

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION
HARRISBURG 17120



Office of Chief Counsel
December 23, 1985

IN REPLY REFER TO

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DEC 23 1985

SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, Pennsylvania 17120

RE: Docket No. G-80092154

Dear Mr. Rich:

Enclosed for filing with the Commission are the original and nine (9) copies of the Exceptions of the Pennsylvania Department of Transportation to Recommended Decision in the above-referenced matter.

I hereby certify that a copy of the said Exceptions has been sent to the interested parties listed below.

Respectfully submitted,

Stephen F. J. Martin
Assistant Counsel

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Enclosures



cc: W. J. Clements, P.E. (Attn.: Robert Peda, P.E.)
Engineering District No.11-0
Parties of Record - Pages 2 and 3

Jerry Rich, Secretary
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December 23, 1985

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December 23, 1985

PARTIES OF RECORD (CONTINUED)

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DEC 23 1985

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE
Public Utility Commission

Glenfield Borough :
 :
 v. : C-80092154
 :
 Consolidated Rail Corporation, :
 Allegheny County and Pennsylvania :
 Department of Transportation :

DOCKETED
DEC 24 1985

EXCEPTIONS OF THE PENNSYLVANIA DEPARTMENT
OF TRANSPORTATION TO RECOMMENDED DECISION

The Pennsylvania Department of Transportation (Department) takes exception to the Recommended Decision of Administrative Law Judge Michael A. Nemec in the above captioned matter as follows:

**DOCKET IT
FOLDER**

1. Exception is taken to the issuance of the Recommended Decision prior to the filing of the transcript of testimony taken at the November 27, 1985 hearing.

It is clear that, since the Recommended Decision was issued prior to the filing of the transcript of testimony taken at the November 27, 1985 hearing, Administrative Law Judge Nemec's determination was made without benefit of review of the 112 pages of testimony given during the four hour hearing. The findings of fact and recommendations were, therefore, formulated

**DUPLICATE REC'D.
ORIGINAL CERTIFIED
TO COMMONWEALTH COURT**

from Judge Nemeč's own recollection of the testimony, not the record of it. Intending no disrespect to Judge Nemeč's excellent capability as an administrative law judge, it is submitted that the broad discretion afforded an administrative law judge has here been abused.

In addition, the issuance of the Recommended Decision prior to the filing of the transcript of testimony resulted in the absence of any reference to the record for any of the facts found or discussed. It is therefore impossible to know which portions of the testimony are relied upon and which may have been discredited. It is impossible to precisely identify the evidentiary support for the conclusions drawn and the recommendations made.

Finally, the issuance of the Recommended Decision prior to the filing of the transcript of testimony resulted in undue prejudice to parties wishing to except to the Recommended Decision. The Recommended Decision was forwarded on December 6, 1985 with exceptions to be filed within fifteen days of that date. The transcript of testimony was received by the Department on December 13, 1985 and filed with the Commission on December 16, 1985. Exceptions, therefore, had to be formulated either without benefit of review of the testimony, or hastily within the ten days remaining after the transcript of testimony was received.

It is submitted, therefore, that the Commission should remand the matter to Administrative Law Judge Nemeč for reconsideration after review of the record.

2. Exception is taken to Paragraph 1 of the Proposed Order assigning maintenance responsibility for the Glenfield Viaduct to the Department.

By Order of December 3, 1982, this Commission assigned maintenance responsibility for the viaduct to Consolidated Rail Corporation (Conrail). Prior to that Order, responsibility for maintenance of the structure rested with the predecessor railroad whose tracks passed beneath it. Paragraph 1 of the Proposed Order is unsupported by any finding of fact or any evidence of record indicating why maintenance responsibility should now be shifted to the Department. Indeed, the record is devoid of any evidence of any change in circumstance to justify a shift of responsibility to the Department. The Department bears no responsibility for the deterioration of the bridge. The viaduct has always carried and continues to carry a local street. The only involvement of the Department of Transportation with the structure arises from the appropriation by the Legislature of significant funding to assist the Borough in replacing it.

By implication, the Discussion portion of the Recommended Decision indicates that maintenance responsibility

should be transferred to the Department so that the cost of any repairs or strengthening can be included in the replacement project funded by the Legislature. (R.D. at 5). Justification of a transfer of maintenance responsibility to the Department on this basis amounts to consideration of which party has the greater ability to bear the maintenance cost. This Commission emphatically reiterated that such consideration of ability to pay is wholly irrelevant and improper in its recent opinion in Application of Consolidated Rail Corporation, Docket No. A-00104609 (adopted April 4, 1985, entered September 10, 1985). The possibility of including the cost of interim maintenance in the replacement project is no cognizable justification for shifting maintenance responsibility for this local structure to the Department.

The Discussion portion of the Recommended Decision also concludes that the Department is directly responsible for the current situation in Glenfield Borough and recommends that the Commission so find. (R.D. at 4). The Discussion points out that two earlier Department highway improvement projects have reduced the size of the Borough by 60 percent, that is to say, reduced the Borough's tax base. Evidence of the reduction of the Borough's tax base was in fact admitted by the administrative law judge over objection from counsel for the Department, counsel for Conrail and the Commission trial counsel. It is clear that the fact that the size of the Borough has been significantly reduced

is of no import except as an indication of the Borough's reduced ability to pay. As noted above this Commission has unequivocally rejected ability to pay as a relevant factor in a rail/highway crossing proceeding. The Discussion also notes that the earlier Department highway improvement projects have limited access to a certain portion of the Borough to the local street which the viaduct carries. There is no law, either in statute or court opinion, which holds that when the Department, in the construction of highway improvements throughout the Commonwealth, limits access to an area to a single local street, the Department is thereafter obliged to maintain that access street, in order to serve the residents of that area. The fact that access to this area of the Borough was reduced to the deteriorating viaduct by the construction of two other Department projects offers no justification for a shift of maintenance responsibility for the structure to the Department.

3. Exception is taken to Paragraph 2 of the Proposed Order directing the Department to immediately commence an evaluation of the viaduct for purposes of restoring the structure to a 16 ton capacity.

As noted above, the Department bears no responsibility for the deterioration of the structure. Responsibility for the viaduct has historically rested with the railroad and, since

December of 1982, with Conrail under order of the Commission. And the viaduct carries a local street, not a state highway.

In addition, the December 3, 1982 Commission Order directs Conrail to inspect and maintain the structure. Conrail's witness testified at the November 27, 1985 hearing that Conrail had in fact performed inspections and a structural inventory of the viaduct. To now direct the Department to undertake an evaluation of the structure might well be duplicative of work already accomplished. At the very least, the order shifts the evaluation task from the party currently familiar with the structure and inspecting it on a regular basis to a party whose only involvement with the structure arises out of the funding scheme developed by the Legislature to replace it. There is no logic in directing the Department to undertake an evaluation. There is no evidence in the record suggesting that the Department is the appropriate party to undertake such an evaluation.

4. Exception is taken to Paragraph 3 of the Proposed Order directing the evaluation ordered in Paragraph 2 to be completed and filed with the Commission within 30 days.

The ordering paragraph is directly contrary to the evidence of record. The Department witness testified at the November 27, 1985 hearing that the Department lacked the in-house

capability to perform an adequate study of what would be necessary to return the viaduct to a 16 ton carrying capacity. (N.T. at 309). The witness testified that to engage a consultant to perform such a study would take approximately four months. (N.T. at 310). It will simply be impossible for the Department to comply with paragraph 3 of the Proposed Order. All the relevant evidence of record indicates that the Department could not perform an evaluation of the structure in less than five months. No evidence of record indicates otherwise. Paragraph 3 of the Proposed Order is unreasonable and wholly unsupported by the record.

5. Exception is taken to Paragraph 4 of the Proposed Order. Paragraph 4 directs the Department at its initial cost and expense to "take all feasible steps" to repair the viaduct to achieve an "adequate load carrying ability to serve the needs of the residents of the Borough of Glenfield."

The ordering paragraph is vague. In the Discussion portion of the Recommended Decision, Administrative Law Judge Nemec stated:

For the above reasons I recommend that this Commission order the Department of Transportation immediately evaluate the subject structure for renovation to a 16 ton weight limit and, if economically feasible, make all necessary repairs. (R.D. at 5, emphasis added).

It is presumed, then, that Paragraph 4 directs the Department to take all economically feasible steps to restore the viaduct to a 16 ton load carrying capacity. It is not economically sound for the Department to restore the viaduct to 16 tons on an interim basis.


As noted earlier, the record shows that in order to perform an appropriate study of the structure to determine what rehabilitation would be needed, it will be necessary for the Department to engage a consultant. Preliminary preparation would require perhaps two weeks. The consultant selection process, as noted earlier, will take approximately four months. The study itself would require perhaps three weeks. Upon completion of plans determining what needed to be done, a minimum of three months would be required to advertise, let, and award a contract to perform the work. (see N.T. at 210). It is impossible to estimate how long the rehabilitation work would take without knowing exactly what needs to be done. It is quite possible however that performance of the rehabilitation work might well require the clearance of additional right of way. Procedures to clear the right of way would take as long as clearance of right of way for the reconstruction project. Consequently the time frame required for the Department to undertake a study and to contract out the work to restore the viaduct to a 16 ton carrying capacity approaches if not equals the time needed to begin the reconstruction project itself.

The record also indicates that while some of the work which might be anticipated to restore the 16 ton carrying capacity will be duplicative of work which would have been done by the Department's contractor to accommodate his construction equipment during the reconstruction of the viaduct, a 16 ton capacity would not serve all the reconstruction contractor's needs. In all likelihood, much of the work to restore the viaduct to a 16 ton capacity would be redone to accommodate heavier construction equipment. Such duplication of effort would clearly result in significant and unnecessary inflation of the cost of the project. It is economically irresponsible to the Legislature which has funded the reconstruction and to the Commonwealth in general to incur the significant costs of engaging a consultant and letting a separate contract to perform work which would be insufficient to accommodate the reconstruction, and which would, in all probability, require nearly as much time to begin as the reconstruction project itself. If, as noted above, it was the intention of the administrative law judge and is the intention of this Commission to include any cost of returning the viaduct to a greater load carrying capacity on an interim basis as part of the total contract cost for the reconstruction of the viaduct, the most economically feasible means is to resolve the issue of allocation of the 5% portion not funded with federal or state funds and to direct the immediate commencement of the reconstruction project.

6. Exception is also taken to Paragraph 5 of the Proposed Order which directs the Department to file weekly reports with the Commission detailing its compliance with the order.

As noted above compliance with this order will require significant time. It is unlikely that circumstances will change on a weekly basis making a weekly report to the Commission helpful to any extent. Nothing in the record suggests that action in compliance with this order will be with sufficient speed to make a weekly report to the Commission necessary or useful.

Respectfully submitted,



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CONRAIL

ORIGINAL

ORIGINAL

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VIA PUROLATOR

January 3, 1986

JAN- 6 1986
SECRETARY'S OFFICE
Public Utility Commission

Jerry Rich, Secretary
Pennsylvania Public Utility Commission
Room G-18
North Office Building
Harrisburg, PA 17120

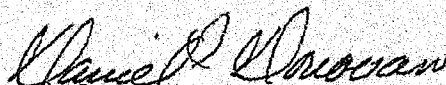
Re: Glenfield Borough v. Consolidated Rail
Corporation, et al.
Pa. P.U.C. Docket C-80092154
Conrail File No. MPCB-00090

Dear Mr. Rich:

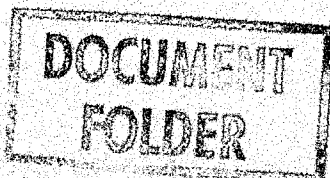
Enclosed for the consideration of the Commission are an original and nine copies of the Reply of Consolidated Rail Corporation to Exceptions of the Pennsylvania Department of Transportation to Recommended Decision.

I hereby certify that a copy of the said Reply to Exceptions has been sent this date to the parties set forth below.

Very truly yours,


Daniel F. Donovan
Senior General Attorney

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Philadelphia, PA 19103
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DFD:des

Enclosure

cc: Stephen F. J. Martin
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Jerry Rich, Secretary
January 3, 1986
Page 2

Honorable Michael Nemeč
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Jerry Rich, Secretary
January 3, 1986
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Public Utility Commission

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Page 4

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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JAN- 6 1986
SECRETARY'S OFFICE
Public Utility Commission

Glenfield Borough

v.

Consolidated Rail Corporation,
Allegheny County and Pennsylvania
Department of Transportation

C-80092154

EXTRA COPY

REPLY OF CONSOLIDATED RAIL
CORPORATION TO EXCEPTIONS OF THE
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
TO RECOMMENDED DECISION

DUPLICATE RECORD.
ORIGINAL CERTIFIED
TO COMMONWEALTH COURT.

DANIEL F. DONOVAN
1138 Six Penn Center Plaza
Philadelphia, PA 19103
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Attorney for
Consolidated Rail Corporation

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Glenfield Borough :
 :
 v. :
 : C-80092154
 Consolidated Rail Corporation, :
 Allegheny County and Pennsylvania :
 Department of Transportation :

REPLY OF CONSOLIDATED RAIL
CORPORATION TO EXCEPTIONS OF THE
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
TO RECOMMENDED DECISION

To the Honorable, the Pennsylvania Public Utility
Commission:

The Pennsylvania Department of Transportation (Penn DOT)
initially takes exception to the Recommended Decision on the
premise that such Decision was issued prior to the filing of
the transcript of the testimony taken at the November 27,
1985 hearing.

There is no law nor is there any rule or regulation of
your Commission which prohibits the issuance of a Recommended
Decision prior to the filing of the transcript of testimony.
The record in this case indicates that this isolated commu-
nity served only by the sixty year old viaduct and ringed by
Penn DOT's Interstate 79 and State Route 65 is in need of
relief at the earliest possible time. Judge Nemecek obviously
understood the urgency of the matter and chose to act expe-

ditionally. The decision certainly conforms to the facts developed at the public hearing.

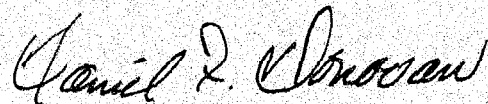
Penn DOT also excepts to the fact that the viaduct carries a local street not under the jurisdiction of Penn DOT. The fact is, however, that this sole access to the Borough of Glenfield was brought about by construction of State Route 65 and Interstate Route 79 by Penn DOT. The law is well settled in Pennsylvania that your Commission has jurisdiction over Penn DOT with respect to allocation of costs and assignment of responsibilities even though the highway involved is not a designated state highway. Com. Dept. of Transp. v. Pa. P.U.C., 469 Atl. 2d 1149, 79 Pa. Comm. 266 (1983); Com. Dept. of Transp. v. Pa. P.U.C., 439 Atl. 2d 1301, 64 Pa. Comm. 224 (1982).

Penn DOT also excepts to the recommendation that it undertake an evaluation of the structure on the premise that it is not currently familiar with the structure. Evidence was introduced at the November 27, 1985 hearing with respect to the evaluation made by Penn DOT's consultant which recommended that the weight limitation be reduced from the present 16 tons. The fact is that Penn DOT's consultant has already made an evaluation of the structure and must be familiar with it.

The subject viaduct is the only access available to the residents and business establishments in the Borough of Glenfield. That situation was brought about by activities of

Penn DOT and its predecessors and is the sole cause of the urgency which exists today. Judge Nemeč's Recommended Decision addresses that urgency and is reasonable and proper under all of the circumstances. Penn DOT's exceptions should be denied.

Respectfully submitted,



Daniel F. Donovan
Senior General Attorney

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