

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120

Public Meeting held January 8, 1982

Commissioners Present:

Susan M. Shanaman, Chairman  
Michael Johnson  
James H. Cawley  
Linda C. Taliaferro  
Clifford L. Jones

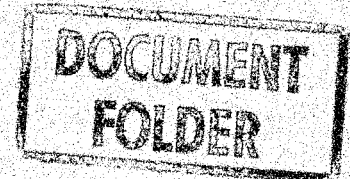
Ralph D. Pratt, State Representative

C-80041953

v.

The Baltimore and Ohio Railroad Company,  
Department of Transportation of the  
Commonwealth of Pennsylvania, Borough  
of Ellwood City, Lawrence County,  
Pennsylvania Power Company, Western  
Pennsylvania Water Company, Columbia  
Gas of Pennsylvania, Inc., The Bell  
Telephone Company of Pennsylvania,  
and The Pittsburgh and Lake Erie  
Railroad Company.

OPINION AND ORDER

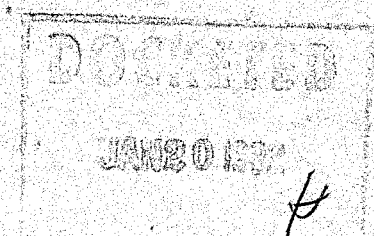
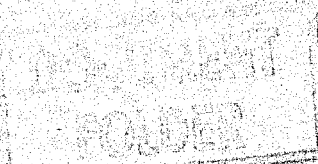


BY THE COMMISSION:

Before us for disposition is a petition filed by The Baltimore and Ohio Railroad Company requesting modification of our Opinion and Order adopted April 3, 1981, and entered May 14, 1981, in the above-captioned proceeding. In the alternative, the petition requests re-hearing.

On April 1, 1980, the Honorable Ralph D. Pratt filed a complaint regarding the safety and adequacy of three rail/highway crossings within the Borough of Ellwood City. The rail/highway crossings are: the Second Street overpass; the Fifth Street underpass; and, the Sixth Street crossing at grade.

A hearing was held on August 14, 1980; Administrative Law Judge Clements presided because Administrative Law Judge Michael A. Nemeč's prior scheduling precluded his attendance. On February 13, 1981, Administrative Law Judge Michael A. Nemeč's (ALJ) Initial Decision was issued for exceptions. The Initial Decision directed that various improvements be made at the crossing and assigned cost responsibility to the parties. Exceptions to the Initial Decision were filed by the Commission's Trial Staff, The Baltimore and Ohio Railroad Company, The Pittsburgh and Lake Erie Railroad Company and Complainant, State Representative Ralph D. Pratt.



Subsequent to review of the Initial Decision and the exceptions filed thereto, we adopted an Opinion and Order on April 3, 1981, wherein we reversed the ALJ's ordering paragraph 10, which dismissed the complaint at the Sixth Street at grade crossing.<sup>1/</sup> We ordered improvement work at the Sixth Street crossing by The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company. In all other respects, we concluded that the ALJ's opinion and discussion correctly resolved the matters in dispute.

On September 17, 1981, the Borough of Ellwood City filed a Petition for Clarification of Opinion and Order. In its petition the Borough argued that our Opinion and Order entered May 14, 1981, improperly placed responsibility on it for the curbs, sidewalks, and railings on the Second Street overpass and its approaches. The Borough contended its responsibility should be limited to the approaches only.

By an Opinion and Order adopted November 6, 1981, and entered November 23, 1981, we modified our Opinion and Order entered May 14, 1981, and assigned responsibility for curbs, sidewalks, and sidewalk railings on the Second Street overpass to The Baltimore and Ohio Railroad Company. Also, we limited the Borough's responsibility for the curbs, sidewalks, and sidewalk railings to the approaches to the Second Street overpass only. Our reasoning in support of the modification of our Opinion and Order entered May 14, 1981, is set forth in our Opinion and Order entered November 23, 1981.

The matter presently before us for disposition concerns the painting of the Fifth Street underpass.

We adopted the ALJ's recommendation and directed The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company to paint the Fifth Street underpass. Ordering paragraph nine in our Opinion and Order entered May 14, 1981, states:

9. That pursuant to Paragraph 6(a), above, the Baltimore and Ohio Railroad Company and the Pittsburgh and Lake Erie Railroad Company shall, at their sole expense, clean and paint the Fifth Street underpass in the Borough of Ellwood City within 120 days after this Opinion and Order becomes final.

The Baltimore and Ohio Railroad Company has filed a petition for modification of our Opinion and Order entered May 14, 1981, or, in the alternative, rehearing. The Baltimore and Ohio Railroad Company requests that ordering paragraph 9 in that Opinion and Order be eliminated.

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<sup>1/</sup> The Opinion and Order was entered May 14, 1981.

The relief requested in the original complaint is that any hazards created by the deteriorated condition of the Fifth Street underpass should be eliminated by repairs and improvements. In its petition, The Baltimore and Ohio Railroad Company asserts that there is no evidence of an existing or imminent safety hazard to vehicular or pedestrian traffic, and that engineers for the involved railroads provided evidence that the bridge is structurally sound. In its exceptions to the ALJ's Initial Decision, The Baltimore and Ohio Railroad Company argues that it should be permitted to paint the underpass during the normal course of its painting program. Also, The Baltimore and Ohio Railroad Company asserts that the painting of a bridge is not the proper subject of a Commission order, absent evidence that painting is necessitated by considerations of public safety.

While we do not possess the authority to order that a structure be painted based upon aesthetic considerations only, our prior decision to direct The Baltimore and Ohio Railroad Company to paint the Fifth Street underpass was based upon other considerations.

First, in addition to being an aesthetic consideration, painting is a maintenance matter. Clearly, maintenance of a rail/highway crossing is a proper subject of a Commission Order. In its exceptions to the Initial Decision, The Baltimore and Ohio Railroad Company impliedly acknowledges that painting the Fifth Street underpass is part of its maintenance responsibility, because it requested that it be permitted to paint the bridge during its normal painting program.

Second, evidence of record establishes that the Fifth Street bridge is an eyesore requiring painting. Other evidence indicates that the present rusted condition of the bridge does not affect its structural integrity. However, it should be clear that an indefinite postponement of painting will result in structural failure in the future, requiring costly repair work. In order to avoid such a situation, our Opinion and Order entered May 14, 1981, directs that the bridge be painted within 120 days.

Based upon the foregoing discussion, our decision requiring The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company to paint the Fifth Street underpass was appropriate. We shall deny The Baltimore and Ohio Railroad Company's petition for modification of our Opinion and Order.

Additionally, we shall deny The Baltimore and Ohio Railroad Company's alternate request for rehearing. In its petition The Baltimore and Ohio Railroad Company does not allege that any newly discovered evidence exists which might persuade us to change our prior decision. Furthermore, to the extent The Baltimore and Ohio Railroad Company's petition requests rehearing, it was not timely filed. Section 703 of the Public Utility Code, 66 Pa. C.S. §703, requires that an application for rehearing be filed within 15 days after the service of an order. Our Opinion and Order was entered May 14, 1981; we received The Baltimore and Ohio Railroad Company's petition 18 days later on June 1, 1981.

The Borough of Ellwood City's solicitor informs us by a letter dated October 21, 1981, that the Fifth Street underpass has not been painted in conformance with our Opinion and Order entered May 14, 1981. The 120 day period within which Respondent was to paint the Fifth Street underpass expired on September 11, 1981.

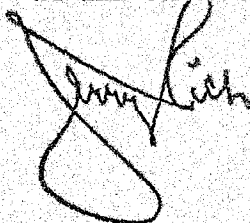
Assuming the Borough of Ellwood City is correct and the Fifth Street underpass has not been painted in accordance with our prior Opinion and Order, we shall direct The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company to paint the structure; THEREFORE,

IT IS ORDERED:

1. That the petition of The Baltimore and Ohio Railroad Company for modification of our Opinion and Order or rehearing is denied.

2. That pursuant to Paragraph 6(a) in our Opinion and Order adopted on April 3, 1981, and entered on May 14, 1981, The Baltimore and Ohio Railroad Company and The Pittsburgh and Lake Erie Railroad Company shall, at their sole expense, clean and paint the Fifth Street underpass in the Borough of Ellwood City by June 1, 1982; absent good cause shown, any failure to adhere to the June 1, 1982 completion date, shall result in the commencement of an appropriate enforcement proceeding.

BY THE COMMISSION,



Jerry Rich  
Secretary

(SEAL)

ORDER ADOPTED: January 8, 1982

ORDER ENTERED: **JAN 19 1982**