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JUL 13 1987

July 3, 1987

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DOCUMENT
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SECRETARY'S OFFICE
Public Utility Commission

Honorable Morris Mindlin,
Administrative Law Judge
P.O. Box 3265
Harrisburg, PA 17120

RE: Moscow Borough
v. City of Scranton, et al.
PUC C-86119

Dear Judge Mindlin:

In regard to your Order dated June 16, 1987 and our telephone conversation held subsequent thereto, please be advised that I am in the process of obtaining the transcripts from the reporting agency so that I may review the same with members of Borough council. However, it may take a few weeks to secure payment for the transcript and then receive the same from the agency, therefore, I am asking that you keep the evidentiary record open and grant each party receiving the transcript an additional fifteen (15) days within which to review it and request additional hearing, if necessary. I believe that the City of Scranton has also made a similar request herein.

Additionally, in light of the fact that the transcript was not provided to us or made available, I would request that you set a new briefing schedule or schedule a briefing schedule after the fifteen (15) day period for requesting an additional hearing has passed. If the second alternative is more feasible, I will advise your office of the date on which I have received said transcript, so that an appropriate Order can be answered.

Please contact me if you have any questions or if there are additional matters which you would like to address. I shall await a reply from your office.

Thank you for the time and attention shown herein.

Very respectfully yours,

James J. Walker
JAMES J. WALKER, ESQUIRE
MOSCOW BOROUGH SOLICITOR

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JUL 9 1987

Office of

JJW/meb

cc: Carlene Gallo, Esq.
Thomas Cummings, Esq.

cc: Herbert Zahn, Esq.

ORIGINAL

City of Scranton
Pennsylvania

David B. Miller, Esq.
City Solicitor



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Office of the City Solicitor

July 20, 1987

C-861119

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SECRETARYS OFFICE
Public Utility Commission

Pennsylvania Public Utility Commission
Office of the Secretary
New Filing Section - Room B-18
P.O. Box 3265
North Office Building
Harrisburg, Pennsylvania 17120

Re: Moscow Borough Council vs. City of Scranton
Lackawanna County and Pennsylvania Department
of Transportation

Dear Sir:

Enclosed please find the original and nine copies of the Brief of the
City of Scranton to be filed in the above-captioned matter.

Thank you.

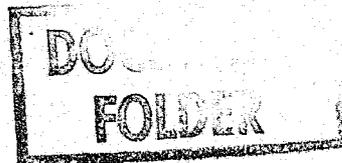
Sincerely,

Carlene Gallo

CARLENE GALLO, ESQ.
First Assistant City Solicitor

CG:mab

encls.



RECEIVED

JUL 21 1987

SECRETARYS OFFICE
Public Utility Commission

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Moscow Borough Council	:	
	:	
vs.	:	Docket No. C-861119
	:	
City of Scranton, Lackawanna	:	
County and Pennsylvania	:	
Department of Transportation	:	
	:	
: :		

BRIEF OF RESPONDENT, CITY OF SCRANTON

STATEMENT OF CASE

This case comes before the P.U.C. on a formal complaint brought by the Moscow Borough Council alleging water leakage, fallen pieces of concrete and deterioration on the base of concrete pier columns of a railroad bridge owned by the City of Scranton but located in the Borough of Moscow, Lackawanna County, over Penn Dot Highway Route 690.

A hearing was held on Moscow Borough's Complaint on May 14, 1987; and this Brief is filed pursuant to the ALJ's Order

of July 1, 1987.

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STATEMENT OF QUESTIONS INVOLVED

The following are the questions involved in the case at bar:

1. Is the Borough's Complaint now moot due to the repairs made by Steamtown or those promised to be made by Steamtown?
2. Is the Moscow Borough Bridge structurally sound or is it in need of repair despite repairs already made?
3. Is a structural study needed in order to determine the soundness of the bridge?
4. If it is necessary that a structural study be done, who shall bear the initial cost of said study?
5. What measures shall be taken to address the problem of water seeping through the bridge's structure?
6. Who shall bear the cost of repairing or altering either the bridge itself and/or the surrounding areas of the bridge in order to stop the water seepage problem?

SUMMARY OF ARGUMENT

The Borough's Complaint as filed is now moot due to the actions of Steamtown in repairing the falling concrete and deterioration of the pier columns and in their promises to address the problem of water seepage.

The Borough's request for a study in order to discover defects should be allowed only at the expense of the Borough since it is the Boroughs' burden to prove its complaints. Should the Court decide to order a study, it should order the initial cost to be paid by the Borough of Moscow, or in the alternative, the cost should be borne by the parties proportionately to the benefit they will receive by having the bridge repaired, i.e., the Borough should bear the major portion, with Lackawanna County bearing the second largest share.

ARGUMENT

Issue: The structural evaluation of the bridge by a consultant.

A. Is there a need to have a study done?

In hearings before the P.U.C., the party bringing the Complaint must bear the burden of proof and be prepared to come forward with evidence to support his claim. 66 Pa. C.S.A. Section 332.

In the case at bar, the Borough claims that the Moscow Bridge may need more repairs than those that have been completed. However, the Borough is unable to come forward with any proof as to what repairs, if any, the bridge needs.

Rather than presenting evidence before the Court, the Borough comes to the proceeding requesting that a study be made of the Bridge at the owner's expense. In other words, the Borough is insisting that one of the respondents, the City of Scranton, provide evidence against itself at its own expense. This goes against all principles of procedure and case law involving these types of hearings.

The Complaint filed by the Borough of Moscow was based upon repairs needed to rectify problems involving fallen concrete and spalling and exposed re-bar. The testimony brought forth by all parties shows that these repairs were made by Steamtown, Inc. to the satisfaction of all parties. The only alleged problem which has not been addressed is the problem of water seeping through the Bridges' structure. However, the General Manager of Steamtown has testified that Steamtown has promised and does intend to do what's necessary to rectify this problem. (Tr. p. 55)

Yet, despite the fact that the Borough's Complaints have been or will be addressed, it still insists, without any tangible evidence, that the Bridge has defects and it wants the City of Scranton to pay money it can ill afford to have a study done to either put to rest the unfounded fears of the Borough or to provide the Borough with the evidence it needs to pursue this action.

In order to bolster their claim that a study should be ordered at another party's expense, the Borough put on its Engineer to state that he had concerns, yet he had no objective evidence upon which to base his opinion. On the other side, two qualified engineers testified that in their professional opinion, a structural study is not necessary. (Tr. p. 155, 175, 186, 189 & 194)

If the Borough is successful at this attempt to force the City to pay for structural study, it will set a precedent for every municipality with an old bridge or crossing in its jurisdiction to file a complaint with the P.U.C. in order to get a free structural study done periodically in order to appease their fears, imaginary or real.

To allow the Borough to bring a Complaint to force the City to have to spend thousands of dollars to exonerate itself would open a Pandora's box of litigation for the future.

Therefore, the Court must be wary of allowing a Complainant to come before it without being prepared to carry the burden of proof. Not only does the Borough not have the evidence to prove that the Bridge is defective, they do not even carry the burden of proof that a study is needed.

B. If a study is deemed necessary, who shall bear the initial cost of said study?

Should the Court determine that a study must be done, then it must determine who shall bear the initial cost of said study.

Since the burden of proof is clearly on the Borough and the study would be the proof of any defects found in the Bridge, it stands to reason that the Borough should bear the initial cost.

However, should the Court not wish to rely on this reasoning, then the second method of apportioning cost would follow the same reasoning as apportioning the cost for repairs found to

be needed; i.e., the parties who would gain the most from said repairs would pay the largest portion of the cost of the study.

Department of Transportation vs. Pennsylvania Utility Commission
469 A2d 1149.

In the case at bar, there are four parties involved: The Moscow Borough Council, the City of Scranton, Penn Dot and Lackawanna County. Also, although not a party, Steamtown, Inc. is very much affected by this case.

The Borough of Moscow, of all the parties, has the most to gain by repairs made to the Bridge, not only because the Bridge is in the Town and Borough of Moscow and traveled underneath by residents of the municipality; but more importantly, because the ability of Steamtown to come over the Bridge into Moscow greatly benefits the Borough through tourism. Testimony indicated that tourism increases during the Steamtown runs. (Tr. p. 119,120.) If the Bridge is closed or somehow rendered inaccessible to Steamtown due to defects, Steamtown will not make its run to the Moscow Station and the municipality will conceivably lose revenue.

Penn Dot owns, maintains and controls the roadway under the Bridge. It is very much in the interest of Penn Dot that the Bridge be in good condition. Yet, it is Penn Dot whose actions have caused the known defects of the Bridge. It has been established that the pitch of the surrounding Penn Dot roads could contribute to and cause the run off of water onto the Bridge (Tr. p. 156, 157, 191-193) and that the deterioration of the base of the Bridge's columns have been caused by the chemicals and salts used on the road underneath in the winter. (Tr. p. 81, 165) Thus, Penn Dot would have much to gain by any repairs needed to be made and since Penn Dot has been a major contributor to the decay of the Bridge, Penn Dot should be apportioned all or a part of the cost.

Lackawanna County, on the other hand, is benefited by a structurally sound Bridge because its citizens travel underneath by vehicle or on foot, and they travel over the Bridge on Steamtown.

Finally, the City of Scranton, the "owner" of the Bridge has little or nothing to gain from repairs on the Bridge. The user, Steamtown, is not connected to the City; the Bridge is not in the municipality; and in essence, the City gains nothing by owning the Bridge. Yet, the Borough wants the City to spend

thousands of dollars it doesn't have in order to assure the Borough that the Bridge is not defective.

Therefore, if the Court deems the study to be necessary and does not wish to assign the Borough the initial cost as its burden of proof, then the cost should be apportioned according to the amount of benefit received by each party, thereby assigning the major portion to Moscow Borough.

Issue: The water seepage problem.

The only defect shown by testimony to actually exist is the problem of water seeping through the Bridge to form icicles on the overhang and ice on the road. However, though the defect was established, there was dispute over the best way to solve this problem. Two solutions were proposed. The first solution was that a membrane be placed over the Bridge in order to stop the seepage of the water through the Bridge. (Tr. p. 55, 49, 199) The second was address the source of the runoff to divert before it even reached the Bridge. (Tr. p. 48, 157)

Although placing a membrane over the Bridge may stop the seepage of water through to the highway, it would seem that the problem would be better addressed at the source of the

water runoff. It is inequitable to assign all blame to the structure of the Bridge. If any study should be done, it should be done to determine the source of the runoff before an equitable and effective solution can be reached.

Issue: Does the Deed of Ownership and the agreement between Steamtown, Inc. and the City of Scranton make the City of Scranton responsible for the alleged complaints regarding the structural integrity of the Bridge?

Moscow Borough claims that the repairs it wishes to be made to the Bridge are automatically the responsibility of the City of Scranton because of a paragraph in the Deed which states that the City of Scranton does accept any and all responsibility for the restoration cost or removal of any bridges located on the property sold to the City by Conrail. (Tr. p.129).

The true interpretation of this paragraph is that the City of Scranton is to hold the Grantor, Conrail, harmless for any defects in the Bridge. In other words, this paragraph is to make clear that Conrail, after the sale of the property, would no longer have responsibility of the Bridge for defects, including those whose source is attributable to a time when

Conrail still owned the Bridge. This paragraph is not an open invitation to the public to demand that the City make whatever repairs any party wishes to see made. Therefore, this Deed is irrelevant to the case and of no value as to assignment of responsibility for bridge repairs.

The agreement between Steamtown and the City for Class II tracks was also brought into evidence by the Borough of Moscow. This agreement is strictly a contract between Steamtown and the City. First, only Steamtown has the right to enforce the promises in said contract. The Borough of Moscow has no standing or legal right to say that the Bridge is defective or that the responsibility must be assigned according to this agreement. Secondly, this agreement only assures Steamtown that the tracks will be maintained in Class II condition. No allegations have been made that these tracks running over the Bridge are not in Class II condition, nor are there any allegations that the condition of the track is relevant to any alleged defects in the Bridge. Thus, the agreement between Steamtown and the City of Scranton is totally irrelevant to this P.U.C. hearing and should not be considered.

CONCLUSION

This P.U.C. Complaint brought by the Moscow Borough Council was originally based solely on allegations of falling concrete, water seepage and exposed re-bar. The testimony throughout shows that these Complaints have been addressed or will be addressed to all the parties satisfaction, but more specifically to Moscow's satisfaction. (Tr. p. 96) Thus, the Complaint of the Borough is moot.

Further, the City of Scranton requests that the Complaint of the Moscow Borough be dismissed on the grounds that the Borough has failed to carry its burden of proof as to what defects it claims still exist on the Bridge. Not only has the Borough not proven that certain defects exist, it has not specified what defects, if any, exist except that there may be a problem with water seepage. However, testimony shows that the problem of water seepage will be addressed by Steamtown. (Tr. p. 55)

PROPOSED FINDINGS OF FACT

The City of Scranton proposes the following findings of fact:

1. That the defects complained of in Moscow Borough Council's Complaint to the P.U.C. have been adequately and satisfactorily repaired, with the exception of the water seepage problem.

2. The problem of water seeping through the structure of the Bridge is caused by the runoff of water from sources adjacent to the Bridge.

3. The most equitable and reasonable solution to the water seepage problem is to address the problem at its source, i.e., that the runoff should be diverted from the Bridge.

4. The Moscow Borough Council has not met its burden of proof in showing that additional defects, other than those listed in the Complaint, currently exist in the structure of the Bridge.

5. That the Deed from Conrail to the City of Scranton and the agreement between Steamtown and the City of Scranton are irrelevant to this proceeding.

6. The Complaint of the Moscow Borough Council is moot in that all of the complained of defects have been or will be repaired to the satisfaction of the Borough.

PROPOSED ORDERING

The following are the proposed ordering paragraphs propounded by the City of Scranton:

1. The Complaint of Moscow Borough Council is hereby dismissed with prejudice as being moot.

2. The Complaint by the Moscow Borough Council is hereby dismissed for failure of the Borough to carry its burden of proof as to alleged structural defects of the Bridge.

In the alternative, the City of Scranton also proposes the following paragraphs:

1. A study of the structural integrity of the Moscow Borough Bridge shall be ordered.

2. The cost of procuring such study shall be borne by the Moscow Borough Council.

3. A study shall be done to determine the exact source of the water runoff which accumulates on the Moscow Borough Bridge and causes water seepage onto the highway below.

4. Said study shall be done by the Engineers of the interested parties working in conjunction to determine the source of the runoff and to propose a solution to the problem.

5. After the completion of both studies an additional and supplemental hearing shall be held based upon the results of said studies and any issues that said studies have raised.

Respectfully submitted:

Carlene R. Gallo

CARLENE R. GALLO, ESQUIRE
First Assistant City Solicitor
Municipal Building
340 North Washington Avenue
Scranton, Pa. 18503
(717) 348-4105

CERTIFICATE OF SERVICE

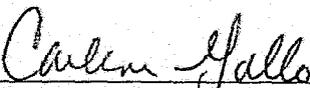
I, CARLENE GALLO, First Assistant City Solicitor for the City of Scranton do hereby certify that I have forwarded a true and correct copy of the foregoing Brief of Respondent City of Scranton to the following counsel of record:

James J. Walker, Esq.
631 Connell Building
Scranton, PA 18503

Thomas P. Cummings, Esq.
200 Adams Avenue
Scranton, PA 18503

Herbert G. Zahn, Esq.
521 Transportation and Safety Building
Harrisburg, PA 17120

Said service was made by placing the same in the United States Postal Service on Monday, July 20, 1987, First Class, Postage Prepaid.



CARLENE GALLO, ESQ.

ORIGINAL

JAMES J. WALKER

Attorney at Law

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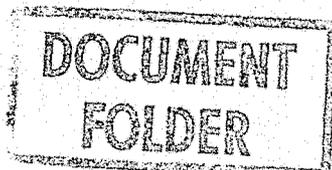
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SECRETARYS OFFICE
Public Utility Commission

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

ATTENTION: New Filing Section - Room B-18

RE: Moscow Borough Council v. City of Scranton, et al
File No.: C-861119

Dear Sir:

Enclosed for filing with the Commission, please find an original and nine copies of the Brief of Moscow Borough Council relative to the above-captioned matter.

I am, by copy of this letter, serving a copy of said Brief upon the Honorable Morris Mindlin, Administrative Law Judge, and upon Counsel for all other parties.

Please contact me if you have any questions regarding this matter.

Very respectfully yours,

A handwritten signature in cursive script that reads "James J. Walker".

JAMES J. WALKER
Solicitor, Moscow Borough

JJW:dar

Enclosures

cc: Honorable Morris Mindlin, Administrative Law Judge
Thomas Cummings, Esquire
Carlene Gallo, Esquire
Herbert Zahn, Esquire

Moscow, but owned by the City of Scranton. At the time of the filing of this Complaint, the Borough requested that the Public Utility Commission make a determination as to who is responsible for the care and maintenance of the subject bridge and to make a determination as to what action should have been taken to abate and alleviate the hazardous and dangerous condition which existed at the time of the filing of the Complaint. In particular, the Borough of Moscow complained about conditions of water seepage which caused damage to the structural integrity of the subject bridge, and complained about falling pieces of concrete and spalling of said concrete, as well as complaints of deterioration of the base of the concrete pillar columns of the railroad bridge located therein. Prior to the date of said hearing, but subsequent to the filing of the formal Complaint, the City of Scranton and Steamtown Foundation, Inc., a non-profit organization which uses the railway trackage for passenger excursions, came to an agreement for the temporary repair of said bridge. However, as the testimony indicated at the time of said hearing, permanent repairs were not accomplished prior to the date of said hearing.

A hearing was held on said Complaint on May 14, 1987 and this Brief is filed pursuant to the Order of the Honorable Judge

Morris Mindlin, A.L.J., dated July 1, 1987.

STATEMENT OF QUESTIONS INVOLVED

1. Is the subject bridge structurally sound or is it in need of repair despite the temporary repairs made by Steamtown Foundation, Inc.?

2. Is an engineering study and analysis needed in order to determine the structural integrity and soundness of the bridge, and in order to determine the effect of water seepage on the structural integrity and soundness of the bridge?

3. If it is necessary that an engineering analysis and study be completed, who shall bear the initial costs of said study?

4. If water seepage through the bridge is determined to be a threat to the structural integrity and soundness of the bridge, what measures shall be taken to address the problem of water seepage?

5. Who shall bear the cost of repairing or altering either the bridge itself and/or the surrounding areas of the bridge in order to stop the water seepage problem which effects the structural integrity of the bridge?

SUMMARY OF ARGUMENT

At the time of the filing of this Complaint by Moscow

Borough Council, an imminent and hazardous and dangerous condition existed at the site of the subject bridge since the concrete on said bridge was spalling and cracking and in a generally deteriorated state, thereby causing pieces of concrete to fall from the bridge which, therefore, endangered pedestrians and vehicular traffic using the area in and around said bridge. Facing impending equitable litigation, the City of Scranton and Steamtown Foundation, Inc., came to an agreement whereby Steamtown would make temporary repairs to said bridge in order to avoid the possibility of injunctive relief impairing Steamtown's ability to run excursions across the railway trackage and railroad bridge which is the subject of this dispute. While temporary repairs were made, permanent repairs were not completed and Steamtown has agreed to make the permanent repairs at the end of their season, to wit, the fall of 1987, if the City of Scranton fails to make the necessary repairs. While temporary actions have been taken to repair the falling concrete and deterioration of the pier columns of the bridge, water seepage problems still exist on said bridge and will cause a continuation or a reestablishment of the spalling and cracking deteriorated condition which existed prior the temporary repairs being made.

While the temporary repairs reflected herein indicate that the imminent dangers of the deteriorated bridge have been addressed, the Borough requests that an engineering study and analysis be done in order to discover whether or not structural integrity of the bridge will be effected in the future by the water seepage problems which have occurred in the past and which will continue to occur until alleviated. Should the Court decide to order an engineering analysis and study to determine the structural integrity of the bridge, the safe load of the bridge, and the origin and effect of the seepage and drainage problems in and about said bridge, the initial cost of said study must be paid by the owners of the bridge, the City of Scranton, Pennsylvania. Additionally, the cost of said engineering study and analysis should be borne by the City of Scranton since the City of Scranton has accepted the full and total responsibility for any and all repairs and/or restoration projects associated with said bridge, pursuant to the agreement which they have with Steamtown Foundation, Inc., the only railway line to use said trackage. In the alternative, Moscow Borough submits that if the cost is to be shared by the parties, the cost should be borne by the parties proportionately to the benefit they receive by having the bridge repaired. The

Borough submits that since the Steamtown Foundation, Inc., a non-profit organization designed to promote industry and tourism in the City of Scranton, is the only railway line to use said trackage and bridge, that the City of Scranton should bear the largest proportionate share of said costs.

ARGUMENT

The Complainant, Moscow Borough Council, submits that the Public Utility Commission of the Commonwealth of Pennsylvania has exclusive jurisdiction over the construction and maintenance of railroad-highway crossings and bridges in the Commonwealth of Pennsylvania and that said jurisdiction is set forth in Section 2702 (c) of the Public Utility Code, 66 Pa. C.S. Section 2702. Said section indicates that the Public Utility Commission shall have the exclusive power to hold a hearing to determine the issues of restoration and/or repairs and to order such crossing to be relocated or altered in any respect. We submit that the P.U.C. also has exclusive authority to make a determination of allocation of cost involved in providing for the safety and public use of all bridges over railroad tracks within the Commonwealth. Department of Transportation v. Public Utility Commission, 3 Pa. Commonwealth Ct. 405, 410 283 A.2d 313, 316 (1971). The Commission has broad powers to allocate an assessed

cost in railroad-highway crossing cases under Section 2704 (a) of the Public Utility Code, 66 Pa. C.S. Section 2704 (a). Additionally, the Borough submits that in hearings before the P.U.C., the party bringing the complaint must bear the burden of proof and come forward with the evidence to support his claim. 66 Pa. C.S. Section 332. We submit that in this particular case the Borough has met its burden in establishing that the subject bridge is in a defective condition and that an engineering study and analysis must be completed to determine the structural integrity of the bridge, the safe load of the subject bridge, and the effect of the water seepage and water leaking on the structural integrity of the bridge. We submit that the evidence and testimony induced at the hearing before this Commission has established that the City of Scranton, as the owner of subject bridge, has the responsibility for the maintenance and repair of said bridge and has the responsibility to alleviate any dangerous conditions which may exist and effect said bridge.

We submit that the City of Scranton has the responsibility for the repair and maintenance of the bridge pursuant to the Deed of ownership under which title to said bridge and railway trackage is held, pursuant to an agreement between Steamtown Foundation, Inc. and the City of Scranton, and pursuant to

various admissions made by the City of Scranton during the course of this dispute and during the course of said hearing. It is clear that the City of Scranton has a past and presently continuing obligation for maintenance of said bridge pursuant to the agreement in Deed referred to herein. Therefore, we submit that the City of Scranton's interest and involvement in this particular matter are significant.

Prior to a determination of whether or not any future repair and maintenance work is necessary on said bridge, we submit that it must first be determined who has the responsibility for the maintenance and repair work on said bridge. Initially, we submit that it is clear that the City of Scranton is the owner of the railroad bridge herein and has responsibility for repair and maintenance on said bridge. The testimony indicated that in 1983 the City of Scranton approached and brought in Steamtown, Inc. for purposes of economic development. (N. T. 35). The testimony of John Hart, General Manager for Steamtown Foundation, Inc., indicated that pursuant to a contract between Scranton and Steamtown Foundation, Inc., the City of Scranton has responsibility for repair and maintenance of the railway trackage, including but not limited to the repair and maintenance of bridges. (N. T. 35-38). Additionally, Mr. Hart

testified that the purpose for bringing Steamtown to the City of Scranton was for economic development and that Steamtown was the only railway line using the trackage and bridge at issue. There is further testimony from Mr. Hart that a P.U.C. site inspection held prior to the date of the hearing herein, the City of Scranton agreed to rectify the problems of the bridge. Additionally, it is clear from the evidence and testimony presented that the City of Scranton took responsibility for repair of the bridge as evidenced by Moscow Borough Exhibits 2, 3, 4, and 5, wherein Steamtown Foundation, Inc. agreed to accept the burden of going forth and making temporary repairs to the bridge conditioned upon the fact that permanent repairs would be completed in the future and that the City of Scranton would retain the responsibility for said repairs pursuant to the agreement of the parties. Additionally, William Heim, a Councilman from the Borough of Moscow, testified that he made a search of the records of the Office of the Recorder of Deeds in and for the County of Lackawanna and determined that the Deed from Conrail Incorporated into the City of Scranton placed the responsibility for any and all removal and/or restoration costs for any and all bridges on the railway trackage in question upon the City of Scranton. A certified copy of said Deed has been

entered into the record and has been marked as Moscow Borough Exhibit No. 11. (N. T. 127). Mr. Heim also indicated that at the February 3rd site inspection called by the P.U.C., John Luciani, City Engineer for the City of Scranton, indicated that the City was the owner of the bridge, has responsibility for the repair of the bridge, and that he had the authority to act for the City when indicating that the City of Scranton would repair said bridge. (N. T. 133-134). Additionally, Mr. Heim indicated that Mr. Luciani forwarded a letter to Moscow Borough Council, which letter has been marked and entered as Exhibit No. 12, stating that repairs would be started. It is important to note that this letter was submitted to Moscow Borough Council after the site inspection hearing or meeting held by the P.U. C.

Additionally, the testimony of John Luciani, the engineer for the City of Scranton, indicates that the City of Scranton has accepted the responsibility for the repair and maintenance of the bridge and has indicated that they are the owners of said bridge and are responsible for any and all maintenance and repair of said bridge and railway trackage located thereabout. Additionally, Mr. Luciani indicated that he had the authority to make these representations at the time of the site inspection hearing on February 3, 1987. (N.T. 172).

Despite the authority and responsibility vested unto the City of Scranton by the agreement with Steamtown Foundation, Inc., and by the very Deed of ownership and title to the railroad bridge which is the subject of this litigation, the City of Scranton denies any and all ownership and/or maintenance responsibilities for said bridge. We submit that even if there is a question or issue regarding maintenance herein, despite the clear language contained in the Deed of ownership and contract with Steamtown, Inc., that this issue may be resolved from the transcript of the hearing held before the P.U.C. It is clear that the City of Scranton has accepted ownership and has accepted the responsibility for making repairs even though they have not ever taken any physical steps to make said repairs. We submit that the Deed of ownership and the agreement between Steamtown, Inc. and the City of Scranton, as well as the ascertains of John Luciani, Engineer and representative for the City of Scranton, make the City of Scranton responsible for the complaints regarding the structural integrity of the bridge and the seepage and water problems encountered at the bridge site. The next issue addressed by way of this Brief is whether or not there exists a threat and defect in the structural integrity of the bridge which creates a hazardous condition to the public at

large. Initially, it must be pointed out that when this Complaint was originally filed, the bridge was in a condition of total decay and deterioration and that pieces of concrete were falling from the bridge onto the roadway causing a hazard for pedestrians who use the roadway and vehicular traffic which use the roadway underneath the bridge. Only after the threat of imminent litigation and the threat of imminent injunctive measures, did a resolve of this imminent and dangerous condition become a reality. Moreover, only after Steamtown Foundation voluntarily assumed to take the necessary measures to resolve the imminent dangerous condition was this matter addressed. But clearly, the matter was addressed by a party which is an arm of the City of Scranton in that Steamtown Foundation, Inc. is a major tourist attraction within the City and was brought to the City by the City of Scranton for purposes of economic development. Still, it was only after the City of Scranton had promised and failed to take the necessary corrective measures, and only after the threat of impending litigation, that the corrective measures were taken. We submit while these corrective measures took care of some of the cracking and spalling and temporary problems which the bridge encounters, that there still exists a need for an engineering study and

analysis to determine the structural integrity and soundness of the bridge and to determine what, if any, effect the water seepage has upon the structural integrity and soundness of the bridge.

In support of the above contention, the Borough submits that the testimony of Dominick Surace, Professional Engineer, clearly indicates that an analysis should be made.

The Complaint filed by the Borough of Moscow was based upon repairs and work needed to rectify problems involving spalling and cracking of the bridge, in particular, falling concrete, exposed steel reinforcement bars, and water and seepage problems attendant to the bridge. While the testimony indicated that temporary repairs were made which covered the exposed re-bar, and corrected the falling concrete and spalling on the bridge, it is clear from the testimony presented that the water and seepage problems continue and will continue into the future. It is also clear that the water and seepage problems will continue into the future and will cause a regression of the spalling and cracking of concrete at the bridge site. It is clear that all of the parties at said hearing were of the opinion that at the time that the Complaint was filed that the bridge was in a deteriorated state of decay and that particles of concrete were

falling from the bridge and made the bridge a safety hazard. While everyone agrees that some temporary measures were taken to alleviate the dangerous condition of the railroad bridge, it is clear that the nature and condition of the bridge, and the particular causes of the dangerous conditions have not been touched upon. Furthermore, the parties all agree that an engineering study and analysis should be conducted to determine the cause and origin of the problems with the bridge (N. T. 8), and that the Commission should determine the responsibility for payment for said engineering study and analysis. The parties all agree that water seepage still existed at the bridge site and if permitted to continue, said water seepage will cause a problem and danger. (N. T. 18). The parties also agree that the existence of water seepage on the bridge has a negative impact on the bridge since it allows decay to progress much more rapidly and since it makes the concrete fall off the bridge due to deterioration (N. T. 21).

At the time of said hearing, Dominick Surace, a consulting engineer with the Borough of Moscow, testified as to the condition of the bridge, his findings upon inspection of the bridge and his involvement with P.U.C. officials and City of Scranton officials regarding said bridge. He testified that the

rapid deterioration of the concrete columns, and discoloration of the concrete columns near the bridge beams sitting on the pier itself, indicated to him that the structural integrity of the bridge had to be examined. (N. T. 80-83). He also indicated that the top of the beams that support the railway trackage showed evidence of seepage, corrosion, and deterioration. (N. T. 83). He also indicated that even though temporary repairs were made that pieces of concrete will continue to fall off in the future if the problems are not addressed. (N. T. 82-86). The testimony of Mr. Surace was supported by a report marked as Moscow Borough Exhibit No. 8 and photographs marked as Moscow Borough Exhibits 7 (a) through (g) which were submitted into evidence. Mr. Surace indicated that it was his opinion that the safe load of the structure must be determined in order to determine the structural integrity of the bridge. (N. T. 90). He also indicated that even though temporary repairs were made, that the infiltration of water through the railroad bed caused concern and it was his opinion that this matter should be resolved. (N. T. 93). Testimony also indicated that the deterioration to the bridge is going to continue unless something is done about the problem. (N. T. 108). The testimony of Mr. Surace, uncontroverted by other professionals,

indicates that an engineering study and analysis was necessary to determine what effect the water seepage would have upon the structural integrity of the structural integrity of the bridge.

Mr. Surace also testified in detail about flaking and deterioration of the bridge which has been caused by trains running over the tracks on the bridge over a number of years (N. T. 83).

Mr. Surace also testified that subsequent to the February 3rd field inspection with P.U.C. officials and various officials from the other entities involved herein, the City of Scranton admitted ownership of the bridge and accepted maintenance responsibility. (N. T. 98-99). He also indicated at the conclusion of said field inspection, there were two areas or thrust which the parties had agreed upon, to wit:

(A) That temporary repairs would be made by the City of Scranton.

(B) That permanent restoration would be made to repair said bridge. (N. T. 99).

It is clear from the testimony of Mr. Surace that his reasoned and professional engineering opinion regarding said bridge would indicate that an engineering study and analysis should be done in order to determine what effect the water seepage has upon the

structural integrity of the bridge, and that a study and analysis should be done to determine the current condition and structural strength of said bridge. Therefore, the Borough of Moscow submits that they have met their burden pursuant to the Rules of Procedure of the Public Utility Commission.

Contrary to the reasoned and professional opinions of Mr. Surace, John Luciani, the City Engineer for the City of Scranton, testified and indicated that he felt an engineering and analysis study was not necessary. Mr. Luciani, while not a professional engineer, testified that there is no need for such study. (N. T. 144-147). Mr. Luciani indicated that he was not a structural engineer and that he had no experience with railroad design and railway bridge design. (N. T. 154-159). However, Mr. Luciani did admit that as a bridge gets older its structural integrity tends to be compromised N. T.-164, and that the water permeating through the bridge was a problem. (N. T. 156). He also testified that the columns of the bridge showed excessive signs of decay. (N. T. 147). However, in a

final analysis, Mr. Luciani testified that an engineering analysis and consulting work would not be necessary to determine what if any problems existed. He testified to this even though he admitted on cross-examination that he had agreed earlier in the day that an engineering analysis and consulting work would be necessary to determine what problems exist with the bridge. (N. T. 158). Interestingly, Mr. Luciani testified that the ways to deal with water problems regarding the bridge were either diversion or placement of a membrane similar to the remedies described by Mr. Hart and Mr. Surace. (N. T. 157). However, Mr. Luciani was unable to indicate which of the two methods would be more feasible, or if both methods would perhaps be more feasible as a method of dealing with the water problem. Therefore, it would appear to the claimant herein that an engineering study and analysis would be the vehicle to determine what problems existed and to determine what remedies should be pursued to resolve those problems.

The Borough submits that the Burden of Proof does not require that an accident or serious injury occur prior to the

Commission rendering an Order to resolve the problem existing at this sight. The testimony of the engineer of the City of Scranton is not a reasonable and professional opinion since his testimony clearly indicated that problems exist on one hand, but that a study to determine what those problems where would not be an appropriate measure, on the other hand. We submit that a study is the method and course of action required to determine the structural integrity of the bridge, whether or not the safeload of the bridge is adaquate, and whether or not the seepage problem can be alleviated so as to maintain the structural integrity of the superstructure. Additionally, William Heim, a Councilman with the Borough of Moscow, Police Chief James Hoover, and Fire Chief Thomas Knowles all testified as to the necessity of the bridge for the residents of the Borough of Moscow in terms of fire safety prevention and police protection, as well as convenience. We submit that the testimony does not need to be repeated verbatim herein, but it does show the need for an analysis and study to determine what problems exist and how the problems and the origin thereof can be corrected.

Should the Court determine that a study must be completed, then the P.U.C. must determine who shall bear the initial cost of said study. It is clear from the record of the transcript herein that the ownership of the bridge lies with the City of Scranton and that the maintenance of said bridge specifically lies with the City of Scranton pursuant to the Deed of ownership granting the City title, and the agreement which the City of Scranton has with Steamtown Foundation, Inc., the only railway line which uses this particular railroad and bridge. We submit that the City of Scranton carries the primary responsibility for the initial cost of said study because they are the owners of the bridge and have this specific responsibility for maintenance of said bridge. Additionally, the City of Scranton has continually made admissions as to their responsibility for maintenance of said bridge. The testimony at the hearing herein also indicated that the only entity and railroad line which uses the railroad and bridge is Steamtown Foundation, Inc., which is an economic arm of the City of Scranton. The testimony of Mr. John Hart indicated that the City of Scranton approached and brought in Steamtown for purposes of economic development in 1983. (N. T. 35). Mr. Hart's testimony also indicates that Steamtown uses the trackage for purposes of running an excursion

line and that as part and parcel of this operation the City of Scranton has agreed to purchase the trackage and bridges thereon and has agreed to maintain the bridges for purposes of Steamtown's operation. Clearly, Steamtown and the City of Scranton, intertwined as they are, rely upon this bridge and railway trackage in order to operate Steamtown, Inc., a tourist attraction centered in the City of Scranton. Therefore, we submit that the Commission should allocate the cost of the initial study to the City of Scranton because they are responsible for the maintenance of this program. Steamtown is a tourist attraction which is located in the City of Scranton and which has been brought to our area by the City of Scranton. Therefore, it is just that the allocation of cost should be placed upon the City of Scranton.

However, should the Court not wish to rely upon the reasoning set forth hereinabove, then a second method of apportion and cost would be to apportion the cost among the parties who would gain the most from said repairs in terms of having those parties pay the largest portion of the cost of study. See Department of Transportation v. Pennsylvania Utility Commission, 469 A.2d 1149. In the case at bar, of the four parties involved, it is clear that the City of Scranton

and Steamtown, Inc., the tourist attraction enticed here by the City of Scranton, are the parties which use the bridge the most and are the parties who would be very much effected by this bridge. The City of Scranton derives direct revenue from the running of Steamtown Foundation, Inc., since the City of Scranton and Steamtown are intertwined by virtue of the contract discussed herein. Therefore, we submit that the primary cost of the feasibility of an engineering study should be allocated to the City of Scranton.

The Department of Transportation of the Commonwealth of Pennsylvania owns, maintains, and controls the roadway under the bridge in question. Therefore, we submit that the Pennsylvania Department of Transportation should be allocated a portion, if not all, of the costs associated herewith. Additionally, the water seepage problems herein have been caused in part by Pennsylvania Department of Transportation chemicals and salt used on the roadway underneath the bridge in the winter. The testimony herein indicates that the Pennsylvania Department of Transportation owns all of the roadways located at or near the bridge. (N. T. 165). Therefore, we submit that the cost should be allocated in whole or in part, among the City of Scranton and the Pennsylvania Department of Transportation. The fact that

the bridge itself is located in the Borough of Moscow should not, in and of itself, dictate that the Borough of Moscow has any responsibility toward the cost of the engineering study and analysis herein. Finally, the issues of testimony at the hearing indicated that the water seepage problem was a defect which everybody and all parties at the hearing could agree upon as existing at the time of said hearing. While the defect was established by all parties, and the attendant consequences of said defect were discussed among the parties, there was a dispute over the best way to solve said problem. Basically, two solutions were proposed by the parties herein. The two solutions proposed by the engineers testifying at the hearing, as well as by Mr. Hart, were the placing of a membrane over the bridge in order to stop the seepage of water through the bridge, (N. T. 55, 199), or the second alternative being to address the source of the run-off by diversion processes. (N. T. 48, 157). We submit that the problem of water seepage herein can only be properly addressed by an engineering study and analysis to determine the source and origin of the water and to determine the proper and most effective manner in which to stop the water seepage problem. Clearly, the testimony of the engineers at the hearing indicated that either one or both of the processes may

be needed to resolve this problem. It would only seem logical that a study be completed to determine which process (or if both processes), would be necessary in order to effectively resolve the water run-off problem.

CONCLUSION

Moscow Borough Council submits that an engineering study and analysis is required to determine the structural integrity of the bridge, the soundness of the bridge, the safe load of the bridge, and to determine the effects of the water seepage problem on the structural integrity of the bridge. Additionally, the Borough submits that an engineering study and analysis is required to determine what method should be used to resolve the water seepage problem which has plagued this bridge. We submit that if said study is not completed, then the cracking and spalling of the bridge will only reoccur because of the water seepage which continues to exist in and about said bridge. The Borough submits that the reasoned and professional opinion of Dominick Surace, Professional Engineer, dictates that this study be completed. We submit that the testimony of the City of Scranton Engineer does not have the merits of Mr. Surace's testimony and that his conclusions that a study is not necessary are meritless and baseless. We further submit that the

testimony of the Penn Dot Engineer who indicated that the bridge was sound and that a study was not necessary is meritless and baseless because the Penn Dot Engineer has not provided this Commission with the written report which it has promised to make a part of this record. (N. T. 26, 27). The testimony is clear that the drainage problems existing at the side of the bridge, the age of the structure, and lack of maintenance over a long period of time require that an engineering study and analysis be performed to determine the structural integrity of the bridge and the effect that the above stated problems have on said bridge.

Furthermore, the Borough of Moscow submits that the engineering study and analysis should be completed at the initial cost of either the City of Scranton or the Pennsylvania Department of Transportation, or both, since those parties have primary responsibility for the maintenance of the bridge and/or are the primary parties benefited by the maintenance of said bridge. The Borough of Moscow is a small entity which can ill-afford to pay for the costs associated with the undertaking requested herein. However, we feel that it is clear from the evidence and the testimony herein that if the problems are not faced and addressed at this time, that continued decay and

deterioration of said bridge will occur and that the safety and well being of the public in general will be endangered by the continued existence of a dangerous condition.

PROPOSED FINDINGS OF FACT

The Borough of Moscow proposes the following findings of fact:

1. That ownership of the bridge at issue is vested in the City of Scranton by virtue of a Deed of ownership and title from Conrail to the City of Scranton.
2. That the responsibility for repair and maintenance of railway trackage and any and all bridges on said railway trackage relevant herein is the responsibility of the City of Scranton by virtue of the Deed from Conrail to the City of Scranton and by virtue of the agreement between Steamtown Foundation, Inc. and the City of Scranton.
3. That the City of Scranton has the specific responsibility for the repair and maintenance of all bridges along the railroad trackage relevant herein and, specifically, the City of Scranton has the responsibility for the repair and maintenance of the bridge herein.

4. That an engineering study and analysis is necessary to determine the structural integrity of the bridge, the safe load of the bridge, and to determine the effect of the water seepage problem upon the structural integrity of the bridge.
5. That if the water seepage problem existing at said location is not corrected and adequately and satisfactorily repaired, that the bridge will experience future cracking and spalling which will ultimately be a hazard to the general public.
6. That Moscow Borough Council has met its burden of proof in showing that the bridge is in a defective condition and in demonstrating that an engineering study and analysis is necessary to determine the nature and extent of the problems as well as to determine the best method to address the water seepage problem existing at said bridge.

PROPOSED ORDERING

The following are the proposed ordering paragraphs set forth by the Borough of Moscow in regard to this action:

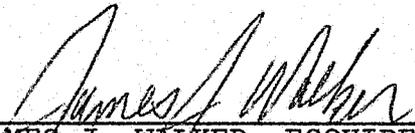
1. That the Complaint of the Borough of Moscow Council is hereby sustained and that an engineering study and

analysis to determine the structural integrity of the Moscow Borough bridge shall be ordered.

2. That the cost of procuring such a study shall be borne by the City of Scranton, since the City of Scranton has the responsibility for maintenance and care of repairing said bridge.
3. That the cost of procuring such a study shall be borne by the City of Scranton and the Commonwealth of Pennsylvania, Department of Transportation, in equal shares.
4. That a study and analysis shall be completed to determine the exact source of the water seepage problem and to determine what method of repair should be used to correct the water seepage problem.
5. That an engineering study and analysis shall be completed by an independent engineering consultant working in conjunction with engineering representatives for the interested parties, and that the cost associated with the procurement of an independent engineering consultant shall be borne by the City of Scranton, the Commonwealth of Pennsylvania, Department of Transportation, or both in proportionate shares.

6. That after an engineering analysis and study is completed, an additional hearing shall be held based upon the result of said study to determine what problems exist and what measures and steps will be taken to correct said problems.

Respectfully submitted:



JAMES J. WALKER, ESQUIRE
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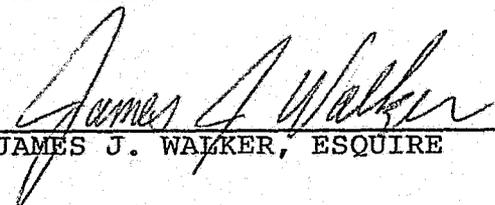
CERTIFICATE OF SERVICE

I, JAMES J. WALKER, Solicitor for the Borough of Moscow, do hereby certify that I have forwarded a true and correct copy of the foregoing Brief to the following parties by placing the same in the United States Postal Service system on July 21, 1987, by First Class Mail, Postage Prepaid.

Carlene Gallo, Esquire
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City of Scranton
Pennsylvania

C-861119

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Office of the City Solicitor

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July 31, 1987

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Public Utility Commission

Pennsylvania Public Utility Commission
Office of the Secretary
New Filing Section - Room B-18
P.O. Box 3265
North Office Building
Harrisburg, Pennsylvania 17120

Re: Moscow Borough Council vs. City of Scranton
Lackawanna County and Pennsylvania Department
of Transportation

Dear Sir:

Enclosed please find original and nine copies of the Reply Brief of the
City of Scranton to be filed in the above-captioned matter.

Thank you.

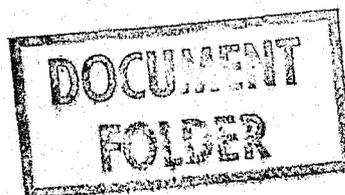
Sincerely,

CARLENE GALLO, ESQ.
First Assistant City Solicitor

CG:mab

encls.

cc: Honorable Morris Mindlin
Attorney James J. Walker
Attorney Thomas P. Cummings
Attorney Herbert G. Zahn



to make these representations at the time of the site inspection hearing on February 3, 1987. However, when looking at Page 172 of the transcript, a correct reading of this page shows that when asked if he had the authority to act on behalf of the City of Scranton, John Luciani emphatically states "NO". Mr. Luciani did answer that at the time of the site inspection he did indicate to Mr. Heim that he had the authority to act, but saying that he had the authority to act does not mean that he did indeed have the authority to act. Further, it is interesting that Moscow Borough Council does not wish to recognize Mr. Luciani's opinion as a Civil Engineer to be reasonable or professional even though they stipulated to recognizing him as a expert for the City of Scranton (Tr. p. 144), yet they are willing to rely heavily upon his stated opinion made on February 3, 1987 that the City of Scranton was the owner and the responsible party for the repairs to the Moscow Bridge even though testimony later shows he had no authority to make such opinion and that he is neither a member of the governing body of the City of Scranton nor is he a lawyer.

The next argument that the Moscow Borough Council makes is that the City of Scranton should bear full or primary

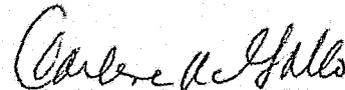
responsibility for the repairs of the bridge because Steamtown, Inc. is "an economic arm" of the City. An examination of Moscow Borough Council's Exhibit No. 1 shows that Steamtown, Inc. is a non-profit corporation. Steamtown, Inc. is not an "economic arm" of the City; nor is it a department of the City, a subsidiary of the City, or an Authority of the City. Steamtown, Inc. is merely a business being run in the City of Scranton which, along with many other businesses in the City, has received financial help from Scranton. The only revenue that the City of Scranton receives from Steamtown, Inc. is the indirect revenue that tourism brings to the City, which is exactly the same benefit that Moscow receives from Steamtown, Inc.

Finally, Moscow Borough Council, in their Brief, states, "the parties all agree that an engineering study and analysis should be conducted to determine the cause and origin of the problems with the bridge (N.T.8)." This statement is based on the attorney for Moscow Borough Council's representation to Judge Mindlin that all the parties have agreed to an engineering study. However, it is clear from other pages of testimony that that is totally incorrect. The parties did not agree that an engineering study should be done. On the contrary,

the Engineer for Penn Dot gave the opinion that an engineering study was not necessary; and the Engineer for the City of Scranton gave the opinion that, aside from the water seepage problem, an engineering study to determine the structural integrity of the bridge was not necessary. (Tr. p. 155, 175, 186, 189 and 194)

THEREFORE, the City of Scranton reiterates its arguments stated in its Original Brief Of Respondent and respectfully requests that the Court afford the City of Scranton the relief it requested in said Brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

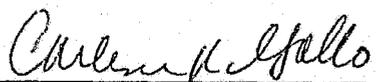
I, **Carlene R. Gallo**, First Assistant City Solicitor for the City of Scranton do hereby certify that I have forwarded a true and correct copy of the foregoing Reply Brief Of Respondent, City Of Scranton, To The Brief Of Petitioner, Moscow Borough Council to the following counsel of record:

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Said service was made by placing the same in the United States Postal Service on Friday, July 31, 1987, First Class, Postage Prepaid.



CARLENE R. GALLO, ESQUIRE
First Assistant City Solicitor