestrian crossings.

If the Township were seeking to now reestablish the subject crossing for vehicular use, it might have a point in regard to the asserted continuing public character of the roadway at the crossing if the roadway has indeed never been vacated. But the Public Utility Code now requires a crossing to be used, and to have been constructed with the intention of use, by vehicles in order for it to qualify as a highway crossing under the jurisdiction of the Commission. The subject crossing does not so qualify.

Perhaps sensing the weakness of its arguments, the Township next attempts to establish the path's status as a highway at the crossing by stating there is "constant vehicular/bicycle use" at the crossing. Township Main Brief at 20. In making this assertion, however, it mischaracterizes the facts of record and testimony of its own witnesses. The Township first states that "[t]he most

frequent vehicular/bicycle use at the crossing is by the children of the Township in order to access the river and the residents of Wenzel Drive” *Id.* In support of this statement, the Township references Township Exhibit No. 1, which is a map of the area. It further references transcript pages 33 and 34, which do not refer to children’s use of the crossings, but instead children taking bikes “down to access the river.” These children could be using Wenzel Drive to “access the river” and there is no testimony that they ride across the crossing. In addition, does the Commission really want to encourage children to use a railroad crossing where there are no warning devices when they have street access? In addition, at transcript pages 76 and 77, the Township’s witness testified that he and his neighbor carry their bikes across the crossing.

The Township next states that “[o]ther vehicles that have used the crossing have included motorcycles and three wheel all terrain vehicles.” Township Main Brief at 20. The Township’s references again do not support its statement. At page 20 of the transcript, the Township witness does not state that motorcycles and three wheel all terrain vehicles have used the crossing, but instead merely refers to the crossing as a “vehicle and pedestrian crossing.” At page 30, the witness makes no mention of motorcycles and other motorized vehicles, but instead refers on the previous page of the transcript to having seen people who “carried” bicycles “up the steps and across the tracks” at the crossing. At pages 50 and 51 of the transcript, the Township witness expressed his opinion that motorcycles “could” travel from one side of the crossing to the other, not that they ever have. Finally, at page 71 of the transcript, the Township witness testified that he believes the crossing “should” be used as “access for bicycles.” In addition to the lack of any evidence of vehicular use of the subject crossing, it is clear by the stairway on the approach to the crossing and

the steep grade there that the crossing was never intended for other than pedestrian use. N.T. 110-115; Norfolk Southern Exhibits No. 1, 3A 3B; Township Exhibit 8G

The *Application of Danville Area School District*, Docket No. A-00118478 (Order entered March 19, 2002), which is cited by the Township at page 21 of its Main Brief and which approved the construction of a proposed pedestrian crossing over which "school students riding bicycles would be using the sidewalk and crossing to access the school," is inapplicable to the present case. See *Application of Danville Area School District*, at 2, a copy of which is attached hereto as Exhibit "B". In that case, the crossing was obviously being constructed for use as a vehicular/pedestrian crossing and thus came within the definition of a highway pursuant to the *Consolidated Rail Corporation* and *County of Bucks* cases. However, in the present case, it is obvious that the crossing was not constructed for vehicular use, due to the use of stairs and the steep approach to the crossing.

While the Township at page 22 of its Main Brief attempts to blame Norfolk Southern for the height of the crossing, the Township presented absolutely no evidence that the stairs were never an integral part of the crossing or how much the tracks may have been raised over time. In addition, the 1930 Opinion and Order states that the street railway tracks of the Allegheny Valley Street Railway Company were lowered about 11 inches at that time to match the grade of the state highway. This indicates that there was a difference in grade between the state highway and the Pennsylvania Railroad in effect at that time. See Township Exhibit No. 4.

The Township next contends that the subject crossing remains a public highway under the jurisdiction of the Commission because the approval of the alteration of the crossing from vehicular/pedestrian to pedestrian only "was subject to the condition that the Pennsylvania Railroad

would continually maintain the subject crossing.” Township Main Brief at 27. “Having failed this condition,” the Township continues, “the Public Service Commission’s approval of the alteration is without effect and the subject crossing is still a vehicular and pedestrian crossing.” *Id.* This is an absurd argument which ignores the practical reality that the subject crossing is no longer open to the use of vehicular traffic as well as the legal reality that the PSC approved this change.

The Township next contends that the Commission has subject matter jurisdiction over the crossing “because all of the crossings in the area are interrelated.” Township Main Brief at 27. In its eight-page argument in this regard, the Township in effect contends that the subject crossing is intended only for pedestrians and the separate Wenzel Road crossing has no sidewalks and is therefore intended for vehicular usage, so that the two crossings must be considered as one for purposes of determining Commission jurisdiction. In support of this novel argument, the Township cites the case of *Pa. Public Utility Commission v. Borough of Souderton*, 231 A.2d 875 (Pa. Super. 1967), in which the Commission issued an Order requiring a comprehensive engineering study to determine the most economical means of alleviating traffic congestion in the Borough, including the feasibility of eliminating 13 highway-rail crossings in and adjoining the Borough. Neither this case nor any other case cited in this section of the Township’s argument supports the argument that separate pedestrian and vehicular crossings located nearly 1,300 feet apart (Township Exhibit No. 1) can be considered one crossing in order to determine Commission jurisdiction, rather than that several crossings can be examined concurrently to determine overall need and public convenience.

Interestingly, in making this argument, the Township contends that “the Wenzel Drive crossing is for vehicular access only and not for pedestrians.” See Township Main Brief at 31. In

making this argument, the Township refers to the provisions of the 1930 Order providing that the subject crossing refers to it being for pedestrian usage, while the establishment of the Wenzel Drive crossing does not refer to any pedestrian usage. This results in the interesting inconsistency that the Township is arguing that the subject crossing can be used for vehicular access when the 1930 Order does not so state while pedestrians cannot use the Wenzel Drive crossing because the PSC Order did not state that it was constructed for that purpose.

In further regard to this argument, the Township again mischaracterizes the testimony of record by stating there are "more than 35 residents that live on Wenzel Drive and more than a 100 residents that live on Twelve Mile Island that would be effectively cut off from the rest of the Township if the Guys Run Road crossing did not exist." Township Main Brief at 32. First, it is difficult to imagine how the residents of Wenzel Drive would be "cut off from the rest of the Township" when that road crosses Norfolk Southern's tracks to intersect with the state highway. Township Exhibit No. 1. Second, the Township's own witnesses provided testimony that most residents of Twelve Mile Island park along or off of Wenzel Drive and take a ferry over to the Island, N.T. 41-42, 69-70, 97, and the Township's assertion in this regard is further belied by the testimony of its own witnesses that only about 6-12 people a day use the subject crossing. N.T. 33-34, 89. The Township's additional statement that "the residents of Terrace Drive and Campbell's Run Road on the north side of the railroad would have no means of accessing the river" if the subject crossing did not exist is similarly unsupportable because those persons can use the Wenzel Drive crossing for access. Township Main Brief at 32, Township Exhibit No. 1. Furthermore, in regard to pedestrians, only one Township witness testified, without explanation, as to the "impossibility of installing"

sidewalks on either side of Freeport Road between the Wenzel Drive crossing and the subject crossing. See Township Main Brief at 32; N.T. 19. Whether that is true or not, however, has absolutely no bearing on the determination whether the Commission has jurisdiction over the subject crossing.

The Township next argues at pages 35-38 of its Main Brief that the Commission has subject matter jurisdiction over the crossing "because the subject road at the crossing is a public prescriptive easement." *Id.* at 35. However, the law is clear in Pennsylvania that the public cannot establish prescriptive rights on active railroad right-of-ways. *Pennsylvania Railroad Company v. Borough of Freeport*, 138 Pa. 91, 20 A. 940 (1890); *Holmes & Holmes v. Public Service Commission*, 79 Pa.Super. 374, 380-381 (1922). It is interesting in this regard that the Township attempts to establish prescriptive rights by testimony such as that of the local tavern owner, who testified that some of her patrons "want to come over and have a drink or two, and they have to use the crossing." See Township Main Brief at 38, quoting the direct testimony of Dolores Prasnkar.

The Township next argues that "the Commission can require the railroad to maintain safe service and facilities at the crossing regardless of the Order," relying generally upon Section 1501 of the Code, 66 Pa.C.S. § 1501. Norfolk Southern would first take the position that any assertion of jurisdiction by the Commission over its tracks outside the parameters of a valid rail-highway crossing would be preempted by federal law. Furthermore, even if Commission jurisdiction under Section 1501 were applicable, it would only be so for facilities which the railroad chooses or is required to provide. Here, in contrast, Norfolk Southern does not want to provide a pedestrian

crossing due to safety concerns and the Commission has no jurisdiction to require it to do so. Therefore, the Township's arguments in this regard are irrelevant.

In further support of its argument that the public has a "right" to use the crossing, the Township cites the permissive crossing doctrine at pages 42-44 of its Main Brief. However, as admitted by the Township, this is an "express or implied *license* to pass over railroad property" and is "a *permissive* right-of-way over a railroad track." *Id.* at 42 (emphasis added). The permissive crossing doctrine is a standard of care placed upon the railroad where it permits a crossing to exist and does not establish the right to a crossing. The doctrine certainly does not establish Commission jurisdiction.

Finally in this regard, the Township contends that because property conveyances to which Norfolk Southern or its predecessors were not parties refer to a roadway at the subject crossing, subsequent property owners retain the right to continued use of the roadway at the crossing. See Township Main Brief at 44-45. However, this argument ignores the fact that the Commission, as well as the PSC before it, has exclusive jurisdiction over rail-highway crossings and has the authority to abolish the use of a crossing for vehicular purposes, which the PSC in effect did in this case.

The Township then spends many pages arguing that the Commission can enforce the Order of the PSC based on the safety of the public. In so arguing it cites alleged roadway and other conditions in the area that have nothing to do with the crossing itself and are irrelevant in any determination as to whether the subject crossing is within the Commission's jurisdiction. Even so, several points raised by the Township in its long discussion of this issue merit rebuttal. The Township did not address whether it could install crosswalks at the intersection of Wenzel Drive

with Freeport Road for the use of pedestrians. The "No Pedestrian Crossing Sign" referenced at page 48 of its Main Brief is actually located at Freeport Road adjacent to the subject crossing, and not at Wenzel Drive. Finally, the testimony at page 62 of the transcript cited at page 50 of the Township's Main Brief did not state that a pedestrian was killed while attempting to cross at the Wenzel Drive crossing, but rather that a resident was killed there. There was no testimony as to whether this resident was in a vehicle or was walking.

As there is no legal or factual basis to support the Township's position in this case, its Complaint should be dismissed.

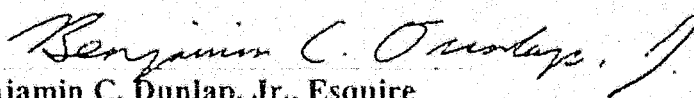
III. CONCLUSION

For the foregoing reasons, the Complaint of Harmar Township in this proceeding should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By


Benjamin C. Dunlap, Jr., Esquire

Supreme Court I.D. #66283

200 North Third Street, 18th Floor

P. O. Box 840

Harrisburg, PA 17108-0840

717-236-3010

Attorney for Norfolk Southern Railway Company

Date: April 12, 2004

DEC 8 1996

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held November 14, 1996

Commissioners Present:

- John M. Quain, Chairman
- Lisa Crutchfield, Vice Chairman
- John Hanger
- David W. Roika
- Robert K. Bloom

Application of Consolidated Rail Corporation for Approval of Abolition of Crossing where T-384 (Whitehouse Lane) crosses above the tracks of said Corporation, in the Township of Lower Swatara, Dauphin County

A-00107458

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition is the Recommended Decision on Remand of Administrative Law Judge ("ALJ") Robert A. Christianson which was issued on August 26, 1996, in the above-captioned proceeding. Exceptions were filed thereto by Stanford Cramer ("Cramer") and Consolidated Rail Corporation ("Conrail") on September 16, 1996. Reply Exceptions were filed by: (1) Township of Lower Swatara ("Township") on September 24, 1996, (2) Pennsylvania Department of Transportation ("PennDOT") on September 25, 1996, and (3) Conrail on September 26, 1996.

HISTORY OF PROCEEDINGS

1. Conrail filed, on May 8, 1987, an Application for approval of the abolition of the crossing where Whitehouse Lane



crosses above Conrail tracks in Lower Swatara Township, Dauphin County.¹

2. The two crossings are near the western (Harrisburg) end of the Harrisburg International Airport ("HIA" or "the airport") and are very close to the Borough of Highspire. The Amtrak crossing is slightly south of the Conrail crossing, closer to the airport. To the east of Whitehouse Lane, a highway spur also reaches the airport. Further to the east, at the Borough of Middletown, there is an additional access to the airport.

3. Various Protests and Petitions to Intervene were filed concerning these Applications, (see Footnote No. 1) and they were both set for hearing on May 19, 1988. A second hearing was held on November 1, 1988, and the record was closed. No Briefs were filed.

4. On September 15, 1987, the Commission had issued an Emergency Order providing that the Conrail crossing, which had been closed by action of the Township, would remain closed. That Order was ratified by Commission Order adopted on October 2, 1987, and entered on October 9, 1987. At the November 1, 1988 hearing, the Commission Order was interpreted to mean that the crossing would remain closed until final disposition of this proceeding and then until an appropriate safety check could be made.

5. A Recommended Decision concerning the two Applications was issued on April 3, 1989. The Commission at its Public

¹ On July 13, 1989, National Railroad Passenger Corporation ("Amtrak") filed a related Application, docketed at A-00107609, concerning a crossing where Whitehouse Lane crosses below Amtrak tracks.

Meeting of May 11, 1989, adopted the ALJ's Recommended Decision, and two orders were issued on May 15, 1989.²

² The Amtrak Application was denied. The text of the Order for the Conrail crossing is as follows:

1. That the application of Consolidated Rail Corporation for approval of abolition of crossing where T-384 (Whitehouse Lane) crosses above the tracks of said corporation, in Township of Lower Swatara, Dauphin County is denied.
2. That the bridge carrying T-384 (Whitehouse Lane) over and above the Consolidated Rail Corporation tracks shall remain closed until the structure has been inspected and the Commission has acted to reopen the bridge.
3. That Lower Swatara Township, Dauphin County shall, within six (6) months of this Commission order and at its initial cost and expense, perform an inspection of the bridge carrying T-384 (Whitehouse Lane) over and above the Consolidated Rail Corporation tracks to ascertain the following:
 - (a) the allowable load carrying capacity with no repairs;
 - (b) the allowable load carrying capacity with any recommended repair of the bridge; and
 - (c) the cost of any work necessary before the bridge is reopened.
4. That Lower Swatara Township, Dauphin County shall promptly report the results of the inspection to the Commission and shall provide copies of this report to all parties to this Consolidated Rail Corporation proceeding.
5. That this Consolidated Rail Corporation proceeding at A-00107458 shall thereafter be scheduled for hearing,

6. The Township reported inspection results and a subsequent hearing was held on February 6, 1992. At the close of the 1992 hearing, the parties requested the opportunity to file Briefs. Briefs and Reply Briefs were filed.

7. A Recommended Decision, dated July 10, 1992, was issued. The Commission then, by its order adopted October 15, 1992, and entered December 17, 1992, allocated certain costs and required that PennDOT perform an engineering study within eighteen (18) months. The study was required in order to determine whether the bridge should be replaced or repaired.

8. A hearing was held on December 7, 1994. Subsequent to the hearing, several Letters and Briefs were filed. A Letter from the ALJ, dated April 24, 1995, referred to the issues as follows:

At this point, the Airport does not seem interested in having the bridge re-opened. Moreover, the various governmental entities are either neutral or in opposition to the reopening of the crossing. Apparently, the main reason for a bridge at this crossing is to reach the land of Stanford Cramer. This provides a basis for a re-opening of the existing bridge or a new bridge. However, I suggest further development before we proceed.

In your letter of February 6, 1995, you suggest that a further hearing be held for the purpose of reconsidering abolition and that repair be considered. I realize that Mr. Cramer is anxious to have some final action taken, but I now support a re-opening, and perhaps a full hearing.

concerning the inspection, a reopening and cost allocation, at a time and place to be designated by the Commission.

Essentially, our problem is that Mr. Cramer has land which would be cut off if the crossing is abandoned. This situation could be a valid basis for additional work on the crossing. There is a chance that the existing bridge would be sufficient for Mr. Cramer's uses, but we do not know this at this time. I gather that no one is particularly interested in using the Amtrak underpass and, as a passing thought, I suggest that Amtrak might seek to have its crossing abolished.

9. A final hearing was held on October 5, 1995. At the conclusion of the hearing, the record was held open, and various settlement efforts continued. Although the issues outstanding were somewhat clarified, no settlement was achieved. Briefs and Reply Briefs were filed.

10. ALJ Christianson's Recommended Decision on Remand, and Exceptions and Reply Exceptions thereto, were filed as noted above.

DISCUSSION

The Findings of Fact of ALJ Christianson, as found on pages 11-14 of his Recommended Decision on Remand, are hereby incorporated by reference unless modified expressly or by necessary implication by this Opinion and Order.

The ALJ concluded inter alia that abolition of this crossing, subject to certain conditions, is necessary and proper for the service, accommodation, convenience or safety of the public. The ALJ further concluded that the bridge structure should be allowed to remain in place for a period of two years from the entry date of the Order to be entered herein.

As noted above, Cramer and Conrail filed Exceptions to the Recommended Decision on Remand. Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. University of Pennsylvania v. Pennsylvania Public Utility Commission, 86 Pa. 410, 485 A.2d 1217, 1222 (1984). Any Exception or argument which is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Cramer filed eight (8) Exceptions to the ALJ's Recommended Decision on Remand. Several of these Exceptions are to specific Findings of Fact, Conclusions of Law, or Ordering Paragraphs of the ALJ. Generally, however, the gravamen of Cramer's Exceptions can be summarized as the twin contentions that: (1) the record does not support the ALJ's Findings of Fact and Conclusions of Law herein, and (2) the ALJ erred in his conclusion that the abolition of this crossing and removal of the bridge is in the public interest. Cramer contends that the evidence of record supports the position that the reopening of this crossing is in the public interest.

PennDOT rejoins that the record herein provides ample support for the findings and conclusions of the ALJ. PennDOT further asserts that the record as developed supports the ALJ's position that the abolition of this crossing is in the public interest. Conrail submits that the ALJ's summary of the evidence and Findings of Fact support his conclusion that "abolition of this crossing... is necessary or proper for the service, accommodation, convenience or safety of the public." (R.D., p. 18). In addition, Conrail points out that both concerned governmental entities in this proceeding, i.e., PennDOT and the Township, support the abolition of the crossing.

In its Reply, the Township notes that Cramer purchased the property in question after the bridge had been closed. The Township further notes that PennDOT has taken the position that it does not need this bridge for access to the airport and, in fact, PennDOT intends to close Airport Drive, a private road, at the Amtrak underpass. Ostensibly, the bridge would no longer serve the general public, but would only serve Cramer.

We believe that it will be instructive to quote verbatim the relevant portion of ALJ Christianson's discussion on the issue of Cramer's land. At page 16 of the Recommended Decision, ALJ Christianson stated very succinctly as follows:

Given the closing of Airport Drive, we are reduced to concern about the Cramer land. This concern is appropriate but the existence of this land does not provide a proper basis for a finding that the public interest requires the continuation of this jurisdictional crossing. I conclude, rather, that the abandonment application should be granted.

In this situation, I am in agreement with the guidance provided by Conrail when, at page 10 of its main brief, it refers to City of Pittsburgh, 55 Pa. PUC 227 (1981). Conrail quotes from the decision of ALJ Clements which was adopted by the Commission. The basic Conrail point is that the Commission should be careful in exercising its power to require parties to spend money on railroad crossings, but should, rather, let the interested parties make their own decision. I am concerned about Mr. Cramer's land and feel that Conrail and PennDOT should also be concerned about this land. There is a chance, as I understand the situation, that they would be liable to pay damages if they "landlock" this Cramer property. However, that is essentially their problem and not a

problem for the Commission in its jurisdictional role over railroad public crossings.

R.D., p. 16.

The foregoing concern is the reason for the ALJ's reluctance to require immediate removal of the bridge, and to allow it to remain in place for an additional two years. We note that this proceeding has been active in excess of nine years. The crossing was closed by Emergency Order issued on September 15, 1987, by this Commission. This date was prior to Cramer's acquisition of the property in question. We find that it has been well established, by the evidentiary record, that a reconstructed crossing would solely benefit Cramer, and would not be in the public interest. As a consequence, we conclude that it is not in the public interest to subsidize the reconstruction of this crossing with public funding.

Accordingly, we conclude that it is in the public interest to direct that the subject crossing should be abolished, and that the bridge in question be removed, within one year from the date of entry of this Opinion and Order.

Additionally, we note that it is well settled in the law that in considering the credibility of witnesses, their manner of testifying, their apparent candor, intelligence, personal interest and bias or lack of it, are to be considered in determining what weight shall be given to their testimony. Danovitz v. Portnoy, 399 Pa. 599, 161 A.2d 146 (1960). We note that it is within the purview of the presiding ALJ to conduct the proceeding in such a manner as to ensure the development of an evidentiary record that is cogent, coherent and complete. 52 Pa. Code §5.242. Premised on our review of the record, we conclude that the ALJ's conduct of the evidentiary proceeding was not

arbitrary or capricious so as to warrant reversal of the ALJ's Recommended Decision.

Therefore, we shall deny the Exceptions of Cramer.

Conrail filed a single Exception to the Recommended Decision on Remand. Specifically, Conrail took exception to Ordering Paragraph No. 4 of the Recommended Decision which reads, in pertinent part, as follows:

4. That Consolidated Rail Corporation, at its initial cost and expense, shall, within 3 months of the end of the two year period... furnish all material and do all work necessary to demolish and remove the bridge structure...

Conrail requested that Ordering Paragraph No. 4 be modified to require the removal of the bridge structure after two years, unless Conrail applies for further relief prior to that time. Conrail asserted that this addition would permit it (Conrail) to apply for further relief prior to the end of that period, should the parties reach some agreement regarding a possible future use of the bridge as a private crossing.

We note that the only party to file a response to Conrail's Exception was the Township, which stated that it has no objection to Conrail's request. However, consistent with our discussion supra, and in light of our limitation of one (1) year for the removal of the bridge with the concomitant abolition of the crossing we shall deny Conrail's Exception.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision on Remand and the Exceptions taken thereto. Premised on our review,

we find that the ALJ's Recommended Decision on Remand, as modified, is amply supported by substantial evidence in the record. We further conclude that the Exceptions of Cramer, and the Exception of Conrail, are not meritorious and are denied:
THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Mr. Stanford Cramer on September 16, 1996, to the Recommended Decision on Remand of Administrative Law Judge Robert Christianson, which was issued on August 26, 1996, be, and hereby are, denied.

2. That the Exception filed by Consolidated Rail Corporation on September 16, 1996, to the Recommended Decision on Remand, be, and hereby is, denied.

3. That the Recommended Decision on Remand issued by Administrative Law Judge Robert Christianson herein on August 26, 1996, be, and hereby is, adopted as modified, by this Opinion and Order.

4. That the Application of Consolidated Rail Corporation filed at Docket No. A-00107458 is approved consistent with this Opinion and Order.

5. That Consolidated Rail Corporation shall, at its sole cost and expense, furnish all material and do all work necessary to maintain the bridge structure until it is removed in accordance with the terms of this Opinion and Order.

6. That Consolidated Rail Corporation, at its initial cost and expense, shall, within one year of the date of entry of this Opinion and Order, furnish all material and do all work necessary to demolish and remove the bridge structure including

the abutments to a point one foot below the ground line. The highway embankment is to be graded back at a two to one slope. All ground disturbed is to be seeded and mulched to prevent soil erosion.

7. That Lower Swatara Township, at its sole cost and expense, shall furnish all material and do all work necessary to (1) erect and thereafter maintain permanent barricades on either side of the abolished crossing to safely prevent vehicular traffic from using the abolished crossing area; (2) erect and thereafter maintain highway signs indicating "road closed," "dead end" or "no outlet" at the intersection of Whitehouse Lane and PA Route 230.

8. That Consolidated Rail Corporation, at its initial cost and expense, shall furnish flagmen, watchmen, and construction and engineering inspection services, as needed, while work is being performed at the crossing in accordance with this Opinion and Order.

9. That Consolidated Rail Corporation, at its initial cost and expense, shall furnish all material and do all work necessary to make any other adjustments to its facilities required as a result of the removal of the bridge.

10. That Bell Atlantic-Pennsylvania and Pennsylvania Power & Light Company, each respectively, at its initial cost and expense, prior to removal of the bridge, shall furnish all material and do all work necessary to alter or relocate its facilities as necessary to accommodate the work herein ordered to abolish the crossing and remove the bridge structure; thereafter to maintain its respective facilities in a safe and satisfactory condition.

11. That any relocation of, change in or removal of any existing structure, equipment or facilities of any public utility other than Consolidated Rail Corporation, Bell Atlantic-Pennsylvania and Pennsylvania Power & Light Company, which may be required as incidental to the work herein ordered be made by the said public utility at its initial cost and expense and in such a manner so as not to interfere with the construction of the improvement.

12. That the Township of Lower Swatara, County of Dauphin, Consolidated Rail Corporation, Pennsylvania Department of Transportation and the involved non-carrier utilities cooperate with each other during the construction of the work herein ordered so that the operations or facilities of the parties will not be endangered or unnecessarily impeded.

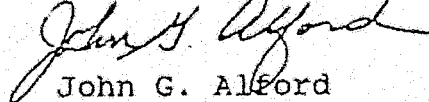
13. That the work ordered herein be completed within one (1) year of the date of entry of this Opinion and Order. Upon completion of the work herein ordered, each of the involved parties report to this Commission the actual date of completion of its respective work and, at the earliest practicable time subsequent to the said date of completion, submit to this Commission a detailed statement of the actual costs incurred in furnishing material and performing work in accordance with this Order.

14. That, upon completion of the work, the Township of Lower Swatara, at its sole cost and expense, shall furnish all material and do all work necessary to maintain the remaining portion of Whitehouse Lane.

15. That upon completion of the work, Consolidated Rail Corporation, at its sole cost and expense, shall furnish all material and do all work necessary to maintain its railroad facilities at the abolished crossing.

16. That upon completion of the work and submission of statement of actual cost by the parties, this proceeding be set for hearing to consider the allocation of costs for work performed in accordance with this Order.

BY THE COMMISSION,



John G. Alford
Secretary

ORDER ADOPTED: November 14, 1996

ORDER ENTERED: DEC 24 1996

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 14, 2002

Commissioners Present:

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

DOCKETED
MARCH 21 2002

Application of Danville Area School District &
Borough of Danville for approval of the construction
of a pedestrian crossing at grade on the tracks of
SEDA-COG Joint Rail Authority, located in the
Borough of Danville, Montour County.

A-00118478

ORDER

DOCUMENT
FOLDED

BY THE COMMISSION:

This matter is before the Commission upon an application filed on December 10, 2001, jointly by Danville Area School District and Borough of Danville seeking approval to construct a pedestrian crossing at grade with a track of SEDA-COG Joint Rail Authority operated by North Shore Railroad Company in the Borough of Danville, Montour County.

In its application, the School District and the Borough state that they propose to construct a concrete and bituminous pedestrian crossing with a nominal width of eight feet to connect existing sidewalks along State Route 11 with the existing school walkways leading to the Middle School facility. The estimated construction cost of the crossing and related connector work to existing facilities is \$6,150, which will be borne by the School District.

A field conference was held at the site of the proposed pedestrian crossing on October 18, 2001.



Representatives of North Shore Railroad Company, SEDA-COG Joint Rail Authority, Larson Design Group, Danville Area School District, Pennsylvania Department of Transportation and Danville Borough were in attendance

At the field conference it was determined that school students riding bicycles would be using the sidewalk and crossing to access the school. The Commission will be required to appropriate the necessary railroad property to accommodate the construction of the pedestrian crossing. Rail traffic at the proposed pedestrian crossing consists of two moves daily at a maximum speed of 10 miles an hour.

No one at the conference objected to the construction of the new pedestrian crossing.

The record having been certified to the Commission, we issue this order approving the application pursuant to Section 335(a) of the Public Utility Code (66 Pa. C.S. § 335(a)) and find that construction of a new pedestrian crossing is necessary and proper for the service, accommodation, convenience or safety of the public;
THEREFORE

IT IS ORDERED:

1. That the application be and is hereby approved.
2. That a new crossing where a proposed pedestrian crossing will cross, at grade, a single track owned by SEDA-COG Joint Rail Authority in the Borough of Danville, Montour County, be and is hereby laid out and established generally in accordance with the right of way plan titled "SIDEWALK CONNECTOR FOR DANVILLE AREA SCHOOL DISTRICT AND THE BOROUGH OF DANVILLE" consisting of one (1) sheet submitted with the application, which said plan is made part hereof and is hereby approved

3. That in accordance with the provisions of Section 2702 of the Public Utility Code, 66 Pa. C.S. § 2702, the following described property be and is hereby taken and appropriated for the construction of the pedestrian crossing in accordance with the approved right of way plan and that Numbered Paragraph 3 of this order together with a copy of said plan shall be recorded by the Recorder of Deeds of Montour County and shall be indexed under the name or names of the record owner of said property, grantor(s), and to the Borough of Danville, grantee, at the sole cost and expense of Borough of Danville, applicant herein.

SEDA-COG JOINT RAIL AUTHORITY - Record Owner
RR 1 Box 372
Lewisburg, PA 17837

All that certain piece, parcel and lot of land situate in the Borough of Danville, Montour County, Pennsylvania, bounded and described as follows:

Beginning at a point on the northern right of way line of the SEDA-COG Joint Rail Authority said point being approximately seventy-four feet westerly from the western back wall of the railroad bridge over Mahoning Creek. Thence from said point of beginning crossing lands of SEDA-COG Joint Rail Authority south 30 degrees, 19 minutes, 54 seconds west (30°19'54"W) 12.0 feet to the southern right of way line. Thence along said southern right of way line of SEDA-COG Joint Rail Authority westerly by a line curving to the left with a radius of 1140.30 feet for an arc distance of 13.93 feet, thence crossing lands of SEDA-COG Joint Rail Authority north 29 degrees, 37 minutes 55 seconds east (29°37'55"E) 12.0 feet to the northern right of way line of SEDA-COG Joint Rail Authority; thence along said right of way line by a line curving to the right with a radius of 1152.30 feet for an arc distance of 14.07 feet to the point and place of beginning.

Containing 168 square feet as above described.

The above tract of land is a portion of real estate which became legally vested in SEDA-COG Joint Rail Authority by deed dated July 30, 1984, recorded in Deed Book 125 on page 827 in the Montour County Courthouse.

4. That SEDA-COG Joint Rail Authority, having agreed so to do, at the sole cost and expense of Borough of Danville, furnish all material and do all work necessary to construct the pedestrian crossing by performing any necessary trackwork and by installing an asphalt crossing with a rubber rail seal interface, and installing highway-rail grade crossing crossbuck signs (R15-1) at proper locations in accordance with the approved plan and Part 8 of the Manual on Uniform Traffic Control Devices.

5. That Borough of Danville at its sole cost and expense do all work necessary to complete the remainder of the project in accordance with the approved plan.

6. That any relocation of, changes in or removal of any adjacent structures, equipment or any other facilities of any non-carrier public utility, which may be required as incidental to the construction of the crossing, be made by said public utility at its sole cost and expense and in such a manner as will not interfere with the improvement, and such relocated or altered facilities thereafter be maintained by said public utility.

7. That Borough of Danville cooperate with North Shore Railroad Company so that during the time the crossing is being constructed, the operations and facilities of the railroad will not be endangered or unnecessarily impeded.

8. That during the time the crossing is being constructed North Shore Railroad Company cooperate with Borough of Danville and conduct its operations in the vicinity of the new crossing in a safe manner.

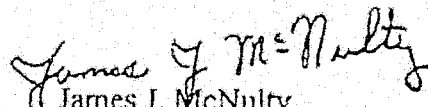
9. That all work necessary to construct the new pedestrian crossing be done in a manner satisfactory to this Commission on or before December 31, 2003, and on or before said date Borough of Danville and SEDA-COG Joint Rail Authority each report the date of actual completion of their respective portions of the work.

10. That Borough of Danville pay all compensation for damages due to the owners of property taken, injured or destroyed by reason of the construction of the crossing in accordance with this order.

11. That upon completion of the construction of the pedestrian crossing, Borough of Danville furnish all material and do all work necessary thereafter to maintain the sidewalk approaches to the pedestrian crossing to points within two feet of the rail.

12. That upon completion of the construction of the pedestrian crossing, North Shore Railroad Company furnish all material and do all work necessary thereafter to maintain the pedestrian crossing surface to two feet beyond the rails and the highway-rail grade crossing crossbuck signs installed in accordance with this order.

BY THE COMMISSION


James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: March 14, 2002

ORDER ENTERED: **MAR 19 2002**

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Harmar Township,	:	
Complainant	:	
	:	Docket No. C-20030526
vs.	:	
	:	
Norfolk Southern Railway Company;	:	
Allegheny County; and Commonwealth of	:	
Pennsylvania, Department of Transportation,	:	
Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of the Reply Brief of Norfolk Southern Railway Company, in the above action, this day in the manner and upon the parties indicated below:

Electronic Mail and U.S. First Class Mail:

Harmar Township
701 Freeport Road
Cheswick, PA 15024-1208
harmar701@comcast.net

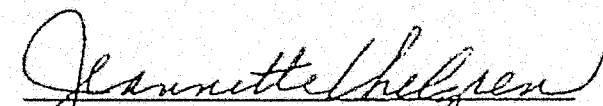
Howard M. Louik, Esquire
Assistant County Solicitor
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
smagliceo@county.allegheny.pa.us

Shawn N. Gallagher, Esquire
Springer, Bush & Perry
Two Gateway Center, 15th Floor
Pittsburgh, PA 15222
sgallagher@springerlaw.com

Jason D. Sharp, Esquire
PA Department of Transportation
Office of Chief Counsel
P. O. Box 8212
Harrisburg, PA 17105-8212
jsharp@state.pa.us

David A. Salapa, Esquire
PA Public Utility Commission
Bureau of Transportation & Safety
P. O. Box 3265
Harrisburg, PA 17105
dsalapa@state.pa.us

Date: April 12, 2004


Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

SPRINGER BUSH & PERRY P.C.

SHAWN N. GALLAGHER

ATTORNEYS AT LAW

WRITER'S DIRECT DIAL
(412)454-0124

sgallagher@springerlaw.com

WRITER'S DIRECT FAX
(412)338-9168

APR 12 2004
ORIGINAL

James N. McNulty, Secretary
Public Utility Commission
P.O. Box 3265
North Office Building
Harrisburg, PA 17105-3265

RECEIVED
2004 APR 16 11:09 AM
SECRETARY'S BUREAU

Re: Harmar Township v. Norfolk Southern Railway Company
Docket No.: C-20030526
Main Brief

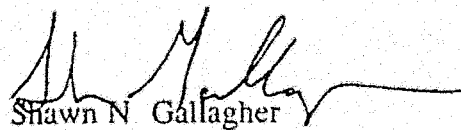
Dear Mr. McNulty:

Please find enclosed an original and nine copies of the Reply Brief of Harmar Township in the above captioned matter. Copies of the Township's Reply Brief have been served on the parties of record in the manner provided for in the attached certificate of service. If you have any questions or concerns regarding the enclosed please contact me at your earliest convenience.

Very truly yours,

SPRINGER BUSH & PERRY P.C.

By:


Shawn N. Gallagher

SNG/dln
Enclosures

cc: Harmar Township (w/o encl.)
Administrative Law Judge John Corbett
Benjamin C. Dunlap, Jr., Esquire
Jason D. Sharp, Esquire
David A. Salapa, Esquire

**DOCUMENT
FOLDER**

53

PROCEDURAL HISTORY

On June 11, 2003, Harmar Township ("Township") filed a formal complaint with the Public Utility Commission ("Commission") against Norfolk Southern Railway Company ("Norfolk") requesting that the Commission order Norfolk to take responsibility for the maintenance of a crossing ("Guys Run Road Crossing") as per the 1930 report and order of the Public Service Commission of Pennsylvania, Application Doc. No. 21878-1930 ("Order"). A field investigation and conference was held at the site where the Guys Run Road Crossing crosses the tracks of Norfolk in the Township on August 21, 2003. On January 29, 2004, a hearing before the Honorable John H. Corbett, Jr. was held to receive testimony and exhibits for the purpose of determining the Commission's jurisdiction and assignment of future maintenance responsibilities.

By letter dated February 27, 2004, ALJ Corbett directed the parties to file Main Briefs on or before March 26, 2004, and Reply Briefs on or before April 12, 2004.

SUMMARY OF ARGUMENT

Pursuant to Section 315(b) of the Code, 66 Pa.C.S.A. § 315(b), Norfolk has the burden of proof to demonstrate that the Order has been complied with. Norfolk has failed to establish by a preponderance of the evidence that it has maintained the Guys Run Road Crossing pursuant to the terms of the Order.

Pursuant to Section 332(a) of the Code, 66 Pa.C.S.A. § 315(b), the Township has the burden of proof to the extent the Township's complaint alleges that Norfolk has failed to furnish and maintain adequate and safe service and facilities for the accommodation, convenience, and safety of the public. 66 Pa.C.S.A. § 1501. The Township has met its initial burden of proof as to the adequacy of its service and facilities at the Guys Run Road Crossing, thereby shifting the burden of going forward with the evidence to Norfolk. Norfolk failed to present any rebuttal evidence of co-equal weight concerning the adequacy and safety of its facilities.

Subject matter jurisdiction is an affirmative defense. As the party asserting an affirmative defense, Norfolk has the burden of proof. Norfolk failed to establish by a preponderance of the evidence that the Guys Run Road Crossing was not intended to be a way open to the use of the public as a matter of right for vehicular traffic.

Norfolk produced no documentary or testamentary evidence at the hearing to support its position that the Guys Run Road Crossing was abolished nor cited any legal authority whatsoever for the proposition that the alteration of a public crossing is tantamount to the abandonment or abolishment of the same. Moreover, the presence of the incline and the stairs at the subject crossing are completely irrelevant in determining the intended use of the Guys Run Road Crossing and inapplicable to satisfying Norfolk's burden of proof. The remainder of the evidence concerning the intended use of the crossing presented by the parties of record is

speculative in nature. As such, the application of the res judicata doctrine and Sections 103 and 316 of the Code should be utilized in interpreting the conflicting inferences that can be deduced from the Order.

Assuming *arguendo* that it was the Township's burden to prove Norfolk's affirmative defense, the Township nonetheless presented a *prima facie* case sufficient to overcome Norfolk's motion to dismiss, and for the Commission to enforce the terms of the Order.

Moreover, Norfolk's safety concerns are overly stated. The Commission can require Norfolk to maintain and address its concerns through Sections 1501 and 2702 of the Code. 66 Pa.C.S.A. §§ 1501, 2702.

Lastly, PennDot may be required to contribute to the maintenance of the subject crossing because it was determined by the Public Service Commission that it was a necessary party to the Order. Also, PennDot receives a benefit from the continued maintenance of the crossing because of the presence of the fully signalized crosswalks at Guys Run Road and the lack of the same at Wenzel Drive.

ARGUMENT

I. PURSUANT TO 66 Pa.C.S.A. § 315(b), NORFOLK HAS THE BURDEN OF PROOF TO SHOW THAT THE ORDER HAS BEEN COMPLIED WITH.

The Bureau of Transportation and Safety of the Pennsylvania Public Utility Commission ("Bureau") mistakenly places the burden of proof on the Township to establish that it is entitled to the relief requested in its complaint (Bureau p. 7). Moreover, it specifically allocates the burden of proof to the Township to establish by a preponderance of the evidence that the Guys Run Road Crossing is or was intended to be a way open to the use of the public as a matter of right for vehicular traffic pursuant to Sections 2702 and 2704 of the Public Utility Code (the "Code"), 66 Pa.C.S.A. § 101 *et. seq.* 66 Pa.C.S.A. §§ 2702, 2704 (Bureau p.11).

Generally, the party that brings a complaint against a jurisdictional public utility pursuant to Section 701 of the Code, usually incurs the burden of proof as provided in Section 332(a) of the Code. 66 Pa.C.S.A. §§ 332(a), 701. However, the Code provides that the utility has the burden of proof in proceedings where it is alleged that the utility has violated any lawful Commission determination or order. 66 Pa.C.S.A. § 315(b). *Mid-Atlantic Power Supply Ass'n v. PECO Energy Co.*, 194 P.U.R. 4th 495 (NO. P-00981615, C-00982011, C-00981846, ID 119000) (May 19, 1999).

The applicable statutory burdens are stated as follows:

(a) Burden of proof.--Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.

66 Pa.C.S.A. § 332.

(b) Compliance with commission determinations and orders.--In any case involving any alleged violation by a public utility, contract carrier by motor vehicle, or broker of any lawful determination or order of the commission, the burden of proof shall be upon the public utility, contract carrier by motor vehicle,

or broker complained against, to show that the determination or order of the commission has been complied with.

(c) Adequacy of services and facilities.--In any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.

66 Pa.C.S.A. § 315 (emphasis added).

Both statutory provisions concern Commission orders and the assignment of the burden of proof, however, one assigns the burden of proof to the complaining party and the other upon the public utility. Even though these similarities may confound the determination, it is crucial to take notice that the language emphasized in Section 315(b) above does not appear in Section 332(a). Under the provisions of the Statutory Construction Act of 1972, 1 Pa.C.S.A. § 1501 *et seq.*, "whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both". 1 Pa.C.S.A. § 1933. The order in Section 315(b) denotes orders previously issued, whereas Section 332(a) concerns the future issuance of a Commission order where no underlying order previously exists. While it is axiomatic that that a complaining party seeking the enforcement of an existing Commission order is also a proponent of a new order, that does not mean that Section 332(a) will automatically be applied, to hold otherwise would render Section 315(b) superfluous.

In this proceeding, the Township has alleged a violation by Norfolk of a Commission order. The burden of proof is on Norfolk to show that it has complied with the Order, not the Township. See *U. S. Steel Corp. v. Pennsylvania Public Utility Commission*, 450 A.2d 1073 (Pa.Cmwlt. 1982); *Liberty Cab Company v. Chernavsky*, 91 Pa.P.U.C. 715 (NO. H-00000780M9801, H-00000780M9802, H-00000780M9803, ID 118877) (Dec 07, 1998); *Mid-*

Atlantic Power Supply Ass'n v. PECO Energy Co., 194 P.U.R. 4th 495 (NO. P-00981615, C-00982011, C-00981846, ID 119000) (May 19, 1999) (public utility to bear the burden of proof in cases involving an alleged violation of a Commission Order); *Pennsylvania Public Utility Com'n v. Orji*, 96 Pa.P.U.C. 345 (NO. H-00000102M1005, P-566, ID 129752) (Oct 05, 2001) (the burden of proof is upon the public utility to show that violation of a Commission Order did not occur); *Pennsylvania Public Utility Com'n v. Anyanwu*, 94 Pa.P.U.C. 27 (NO. H-00004276M0181, ID 120865) (Jan 21, 2000).

The burden of proof is not synonymous with the burden of going forward with the evidence. *Pa. Public Utility Commission v. Breezewood Telephone Co.* Docket No. R-901666, Slip op. at 7 (Opinion and Order adopted January 31, 1991, entered January 31, 1991). The Township had the initial evidentiary burden to establish Norfolk's violation of the Order, while Norfolk bears the burden of proof demonstrating that it complied with the Order. *See In re AT&T Communications of Pennsylvania, Inc.*, 80 Pa.P.U.C. 349 (NO. P-880306) (Aug 19, 1993).

To meet its preliminary burden, the Township was required to demonstrate that Norfolk was privy to a lawful determination or order of the Commission and that Norfolk was in violation of the same. 66 Pa.C.S.A. § 315(b). As the record indicates, the Township has more than satisfied this preliminary requirement thereby placing the burden of proof upon Norfolk. The Order is a lawful determination or order of the Commission (Bureau Br. 16, 17; Tr. 135, 136), Norfolk is the responsible party under the Order (Twp. Ex. 14 p. 2; Tr. 108, 123, 124), and Norfolk and its predecessor in interest has violated the Order in excess of 30 years (Twp. Ex. 8; Tr. 107, 115, 116, 121). *See* 66 Pa.C.S.A. § 103 ("[a]ll certificates, . . .[and] . . . orders issued, . .

under any repealed statute . . . in full force and effect upon the effective date of this part, shall remain in full force and effect . . . until revoked, vacated, or modified").

As to the burden of proof, in addition to presenting no substantial and legally credible evidence demonstrating that it complied with the Order, Norfolk expressly admitted to violating the Order (Twp. Ex. 8; Tr. 107, 115, 116, 121). *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Com'n*, 578 A.2d 600 (Pa.Cmwlth. 1990).

II. PURSUANT TO 66 Pa.C.S.A. § 332(a), THE TOWNSHIP HAS THE BURDEN OF PROOF TO SHOW A VIOLATION OF 66 Pa.C.S.A. § 1501, BUT NORFOLK HAS THE BURDEN OF GOING FORWARD.

In contrast, the Bureau's assertion is correct to the extent the Township's complaint concerns the adequacy of Norfolk's service and facilities at the Guys Run Road Crossing. *Aronson v. Pennsylvania Public Utility Commission*, 740 A.2d 1208 (Pa.Cmwlth. 1999). In this instance, the Township is a proponent of a Commission order requiring Norfolk to make necessary improvements pursuant to Section 1501 of the Code, irrespective of the existence of the Order. 66 Pa.C.S.A. § 1501. Under Section 315(c), the public utility has the burden in proceedings involving its service or facilities. 66 Pa.C.S.A. § 315(c). However, since Section 315(c) of the Code applies only to proceedings "upon the motion of the commission" and this is not a Commission action, Section 315(c) has no application, Section 332(a) does. *Teltron, Inc. v. Pennsylvania Public Utility Commission*, 477 A.2d 599 (Pa.Cmwlth. 1984).

While the Township cannot use its argument that Norfolk has violated the Order to bootstrap the initial burden of proof as to the adequacy of its service and facilities at the Guys Run Road Crossing, the burden of going forward with the evidence is nonetheless shifted to Norfolk. *See Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217 (Pa.Cmwlth.

2001) (once it is determined that a complainant has made out a *prima facie* case, the burden of going forward shifts to the utility).

The Commission has held that for a complainant, to establish a sufficient case against a utility and satisfy the burden of proof under Section 332(a), it must show the utility is responsible or accountable for the problem described in the complaint. *Wayne Rhodes v. Southwest Pennsylvania Railroad Company*, Case 00981691 (Pa.P.U.C. January 19, 2000) (citing to *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa P.U.C. 300 (1976)).

In this case, the Township has plead and produced evidence that Norfolk is responsible and accountable for the current condition of the Guys Run Road Crossing (Twp. Br. 38-45). Having established a *prima facie* case, the burden of going forward with the evidence shifted to Norfolk to produce rebuttal evidence. *John Nicklas, Jr. v. Pennsylvania-American Water Company*, C-00923845 (Pa.P.U.C. September 17, 1992).

As with failing to produce evidence to demonstrate compliance with the Order, Norfolk likewise failed to produce any rebuttal evidence concerning the applicability of Section 1501 to the Guys Run Road Crossing or that it furnished and maintained adequate, efficient, safe, and reasonable service and facilities for the accommodation, convenience, and safety of the public. 66 Pa.C.S.A. § 1501.

The term "burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Marquies*, 70 A.2d 854 (Pa. 1954). Due to Norfolk's failure to go forward with any rebuttal evidence concerning the applicability of Section 1501, the Township has met and satisfied its burden of proof.

III. THE QUESTION OF THE COMMISSION'S SUBJECT MATTER JURISDICTION IS AN AFFIRMATIVE DEFENSE WITH WHICH NORFOLK HAS THE BURDEN OF PROOF.

The Bureau asserts that the Commission should dismiss the Township's complaint to the extent that it requests the Commission to exercise jurisdiction pursuant to Section 2702 of the Code because it failed to establish by a preponderance of the evidence that the Guys Run Road Crossing is or was ever intended to be a way open to the use of the public as a matter of right for vehicular traffic (Bureau Br. 11). However, under the long established principles of Pennsylvania jurisprudence, this purported allocation of the burden of proof is mistakenly placed upon the Township.

It is Norfolk, not the Township, that contends the Commission does not have jurisdiction over this case. Subject matter jurisdiction is an affirmative defense. *Mansfield Hospitality Ltd. Partnership v. Board of Assessment Appeals of Tioga County* 680 A.2d 916 (Pa.Cmwlth. 1996). As the party asserting an affirmative defense, Norfolk has the burden of proof. *Baldwin v. Devereux Schools*, 154 A. 21 (Pa. 1931); *Re CSX Transp., Inc.*, 77 Pa.P.U.C. 194 (NO. A-00109572) (Sep 17, 1992); *Pennsylvania Public Utility Com'n v. Pittsburgh Limousine, Inc.*, 88 Pa.P.U.C. 337 (NO. A-00107834C9701, A-00107834C9702) (Apr 09, 1998).

A litigant's burden of proof before the Commission is satisfied by establishing a preponderance of evidence which is substantial and legally credible, and not with mere "suspicion" or by only a "scintilla" of evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa.Cmwlth. 1990) quoting *Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc.*, 29 A.2d 90, 92 (Pa. 1942). The term "substantial evidence" requires more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pennsylvania Public Utility Commission*, 413

A.2d 1037 (Pa. 1980); *Murphy v. Pa. Dept. of Pub. Welfare*, 480 A.2d 382 (Pa.Cmwlth. 1984). Moreover, and most importantly with regard to the case *sub judice*, speculative evidence alone is insufficient to support a finding that that a litigant has satisfied his burden of proof. *See Barone v. Pennsylvania Public Utility Commission*, 485 A.2d 519 (Pa.Cmwlth. 1984).

A. NORFOLK DID NOT SATISFY ITS BURDEN OF DEMONSTRATING THAT THE GUYS RUN ROAD CROSSING WAS ABOLISHED BY THE PUBLIC SERVICE COMMISSION.

In this proceeding, Norfolk bases its assertion that the Commission is without subject matter jurisdiction on the erroneous supposition that the Guys Run Road Crossing was abolished by the Public Service Commission and a misplaced reliance on *County of Bucks v. Pennsylvania Public Utility Commission* ("Bucks"), 684 A.2d 678 (Pa.Cmwlth. 1996) (Addendum to Norfolk's Preliminary Motion to Dismiss, paragraph 3).

Norfolk's allegation that the Guys Run Road Crossing was formally abolished is solely predicated on the 1930 Public Service Commission Docket (Twp. Ex. 2, 3, 4; Tr. 128). However, as the party with the burden of proof, Norfolk produced no documentary or testamentary evidence at the hearing to support its position. Furthermore, Norfolk has failed to cite any legal authority whatsoever for the proposition that the alteration of a public crossing is tantamount to the abandonment or abolishment of the same. *See City of Erie v. Public Service Commission*, 74 Pa.Super. 265, 269 (Pa.Super. 1920) ("three words are used in the act, 'relocate,' or 'alter,' or 'abolish'. . . we must presume that each of these words has some distinctive meaning").

In response to this assertion, the Township produced ample evidence at the hearing and explained in great detail in its Main Brief that the Guys Run Road Crossing was never abolished by the Public Service Commission (Twp. Ex. 2, 3, 4, 14 page 2, 15; Twp. Br. 6-19). Assuming *arguendo* that it was the Township's obligation to demonstrate that the subject crossing was

never abolished, it has more than satisfied this burden. See *City of Erie v. Public Service Commission*, 74 Pa.Super. 265 (Pa.Super. 1920); *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa.Super. 1951); *A. D. Graham & Co. v. Pennsylvania Turnpike Commission*, 33 A.2d 22 (Pa. 1943); *CSX Transp., Inc. v. Pennsylvania Public Utility Commission*, 558 A.2d 902 (Pa.Cmwlth. 1989).

B. THE INCLINE AND PRESENCE OF STAIRS AT THE GUYS RUN ROAD CROSSING IS NOT SUBSTANTIAL AND LEGALLY CREDIBLE EVIDENCE.

All of the parties of record in this proceeding rely on the incline and presence of stairs at the Guys Run Road Crossing as evidence that the Public Service Commission intended to limit the use of the crossing to only pedestrians (Norfolk Br. 3, 5-8; Bureau Br. 5, 9, 10; PennDot Br. 7, 8). However, this is specious reasoning and completely speculative in nature.

The Order expressly states:

THIRD: That the crossing immediately west of Harmarville Passenger Station altered and changed from vehicular to pedestrian crossing shall be planked or paved for a width of four feet.

The 1930 Docket does not mention the construction of stairs or anything about an increased grading in altering the crossing. The third paragraph of the Order is probative evidence that at the time the Public Service Commission ordered the crossing altered it was at a grade that was accessible for vehicular use, and was to remain that way upon completion.

Moreover, the only evidence concerning any type of grading in the Order is that the right of way be lowered, not raised. The Order states that the street railway tracks of the Allegheny Valley Street Railway Company were lowered about 11 inches at that time to match the grade of the state highway at the new crossing (the Wenzel Drive Crossing) (Twp. Ex. 4). At that time the

crossing was still for "vehicular and pedestrian" use. As such, it was at a grade which vehicles could cross, and only 1,300 feet away the grade was being lowered (Twp. Ex. 1).

In rebutting the increased grade and stairs as evidence to the intended use of the crossing, the Township presented evidence that the present incline, which necessitated the steps at the crossing, did not exist in 1930 (Twp. Br. 21, 22). It is patently obvious that if the incline did not exist in 1930, it could not have been contemplated by the Public Service Commission in making its determination to alter the crossing. Assuming *arguendo* that the Public Service Commission did intend the subject crossing be limited to only pedestrians, the incline and stairs would still not be germane proof to such a finding. Moreover, it was Norfolk and its predecessors in interest that created "the steep six-foot rise leading up to the subject crossing" over the past 74 years (Twp. Br. 21, 22; Norfolk Br. 3, 8; Tr. 100, 130).

The presence of the incline and the stairs at the subject crossing are completely irrelevant in determining the intended use of the Guys Run Road Crossing and inapplicable to satisfying Norfolk's burden of proof.

C. THE APPLICATION OF THE RES JUDICATA DOCTRINE AND SECTIONS 103 AND 316 OF THE CODE ARE DETERMINATIVE IN WEIGHING CONFLICTING INFERENCES.

In support of Norfolk's contention, the Bureau cites to the phraseology of the Order as indication of the Public Service Commission's intent that the subject crossing be limited to pedestrians (Bureau Br. 5, 10). The inferences that the Bureau makes concerning the express language of the Order are addressed in the Township's Main Brief (Twp. Br. 21, 22). See *Application of Danville Area School District*, Docket No. A-00118478 (Order entered March 19, 2002) ("Application of Danville Area School District & Borough of Danville for approval of the

construction of a pedestrian crossing at grade on the tracks of SEDA-COG Joint Rail Authority, located in the Borough of Danville, Montour County”).

The Bureau’s assertion that the wording of the Order altering the crossing from a vehicular crossing to a pedestrian crossing as inferential evidence of the Public Service Commission’s intent, is nonetheless speculative in nature and uncorroborated by other reliable evidence. To the extent that this may shift the burden of going forward with the evidence to the Township, the Township has more than met this burden by presenting evidence of greater weight than that of the Bureau’s asserted herein (Twp. Br. 15, 20, 21, 28, 30, 31). *See Wayne Rhodes v. Southwest Pennsylvania Railroad Company*, Case 00981691 (Pa.P.U.C. January 19, 2000).

All of the parties of record can postulate as to what the true intent of the Public Service Commission was in 1930 to the same speculative degree. The Public Service Commission could have altered the crossing to disallow cars, but allow only pedestrians and bicycles. The Public Service Company Law (the “Act”) of July 26, 1913, P. L. 1374, as amended, did not define the term “vehicle”. In the same conclusory fashion, it can be inferred that the Public Service Commission did not consider a bicycle a vehicle. The same approaches at the crossing still exist today as they did in 1930. As such, it can be inferred that the Public Service Commission considered the safety of children using their bicycles to access the river (Twp. Ex. 1). Conceivably, it was self evident to the Public Service Commission that the use of bicycles would necessarily be included in the alteration that it did not deem it worthy of mentioning in the Order.

This is the same kind of reasoning that underlies Norfolk’s contention that any prior assertion of jurisdiction over the Guys Run Road Crossing by the Public Service Commission is without effect. As with the term “vehicle,” the term “highway” was an undefined term in the Act. Both of these terms are now defined terms under the Code and provide more guidance to

the Commission in determining jurisdiction over highway-rail crossings than it did for its predecessor in interest under the Act. 66 Pa.C.S.A. § 102; *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission* (“Conrail”), 463 A.2d 90 (Pa.Cmwlth. 1983).

Even though highway was an undefined term, for the Public Service Commission to maintain jurisdiction over a rail crossing, the tracks or other facilities of the railroad still had to cross a “public highway”. Article V, Section 12. As explained in detail in the Township’s Main Brief, it can be inferred that the Public Service Commission intended to maintain jurisdiction over the Guys Run Road Crossing after its alteration as contemplated by Section 2702 of the Code, from its intentional linguistic modifications between the application of the Pennsylvania Railroad and the Order, and its future tense references of the disputed portion of Guys Run Road as a highway (Twp. Br. 12 -15). Regardless, this is not the Township’s burden to prove.

As previously explained in the Township’s and Bureau’s Main Briefs, the case at Docket No. C-2003030526 is not an opportunity to relitigate or redetermine the issues already decided by the Public Service Commission at Docket No. 21878-1930 (Twp Br. 54; Bureau Br. 15, 16). In the absence of an appeal, Pennsylvania Railroad conceded the validity of the findings in the Order. *York Tel. & Tel. Co. v. Pennsylvania Public Utility Commission*, 121 A.2d 605 (Pa.Super 1956); *see also Com. ex rel. Cook v. Cook*, 449 A.2d 577, 582 (Pa.Super. 1982) (“the issue of subject matter jurisdiction is res judicata even though it was not litigated in the first instance or, indeed, even though the matter was wholly uncontested”); *Hall v. Pennsylvania Board of Probation and Parole*, 733 A.2d 19 (Pa. Cmwlth. 1999) (the principles of res judicata apply to administrative determinations).

Moreover, Section 316 of the Code provides: “Whenever the commission shall make any rule, regulation, finding, determination or *order*, the same shall be *prima facie* evidence of the

facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review." 66 Pa.C.S.A. § 316 (emphasis added); see *Buffalo & Lake Erie Traction Co. v. Public Service Commission*, 67 Pa.Super. 581 (Pa.Super. 1917) (an order of the Public Service Commission concerning a crossing is *prima facie* reasonable, and when appealed from, the burden of proving it unreasonable rests upon the appellant).

Despite the speculative assertions concerning the intended use of Guys Run Road Crossing, the application of the *res judicata* doctrine and Sections 103 and 316 of the Code conclusively affirm the evidence presented by the Township. 66 Pa.C.S.A. §§ 103, 316; see *J. Berman & Sons, Inc. v. Pennsylvania Dept. of Transp.*, 345 A.2d 303 (Pa.Cmwlth. 1975).

D. EVEN IF THE TOWNSHIP HAD THE BURDEN OF PROOF IT ESTABLISHED ITS CASE BY A PREPONDERANCE OF THE EVIDENCE.

Assuming *arguendo* that it was the Township's burden to prove Norfolk's affirmative defense, the Township nonetheless presented a *prima facie* case sufficient to overcome Norfolk's motion to dismiss, and for the Commission to enforce the terms of the Order.

In satisfying the burden of proof by a preponderance of the evidence, "to prevail on a complaint, a complainant normally must demonstrate, according to statutory and decisional law criteria or recognized equitable principles, that the respondent utility has violated a 'statute which the Commission has jurisdiction to administer' or violated a 'regulation or order of the Commission.'" 66 Pa.C.S. § 701; *Sobota v. Equitable Gas Co.*, 93 Pa.P.U.C. 359 (NO. C-00981661, ID 119018) (Oct 18, 1999).

In satisfying this burden, the Township has shown that it would have been impossible for the Public Service Commission to have contemplated the incline and stairs in 1930 and that the crossing was never abolished. All of the parties of record point to these two factors as the only

reasons why the Commission does not have subject matter jurisdiction under Section 2702 of the Code, 66 Pa.C.S.A. § 2702.

In applying this discredited evidence to decisional law, the parties of record put forth the proposition that the case *sub judice* must either conform with the holding in *Conrail* or *Bucks*, with each of them finding that *Bucks* was determinative of the facts presented (Bureau Br. 9; PennDot Br. 7; Norfolk Br. 5-8). The evidence presented by the Township clearly shows that of the two, the Guys Run Road Crossing is more like the crossing in *Conrail* (Twp. Br. 20, 21, 51-54).

In *Bucks*, the Pennsylvania Public Service Commission ordered that an above-ground pedestrian bridge be constructed as a condition to the abolishment of an at-grade crossing. *Bucks* at A.2d 681-82 (emphasis added). None of these factors apply to the Township's case. In holding that the Commission did not have jurisdiction under Section 2702, the Court stated "[a]lthough bicycle travel is considered vehicular traffic, a bridge constructed solely for pedestrian use is not a highway as defined by the Code because no "vehicular traffic" was intended or permitted." *Id* (emphasis added).

As previously explained, the Guys Run Road Crossing was not constructed solely for pedestrian use, it was constructed primarily for vehicular use, it was altered for pedestrian use (Twp. Ex. 2, 3, 4, 12; Twp. Br. 51-54). Moreover, the court held that the Commission lost jurisdiction once it ordered it abolished. *Id*. It is obvious that *Bucks* is not applicable in this proceeding since the Court did not address the issue of Commission jurisdiction under Section 2702 once it ordered a crossing altered. As the Court in *Bucks* stated: "[o]ur decision has no effect on the PUC's regulation of pedestrian portions of highway crossings because where the PUC has jurisdiction, it is exclusive" (emphasis added) (Twp. Br. 51-54).

Outside of *Conrail and Bucks*, none of the parties of record presented any evidence or decisional law that would preclude the Commission from assuming jurisdiction under Section 2702. The Township on the other hand, presented testimony, evidence (Twp. Ex. 12, 16), and decisional law that demonstrated that the disputed portion of Guys Run Road is both a *de jure* and *de facto* "highway" under Section 2702. See *Reading Co. v. Pennsylvania Public Utility Commission*, 333 A.2d 525 (Pa.Cmwth. 1975) (Twp. Br. 18, 19); *Pennsylvania Public Utility Commission v. Borough of Souderton*, 231 A.2d 875 (Pa.Super. 1967) (Twp. Br. 27-35); *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 505 A.2d 1046 (Pa.Cmwth. 1986) (Twp. Br. 35-38).

IV. NORFOLK'S SAFETY CONCERNS CAN BE ADEQUATELY REMEDIED BY THE TOWNSHIP AND THE COMMISSION.

Norfolk maintains that if the Commission is found to have jurisdiction that it should not enforce the Order because of the significant safety hazards the crossing presents to the public due to the "limited sight distance caused by heavy vegetative growth," the 16 trains a day that pass by, the presence of a tavern and lack of warning devices (Norfolk Br. 8-10).

With regard to Norfolk's concern about the vegetative growth, the Township has expressed a willingness to cut back and maintain the same (Tr. 71, 83). Moreover, the Code provides in relevant part, that "the Commission shall require every railroad the right-of-way of which crosses a public highway at grade to cut or otherwise control the growth of brush and weeds upon property owned by the railroad within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists" 66 Pa. C.S.A. § 2702(b). Sections 1501 and 2702 would also provide the Commission with the authority to require Norfolk to install warning devices at the Guys Run Road Crossing for the accommodation, convenience, and safety of the public. 66 Pa.C.S.A. §§ 1501, 2702.

As to Norfolk's other concerns, the Township has presented evidence that in the past 50 years there has never been any problems concerning the patrons of the tavern (Tr. 88). Of the 16 trains, not all of them pass by during business hours, many of them pass by during the night when the Guys Run Road Crossing is not heavily used (Tr. 66).

As the Township addressed in its Main Brief at length, Norfolk's safety concerns should be given little credence since the crossing is one of necessity. If the Order was not enforced, pedestrians would be required to utilize the Wenzel Drive Crossing. As such, Norfolk's purported concerns would not only persist, but be exacerbated (Twp. Br. 45-51).

V. PENNDOT MAY BE ALLOCATED RESPONSIBILITY FOR THE MAINTENANCE OF THE GUYS RUN ROAD CROSSING.

PennDot maintains that it has no interest in, and receives no benefit from, the Guys Run Road Crossing and that it should not be allocated any of the costs of maintenance because the crossing is of no benefit to the general state transportation network. (PennDot Br. 9-11). While the Township is not actively pursuing PennDot as the primary party responsible for the maintenance of the crossing, it may nevertheless be required to contribute to the maintenance of the crossing.

PennDot's predecessor in interest was a party to the Order. While its responsibilities were not enunciated in the same, the Public Service Commission determined that they were a necessary party. Additionally, PennDot would receive a benefit from the maintenance of the Guys Run Road Crossing because of the presence of the crosswalk on Freeport Road (Twp. Br. 45-51).

If the Order was not enforced, pedestrians would be required to use the Wenzel Drive Crossing where no traffic control devices or crosswalks exist (Twp. Br. 48). As such, not only would pedestrian traffic be in grave danger on a State Highway, so would vehicular traffic since

it would have to contend with pedestrians crossing Freeport Road at any given time. PennDot has a continuing responsibility for the safe passageway of the traveling public over the Commonwealth highways arising from its administrative and advisory functions *Com., Dept. of Transp. v. Pennsylvania Public Utility Com'n*, 469 A.2d 1149 (Pa.Cmwlt. 1983). As such, the determination of PennDot's responsibilities over the crossing should be made by the Commission.

CONCLUSION

Pursuant to Section 315(b) of the Code, Norfolk has the burden of proof to demonstrate that the Order has been complied with. Pursuant to Section 332(a) of the Code, the Township had the burden of proof to the extent the Township's complaint alleged a violation of Section 66 Pa.C.S.A. § 1501. The Township met its initial burden thereby shifting the burden of going forward with the evidence to Norfolk. Subject matter jurisdiction is an affirmative defense. As the party asserting an affirmative defense, Norfolk has the burden of proof.

Respectively Submitted,

SPRINGER, BUSH & PERRY

By: 

Blaine A. Lucas, Esquire

I.D. # 35344

Shawn N. Gallagher, Esquire

I.D. # 88524

Two Gateway Center, 15th Floor

Pittsburgh, PA 15222

(412) 281-4900

Counsel for the Township

Dated: April 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, pursuant to 52 Pa. Code §1.54.

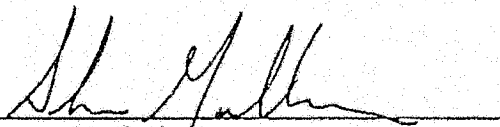
Service by first class mail addressed as follows:

Honorable John H. Corbett, Jr.,
Administrative Law Judge
Pa. Public Utility Commission
1103 Pittsburgh State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222-1210

Benjamin C. Dunlap, Jr., Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North 3rd Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840

David A. Salapa, Esquire
Assistant Counsel
Law Bureau
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2841

Jason D. Sharp, Esquire
Pennsylvania Department of Transportation
Commonwealth Keystone Building
9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212


Shawn N. Gallagher

Springer, Bush & Perry PC
2 Gateway Center, 15th Floor
Pittsburgh, PA 15222-1402
(412) 281-4900

Dated: April 12, 2004

RECEIVED
2004 APR 16 10:04 AM
SECRETARIAT BUREAU