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January 17, 1973

Mr. Will Ketner, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, Pa. 17120

Re: Department of Transportation of the Commonwealth  
of Pennsylvania v. Reading Company, Borough of  
Conshohocken, Borough of West Conshohocken and  
County of Montgomery  
Complaint Docket No. 19707

Dear Sir:

Enclosed for filing with your Commission are original and  
fourteen (14) copies of brief of the Borough of Conshohocken  
regarding the captioned matter.

I hereby certify that three (3) copies of said brief are  
being served this day on each party of record.

Very truly yours,



Walter Phipps, Jr.

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cc. with 3 copies of brief, to  
Lionel B. Gumnit, Esq., Legal Bureau, Penn DOT, Harrisburg  
Edward F. Kane, Esq., 522 Swede St., Norristown, Pa. 19407  
Joel E. Mazor, Esq., Reading Company, Reading Terminal,  
Philadelphia, Pa. 19107

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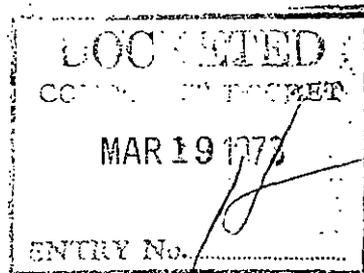
Department of Transportation of the Commonwealth  
of Pennsylvania vs. Reading Company, Borough of  
Conshohocken, Borough of West Conshohocken and  
County of Montgomery

COMPLAINT DOCKET NO. 19707

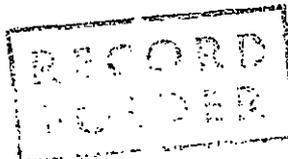
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BRIEF OF RESPONDENT  
BOROUGH OF CONSHOHOCKEN

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Walter Phipps, Jr., Esq.  
312 Fayette Street  
Conshohocken, Pa. 19428



Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Department of Transportation	:	
of the Commonwealth of Pennsylvania	:	Complaint Docket
vs.	:	
Reading Company, Borough of	:	No. 19707 1972
Conshohocken, Borough of West	:	
Conshohocken and County of	:	
Montgomery	:	

BRIEF OF RESPONDENT BOROUGH OF CONSHOHOCKEN

STATEMENT OF CASE

The Pennsylvania Department of Transportation filed this Complaint alleging that the Matsonford Bridge is in a state of disrepair and requires rehabilitation in accordance with a plan and estimate, and asking the Commission to order the parties responsible for said maintenance to bear their respective shares of the cost thereof in accordance with allocation thereof made by the Commission in its order issued December 13, 1937, at C.11279.

STATEMENT OF QUESTIONS INVOLVED

1. Under the Complaint, is it necessary for the Commission to order the rehabilitation of the East Ramp?

2. Is the work to be done on the East Ramp properly considered to be maintained as intended by the Commission order of December 13, 1967?

3. Should the Borough of Conshohocken be responsible for the rehabilitation of the East Ramp when its present condition was caused by factors beyond its control, to wit, increased volume and weight of traffic using facility?

#### REQUESTED FINDINGS OF FACT

1. That the Pennsylvania Department of Transportation is willing to delete the repair of the East Ramp from its Complaint and rehabilitate the main bridge without the East Ramp being rehabilitated. Notes p. 9 and 27.

2. That the work required to be done on the East Ramp is not ordinary maintenance but rehabilitation or major repair. Notes p. 28.

3. That the bridge receives a large volume of traffic going to and from the Schuylkill Expressway and Pennsylvania Turnpike.

4. That the present deterioration of the East Ramp was caused by the increased volume and weight of traffic upon the structure. Notes p. 27 and 49.

5. That the East Ramp is of little value to the Borough of Conshohocken as a local street. Notes p. 67 and 68.

## SUMMARY OF ARGUMENT

The Pennsylvania Department of Transportation is willing to delete the repair of the East Ramp from its Complaint. There is no imminent public danger arising from the condition of the East Ramp. The work to be done on the East Ramp is rehabilitation and reconstruction and not the maintenance intended by the Commission in its Order of December 13, 1937. Since the entry of the 1937 Order, the bridge has increased from two lanes to four lanes, the Schuylkill Expressway and the Pennsylvania Turnpike have been built, and the State has permitted increased truck weights. These changes in circumstances warrant the Commission in shifting to the Commonwealth the Borough's prior share of the maintenance responsibility.

## ARGUMENT

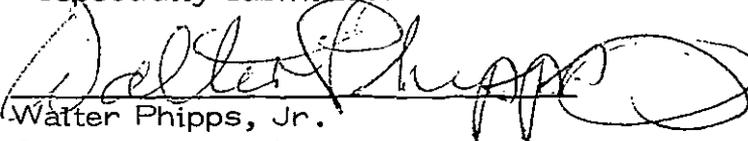
The Commission should not impose a broader or more onerous order on respondents than complainant seeks. The Commonwealth has testified that it is willing to delete from its Complaint the portions thereof pertaining, inter alia, to the East Ramp. No credible evidence was adduced that the East Ramp is in imminent need of reconstruction or poses a present public danger.

There is no testimony that the Borough of Conshohocken has not performed routine maintenance. The work allegedly required to be done on the East Ramp is not routine or ordinary maintenance. The structure is wearing out and some day will have to be replaced.

The bridge was not built for the benefit of the Borough. Will the Borough have to reconstruct the Ramp when and if a new bridge is built? The Ramp is of little value to the Borough but does serve as a bypass for regional traffic passing through the Borough to and from the Schuylkill Expressway and Turnpike. Reconstruction and rehabilitation of the magnitude suggested is not embraced within the maintenance responsibilities thrust upon the Borough by the Commission Order of 1937.

Since said Order assigning maintenance responsibility was imposed, the Schuylkill Expressway and Pennsylvania Turnpike have been built and the bridge has become a regional traffic artery. It now has twice as many traffic lanes and serves more than 30,000 vehicles daily. It can hardly be considered a local bridge. Although the Examiner would not permit testimony regarding traffic studies, it is obvious that the East Ramp has also been subjected to increased through traffic seeking to avoid some of the congestion on the bridge or to find a shortcut. These changed circumstances justify the Commission in shifting to the Pennsylvania Department of Highways the responsibility for the reconstruction and future maintenance of the East Ramp when and if such reconstruction is deemed necessary.

Respectfully submitted:

  
Walter Phipps, Jr.  
Solicitor to the Borough of  
Conshohocken



# READING COMPANY

RICHARDSON DILWORTH AND ANDREW L. LEWIS, JR., TRUSTEES

LAW DEPARTMENT

READING TERMINAL, PHILADELPHIA, PA. 19104

JOEL E. MAZOR  
B. DAVID SIGMAN  
JOSEPH M. O'MALLEY  
ASSISTANT GENERAL ATTORNEYS

ALFRED W. HESSE, JR.  
VICE PRESIDENT AND GENERAL COUNSEL  
LOCKWOOD W. FOGG, JR.  
GENERAL ATTORNEY

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WILLIAM C. JAMOUNEAU  
ATTORNEY  
JACK J. BERNSTEIN  
CLAIMS ATTORNEY

January 15, 1973  
File: G-2294-V2

Complaint of Department of Transportation of the Commonwealth of Pennsylvania v. Reading Company, Debtor, Borough of Conshohocken, Borough of West Conshohocken and County of Montgomery.  
Complaint Docket No. 19707

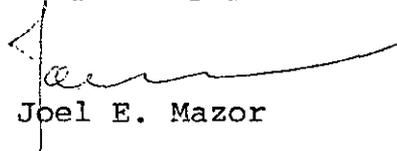
Mr. Will Ketner, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, Pennsylvania 17120

Dear Sir:

Enclosed for filing with your Commission are original and fourteen (14) copies of brief of Reading Company, Debtor, regarding the captioned matter.

I hereby certify that three (3) copies of said brief are being served this day on each party of record.

Very truly yours,

  
Joel E. Mazor

JEM:mln  
Encs.

cc, with 3 copies of brief, to:  
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Before the

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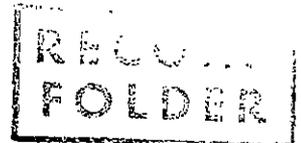
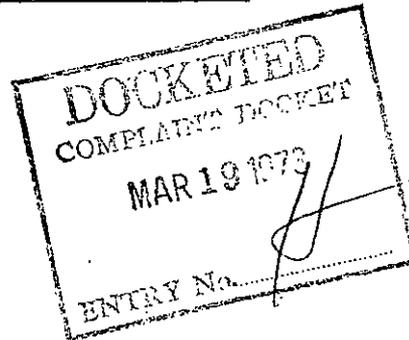
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of the Commonwealth of Pennsylvania v.  
Reading Company, Debtor, Borough of Consho-  
hocken, Borough of West Conshohocken and  
County of Montgomery.

COMPLAINT DOCKET NO. 19707

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BRIEF FOR READING COMPANY, DEBTOR

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Joel E. Mazor  
415 Reading Terminal  
Philadelphia, Pa. 19107

Attorney for Debtor

January 15, 1973.

Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

---

In re:

Complaint of Department of :  
Transportation of the Commonwealth of : COMPLAINT DOCKET  
Pennsylvania v. Reading Company, Debtor, :  
Borough of Conshohocken, Borough of West : NO. 19707 1972  
Conshohocken and County of Montgomery. :

BRIEF FOR READING COMPANY, DEBTOR

1. HISTORY OF THE CASE

State Highway Route 46140 in Montgomery County is carried on a 10-span concrete arch bridge over and above grade of tracks of Reading Company, Debtor, on the east and west sides of the Schuylkill River, as well as over the river, connecting Ford Street in West Conshohocken with Fayette Street in Conshohocken.

The bridge was constructed in 1920 (N.T. 5\*) pursuant to Application Dockets 2581 and 2582 before the then Public Service Commission, and maintenance responsibility was solely that of Montgomery County until the Public Service Commission's order of December 13, 1937 at Complaint Docket 11279. By this order, Reading Company was charged with maintenance of the two end spans over its tracks, including supporting abutments, sidewalk and curb on the superstructure, excluding supporting piers and roadway surface, the three

---

\* References are to pages in the official transcript.

stairways leading from the bridge to the station, the Forrest Street ramp, including the bridge carrying the ramp over the canal and the vehicular ramp leading from the main bridge to the station and the mill of the Merion Worsted Company.

Except for the Fayette Street approach, exclusive of paving and the Mill Street vehicular ramp to the bridge, including the roadway paving, and curb and sidewalk on the two approaches connecting the bridge highway with Front and Ford Streets, the balance of maintenance was imposed on the then Highway Department.

In September of 1972, the Department of Transportation filed the instant complaint alleging the structure to be in a state of disrepair and attached proposed plans for repairs "necessary to insure the life of the subject structure."

Formal hearing was held December 20, 1972, and parties reserved the right to file briefs.

## II. STATEMENT OF QUESTIONS INVOLVED

a) Is the bridge in such a state of disrepair that all the work proposed by Penn DOT needs to be done?

b) How are costs of doing whatever work is necessary to be borne?

c) Should not Reading Company have been permitted to show the volume of traffic using the ramp and the destination of such traffic?

d) Should not Reading Company have been allowed to request change in maintenance responsibility for portions of the bridge for which Reading Company is now responsible?

### III. ARGUMENT

a) Even the complainant in this case, Penn DOT, conceded that all of the work proposed was not necessary. Their witness indicated a willingness to delete repairs to the west ramp, east ramp, Forrest Street ramp, east stairway and removal of west stairway (N.T. 9). The deletion of these items reduced estimated costs by \$37,237 (N.T. 15). Penn DOT witness also conceded that the Department's Bridge Engineer at District 6-0 had stated at the field conference that the bridge was in no danger of imminent collapse (N.T. 13) but no estimate could be given as to when such danger would be imminent. And yet, the complainant proposes repairs in the total amount of \$655,533.50, with the portion allegedly assignable to Reading Company at \$166,056.50. It would seem to us that before making such an expenditure far more investigation ought to be made into the structural condition of the bridge and the causes of whatever deterioration has occurred. It is quite obvious that everything proposed need not now be done in view of complainant's own admission that there is no imminent danger of collapse.

b) Reading Company's witness stated that in his

opinion, the chief causes of deterioration, if any, was salting of the road, blocking of the scuppers and volume and class of traffic using the bridge. Penn DOT witness blamed the conditions on lack of preventive maintenance. While we can find no record of original vehicular traffic counts on the bridge, there is little doubt that the present count of 30,260 vehicles per day (N.T. 4) is a substantial increase in activity, especially considering the construction of the Schuylkill Expressway and its Conshohocken Interchange. There is also little doubt from the record and from the pictures introduced by Reading Company that a large number of heavy trucks constitute a portion of the daily traffic. Nothing in the record indicates any activity on the part of the railroad that contributed to the present condition of the structure. There can be little doubt, based on the record and on physical examination of the structure, that the volume of traffic, the effect of salting and blocking of scuppers (none of which was done by Reading) are the major causes of whatever the Commission decides needs to be done. In view of this, the major portion of cost of repairs ordered should be borne by parties other than Reading Company.

c) Reading Company attempted to introduce into the record a count of the traffic using the ramp leading to its station and the destination of such traffic (N.T. 53). The examiner, on objection from Penn DOT, refused to permit the

testimony. We submit this is error, since such testimony was offered in an effort to persuade the Commission to allocate costs against parties other than Reading. Reading Company's Answer filed in this proceeding requested the Commission to conduct such hearings that would "determine the cause of whatever deterioration has occurred to aid the Commission in allocating costs and to consider reassigning maintenance responsibility".

The hearing notice of the Commission suggested each party in interest submit testimony and exhibits to those issues raised by complainant, with the understanding that the Commission may "take jurisdiction over any desired portion of the crossing, the approaches, and all matters pertinent thereto."

The traffic count offered was certainly a matter pertinent to the hearing, and should have been allowed.

d) Reading Company offered to introduce testimony asking the Commission to change future maintenance responsibility (N.T. 54). This was disallowed. It is respectfully submitted that such testimony, in view of Reading Company's Answer above quoted, and the purpose of the hearing, as above set forth, made such a request admissable as part of the hearing.

In addition, the Act of May 28, 1937, P.L. 1053, Art. X §1007, (66 P.S. 1397) indicates the Commission may,

at any time after notice and after opportunity to be heard, rescind or amend any order made by it. It is submitted that the Answer of Reading Company and the hearing notice sent by the Commission, constituted such notice as required and all parties being present, Reading had a right to be heard on its request to change the December 13, 1937 order with respect to maintenance. It was reversible error to exclude such testimony.

#### IV. CONCLUSION

For all the reasons above stated it is respectfully submitted that all the work proposed by Penn DOT has not been proved to be necessary and the Commission should carefully consider the entire record in determining what needs to be done; that Commission should consider the entire record and the causes of whatever deterioration does exist in allocating costs and that the record should be reopened to receive the testimony offered by Reading Company that was excluded.

Respectfully submitted,

  
Joel E. Mazor

Attorney for Reading Company,  
Debtor.

Philadelphia, Pa.

January 15, 1973.

LAW OFFICES

BEAN, DEANGELIS, KAUFMAN & KANE, P.C.

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ROBERT A. BACINE  
FREDERICK W. MCBRIEN III  
RONALD J. PSARIS  
JOHN A. LORD

January 19, 1973

Mr. Will Ketner, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, Pennsylvania 17120

Re: Department of Transportation of the Commonwealth  
of Pennsylvania vs. Reading Company, Borough of  
Conshohocken, Borough of West Conshohocken and  
County of Montgomery  
Complaint Docket No. 19707

Dear Sir:

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EDWARD F. KANE

EFK/nd  
enc.

cc: with 3 copies of brief to  
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Walter Phipps, Jr., Esq., 312 Fayette Street, Conshohocken, Pa.  
Joel E. Mazor, Esq., Reading Company, Reading Terminal,  
Philadelphia, Pa. 19107

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMPLAINT DOCKET NO. 19707

DEPARTMENT OF TRANSPORTATION

VS.

READING COMPANY, ET AL

BRIEF OF BOROUGH OF WEST CONSHOHOCKEN

QUESTION PRESENTED

WHETHER THE BOROUGH OF WEST CONSHOHOCKEN IS RESPONSIBLE FOR THE MAINTENANCE OF THE CONCRETE CURBS AND SIDEWALKS FOR A DISTANCE OF APPROXIMATELY 129 FEET WEST OF THE WEST ABUTMENT AS SHOWN ON SHEET NUMBER 1 OF EXHIBIT NUMBER 1?

ARGUMENT

The Department of Transportation relies upon the Order of the Pennsylvania Public Utility Commission, dated December 13, 1937, in which the Commission ordered the Borough of West Conshohocken to maintain the concrete curbs and sidewalks on the two approaches in said Borough connecting the highway on the bridge with Front Street and Ford Street.

At the hearing, the question arose as to what the Public Utility Commission contemplated when it referred to the "approaches". It is the contention of the Borough of West Conshohocken that the area of responsibility being charged to the Borough by the Department of Transportation is part of the bridge rather than the approach to the bridge from West Conshohocken.

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The Borough of West Conshohocken with its limited budget is hardly in a position to sustain the financial burden attempted to be imposed upon it by the Department of Transportation, namely, over Six Thousand (\$6,000.00) Dollars. This is why it is most important for the Commission to determine exactly what was contemplated by the Public Utility Commission in 1937 when the responsibility of the Borough of West Conshohocken was delineated.

The Department's witness testified at the hearing that the approaches referred to in the Commission's Order of 1937 included all curbs and sidewalks west of the center line of the west abutment which is immediately adjacent to Pier No. 1 of Span No. 1. This involves a distance of some 129 feet which the Department claims can in no way be considered part of the bridge.

If the aforementioned 129 feet west of the middle line of the west abutment is considered part of the bridge, then obviously the Borough of West Conshohocken has no obligation at this time.

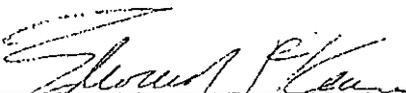
The question should be resolved in favor of the Borough of West Conshohocken for two reasons. First, the Commission in its Order of 1937 specifically stated that the length of the bridge was approximately 1,342 feet. The Department of Transportation's expert witness contradicted this finding and stated that the bridge was only 1,187 feet in length claiming that the Commission was in error when it included the areas west and east of the abutments in defining the overall length of the bridge. However, the fact does remain that the area west of the west abutment must be included in order to compute an overall length of 1,342 feet.

Secondly, a plan of the bridge which was made in 1919 by B. H. Davis and which was identified by the Department's expert witness which plan was entitled "Main Bridge" showed the area in question as being part of the bridge and did not attempt to delineate it as an approach rather than part of the bridge itself. *NT-pg. 73*

The question then is what did the Commission consider as the approaches to the bridge from the Borough of West Conshohocken. The Department's expert witness was unable to explain why the Commission referred to "two" approaches in the Order of 1937. To the Borough of West Conshohocken, however, it appears quite obvious that the Commission was referring to the sidewalks and curbs on both Ford Street and Front Street leading to that point on the bridge which is 129 feet west of the center line of the west abutment. It is not contended that these curbs and sidewalks are in need of repair at this time and, in fact, they are not.

In addition to the above arguments, the arguments of the Reading Company and the Borough of Conshohocken with respect to the necessity of the work and the responsibility for the cause of the damage is hereby adopted by the Borough of West Conshohocken.

RESPECTFULLY SUBMITTED:

  
EDWARD F. KANE  
Solicitor for Borough of West  
Conshohocken

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Public Utility Commission

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DEPARTMENT OF TRANSPORTATION :  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA, :  
COMPLAINANT : Complaint Docket  
V. : No. 19707  
READING COMPANY, BOROUGH OF :  
CONSHOHOCKEN, BOROUGH OF WEST :  
CONSHOHOCKEN AND COUNTY OF :  
MONTGOMERY, :  
RESPONDENTS

Brief of Staff of Pennsylvania Public Utility Commission

Candace N. Kreiger  
Assistant Counsel

For Staff of Pennsylvania Public  
Utility Commission

North Office Building  
P.O. Box 3265  
Harrisburg, Pennsylvania 17120

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Citations . . . . .	ii
Questions Presented . . . . .	1
Statement of the Case. . . . .	2
Nature of the Case. . . . .	2
Present Matter. . . . .	3
Abstract of Evidence . . . . .	6
Summary of Pertinent Testimony. . . . .	7
Summary of Argument. . . . .	16
Argument . . . . .	18
A. THE P.U.C. HAS EXCLUSIVE JURISDICTION AND POWER OVER PUBLIC RAIL-HIGHWAY CROSSINGS . . . . .	18
B. ACT 120 DOES NOT AFFECT IN ANY MANNER THE POWERS AND DUTIES OF THE P.U.C.. . . . .	21
C. P.U.C. PROJECTS ARE NOT CAPITAL PROJECTS WITHIN THE CONTEXT OF THE "CAPITAL FACILITIES DEBT ENABLING ACT" . . . . .	25
D. EVEN ASSUMING ARGUENDO THAT THE CAPITAL FACILITIES DEBT ENABLING ACT INCLUDES P.U.C. ORDERED PROJECTS WITHIN THE CATEGORY OF "CAPITAL PROJECTS", THE FUNDS FOR THE DESIGN OF THE MATSONFORD BRIDGE PROJECT DO NOT REQUIRE LEGISLATIVE APPROVAL . . . . .	31
Conclusion . . . . .	34
Proposed Findings and Conclusions. . . . .	35
Findings of Fact. . . . .	35
Conclusions of Law. . . . .	40

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Borough of Bridgewater v. Pennsylvania Public Utility Commission</u> , 181 Pa. Super. Ct. 84, 124 A.2d 165 (1956) . . .	22,27,30
<u>Department of Highways v. Penna. P.U.C.</u> , 141 Pa. Super. Ct. 376, 14 A.2d 611 (1940) . . . . .	27
<u>Department of Highways v. Pa. P.U.C.</u> , 198 Pa. Super. Ct. 405 (1971) . . . . .	19
<u>Department of Transportation v. Pennsylvania Public Utility Commission</u> , 21 Pa. Commw. Ct. 407 (1975) . . . . .	19
<u>Department of Transportation v. Pennsylvania Public Utility Commission</u> , 21 Pa. Commw. Ct. 415 (1975) . . . . .	19
<u>Goodman v. Kennedy</u> , 459 Pa. 313, 329 A.2d 224 (1974) . . . . .	29
<u>Pennsylvania Railroad Co. v. Pa. P.U.C.</u> , 136 Pa. Super. Ct. 1 (1939) . . . . .	19
<u>Pittsburgh Railways Co. v. Pa. P.U.C.</u> , 198 Pa. Super Ct. 415 (1962) . . . . .	19
<u>Somerset County v. Pennsylvania Public Utility Commission</u> , 132 Pa. Super. Ct. 585, 1 A.2d 806 (1938) . . . . .	22,27,30
 <u>CONSTITUTION</u>	
Pennsylvania Constitution of 1968,	
Article VIII, Section 7(a), clause 4. . . . .	25,38
 <u>STATUTES - PENNSYLVANIA</u>	
Act 120, Act of May 6, 1970, P.L. 356 . . . . .	8,10,16,21,22, 23,40
§22 . . . . .	16,21,27
Administrative Code of 1929, Act of April 9, 1929, P.L. 177 . . . . .	27
§§2001-2009, 71 P.S. §§511-519. . . . .	27
Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended . . . . .	16,25,38
§2(1), 72 P.S. §3920.2(1) . . . . .	17,25,26,28,29, 31,32,38
Public Service Company Law, Act of July 26, 1913, P.L. 1374, as amended . . . . .	26
§12 . . . . .	26,30

	<u>PAGE</u>
Public Utility Law, Act of May 28, 1937,	
P.L. 1053, as amended . . . . .	18
§409, 66 P.S. §1179 . . . . .	16,18,19,22,26, 27,29,30,43
§411, 66 P.S. §1181 . . . . .	16,18,19,22,26, 27,29,30,40
§902, 66 P.S. §1342 . . . . .	19,40
§904, 66 P.S. §1344 . . . . .	4
State Highway and Bridge Authority Act, Act of April 18, 1949,	
P.L. 604. . . . .	27
§4, 36 P.S. §3604 . . . . .	27
Statutory Construction Act, Act of May 28, 1937,	
P.L. 1019 . . . . .	29
§51, 46 P.S. §551, (1 Pa. C.S.A. §1921) . . . . .	30
§52(1), 46 P.S. §552(1), (1 Pa. C.S.A. §1922) . . . . .	29
 <u>Other Authorities</u>	
1970 Senate Journal 1117 . . . . .	21
Governor's Executive 1977-78 Budget, pgs. 231-264 . . . . .	31

QUESTIONS PRESENTED

1. Whether P.U.C. ordered projects are required to be placed on the Commonwealth's twelve year highway program?
  
2. Whether funds for the design of the Matsonford Bridge require approval by the Legislature on a Capital Budget?

STATEMENT OF THE CASE

Nature Of The Case

This proceeding was initiated on September 27, 1972 when the Department of Transportation of the Commonwealth of Pennsylvania (PennDOT) filed a Complaint at C. 19707 with the Pennsylvania Public Utility Commission (P.U.C.). PennDOT's Complaint at Paragraph No. 4 alleged, inter alia, that the Matsonford Bridge is in a state of disrepair; that PennDOT has prepared a plan to repair the crossing structure; and that said repair is necessary to insure the life of the structure.

Answers to PennDOT's Complaint were filed by each party respondent, with the exception of Montgomery County.

A field conference and investigation was conducted by the P.U.C. at the site of the subject crossing.

Formal hearing upon all matters and things involved in this proceeding was held before the P.U.C. on December 20, 1972.

On January 15, 1974 the P.U.C. issued an order directing, inter alia, that PennDOT's repair plan be approved; that PennDOT, at its initial cost and expense, undertake repairs and rehabilitation in accordance therewith; and that further hearing be held regarding the matter of cost allocation and future maintenance obligations.

On December 16, 1974 PennDOT filed a Petition for Modification of Order alleging, inter alia, that rehabilitation of the Matsonford Bridge is no longer economically feasible and that the structure should be reconstructed. PennDOT specifically requested

by its petition that the P.U.C. modify its January 15, 1974 order to require PennDOT within twelve (12) months of the service date of the modified Order to prepare and submit to the P.U.C. a detailed plan and estimate of costs providing for the reconstruction of the Matsonford Bridge.

The P.U.C. at Public Meeting held February 24, 1975 directed that PennDOT's petition be more fully explored on the record, and public hearing upon the necessity of reconstruction was held on April 15, 1975.

Following the April 15, 1975 hearing the P.U.C., acting upon the specific request of PennDOT, issued an order on October 21, 1975, approving PennDOT's petition for modification of the scope of the project and directing, inter alia, that PennDOT within twelve (12) months of the service of the modified Order prepare and submit to the P.U.C. and each party of record a detailed construction plan and cost estimate providing for reconstruction of the Matsonford Bridge.

#### Present Matter

This matter is currently before the P.U.C. upon two petitions:

1. A Letter-Petition filed on November 12, 1976 by the Borough of Conshohocken praying for enforcement of the October 21, 1975 order against PennDOT; and
2. A petition filed by PennDOT on December 16, 1976 praying for modification of the October 21, 1975 order, in the nature of a time extension.

The Borough by its petition avers that it has not received the detailed construction plan and cost estimate from PennDOT as required by the October 21, 1975 order and further that the structure is sorely in need of repairs to make it safe for the traveling public. Accordingly, the Borough prays that the P.U.C. request the Attorney General of the Commonwealth of Pennsylvania, under Section 904 of the Public Utility Law, as amended, 66 P.S. §1344, enforce the October 21, 1975 order against PennDOT; specifically, Paragraph 3 requiring preparation of a detailed construction plan and estimate of costs and Paragraph 5 requiring PennDOT to make appropriate repairs to the Matsonford Bridge during the time the plan and cost estimate are being prepared. On February 9, 1977 PennDOT filed an Answer in opposition to the Borough's Letter-Petition.

PennDOT by its petition alleges that because of the present financial situation within PennDOT, the Matsonford Bridge project is not on the Commonwealth's twelve year highway program nor on an approved Capital Budget, and that, therefore, PennDOT is not financially able to proceed with the detailed construction plan and cost estimate in accordance with the October 21, 1975 order. PennDOT submits that the plan and estimate can be completed within twelve (12) months from the date the design for the Matsonford Bridge is approved by the Legislature on a Capital Budget and requests that the P.U.C. modify Paragraph 3 of the October 21, 1975 order to extend the time accordingly.

At the Public Meeting held January 18, 1977 the P.U.C. directed that the Borough's Letter-Petition for Enforcement and PennDOT's Petition for Modification be set for hearing so as to afford all parties of record an opportunity to submit testimony on the issues raised therein. On January 25, 1977 the Staff of the P.U.C. (Staff) filed Notice of its Intent to Participate in this proceeding, pursuant to authority contained in the Act of October 7, 1976, Act No. 216, P.L. \_\_\_\_\_, as amended, 66 P.S. §§1101, et. seq..

On March 10, 1977 further hearing was held on the Borough's Letter-Petition for Enforcement and on PennDOT's Petition for Modification.

ABSTRACT OF EVIDENCE

At the March 10, 1977 hearing, Counsel for PennDOT opened by stating the basis for PennDOT's current petition: modification is requested because due to the present financial condition within PennDOT, the Matsonford Bridge project is not on the Commonwealth's twelve year highway program or an approved Capital Budget; there are no funds under those programs to proceed with the project and, therefore, PennDOT has been unable to complete a detailed construction plan and cost estimate as ordered by the P.U.C. (T. 4, 5).

PennDOT presented testimony through two witnesses: James B. Chiles, PennDOT's Director of Economic Research and Programming, and Paul C. Peterson, District Bridge Engineer for PennDOT's District 6-0.

Mr. Chiles testified regarding the Commonwealth's twelve year highway program and the Capital Budget; explained why the Matsonford Bridge project is on neither; and described PennDOT's policies with respect to budgeting P.U.C. projects (T. 5-20; 28-64).

Mr. Peterson was qualified by Counsel for PennDOT who then deferred to the Staff for questioning, since Mr. Peterson had been subpoenaed (T. 64, 65). Upon cross-examination Mr. Peterson testified regarding the status and cost of the detailed construction plan, as well as the present safety condition of the structure (T. 65-89).

Three PennDOT Exhibits were admitted into the record: PennDOT Exhibit No. 3, Senate Bill No. 59, Act 42 (T. 9); PennDOT Exhibit No. 4, "Capital Budget Highway Project Estimate - 1976 - 1977", Page 24 (T. 12); and PennDOT Exhibit No. 5, Letter to members of State Transportation Commission from William A. Sherlock, dated September 13, 1976. (T. 16).

The Borough of Conshohocken called one witness: Frank Moran, Engineer to the Borough of Conshohocken. Mr. Moran testified to the present safety condition of the Matsonford Bridge (T. 90-103).

A statement was made on the record by Representative Anthony J. Scirica, Representative of the 148th District, regarding his experience with the Matsonford Bridge project (T. 20-27).

#### Summary of Pertinent Testimony

James B. Chiles testified that he is employed by PennDOT as Director of Economic Research and Programming, which entails analyzing projects and developing a twelve year transportation program for the Commonwealth (T. 6).

Mr. Chiles explained that development of a full transportation program for the Commonwealth was begun in April of 1976 (T. 6); that the State Transportation Commission (Transportation Commission) felt there should be local input into the program (T. 7); that the program which was completed on October 6, 1976 did not include construction of the Matsonford Bridge, but that just

prior to the October 6, 1976, program the Matsonford Bridge had been on the twelve year highway program for reconstruction or total replacement at a cost of approximately five million dollars (T. 7-8). A transportation improvement program is required to be developed every two years on even numbered years in accordance with Act 120 of the Session of 1970 (Act 120) (T. 8).

Mr. Chiles testified that the Matsonford Bridge project was on an approved Capital Budget for the fiscal year 1972-73 as a bridge rehabilitation at a cost of approximately \$300,000 in construction (T. 8, 9; PennDOT Exhibit No. 3); that authority for a rehabilitation project remains under Act No. 42, the Capital Budget Act for the Fiscal Year 1972-1973 (T. 10); and that due to inflation PennDOT has exhausted the obligation authority contained within Act No. 42 (T. 10).

The nature of the Matsonford Bridge project has been changed, at the request of the District Engineer at St. David's, from a rehabilitation project to complete replacement of the structure, therefore, funds authorized for rehabilitation cannot be used for the present project (T. 10). Funds for the current reconstruction project were never approved on a Capital Budget, even though reconstruction of the Matsonford Bridge was on a proposed budget for 1976-77 (T. 11-15; PennDOT Exhibit No. 4).

PennDOT's policies dictate that only those projects on a twelve year highway program can be budgeted (T. 15).

Mr. Chiles described the role of the Transportation Commission in the development of the twelve year highway program. (T. 15-19) The Transportation Commission recommends the program

and adopts the projects for the Commonwealth (T. 16). The Matsonford Bridge project was submitted to the Transportation Commission by PennDOT for inclusion in the program (T. 16; PennDOT Exhibit No. 5), and one of the Commissioners on the Transportation Commission, Representative Beren, recommended another project be added to the program instead of the Matsonford Bridge project (T. 18-19). The Commission was aware that the Matsonford Bridge project was a P.U.C. ordered project; and the late Secretary Sherlock specifically pointed out to the Transportation Commission that the Matsonford Bridge project was a fine candidate (T. 19).

Mr. Chiles concluded his direct testimony by stating that PennDOT does not at this time have approved funds for the construction of the Matsonford Bridge (T. 19).

Mr. Chiles was asked by Staff upon cross-examination:

"Q. What are the priorities of the State Transportation Commission in their decision to include projects on their twelve year highway program or to approve discretionary funds for these projects?

"A. The priorities (sic) that were used were the local priorities." (Emphasis supplied) (T. 29-30)

Next, Mr. Chiles was asked whether PennDOT specifically indicated to the Commission that the Matsonford Bridge project was a P.U.C. project. In response thereto, he stated that the project carried with it the P.U.C. Complaint Docket number which is well known to the Transportation Commission (T. 31), and further that "Secretary Sherlock pointed out to the Commissioners that the Matsonford Bridge was an excellent project . . ." (T. 32).

Mr. Chiles admitted that he does not believe Secretary Sherlock specifically said that the Matsonford Bridge project is a P.U.C. project (T. 32).

Mr. Chiles further testified, upon cross-examination, that PennDOT in accordance with its departmental policy to carry forth Act 120, cannot on its own submit projects to the Legislature for approval on a Capital Budget; cannot overturn the Transportation Commission as to what projects are placed on a twelve year highway program; and could hardly insist that a P.U.C. project be submitted to the Legislature if not on a twelve year highway program. (T. 34-36). PennDOT submits P.U.C. projects to the Planning Commission and Transportation Commission just as it does its own projects (T. 34-36; T. 49).

When asked what steps PennDOT takes if P.U.C. projects are not included on a twelve year highway program, Mr. Chiles testified that in accordance with the policy instituted by the late Secretary Sherlock no further work is done on the project. (T. 38). Mr. Chiles was also asked whether it would be possible to use money from the motor license fund or from PennDOT's operating budget for construction projects (T. 43). He answered: "Operating funds are normally for the operation in the general government maintenance type facilities, issuing, buying licenses and things of that nature." (T. 44).

Counsel for P.U.C. Staff asked Mr. Chiles when PennDOT was aware that no money was available for the Matsonford Bridge

project (T. 38). He responded that at no time was money not available since the Montgomery County allocation for the twelve year time period was over forty million dollars and that the resources are still available (T. 48). Mr. Chiles acknowledged that a twelve year highway program can be modified at any time, that is, a certain program can be deleted and another added (T. 61-63).

Mr. Paul C. Peterson was called by PennDOT and testified that he is PennDOT's District Bridge Engineer for District 6-0 which comprises Philadelphia and the four surrounding counties, including Montgomery County (T. 64). Upon cross-examination Mr. Peterson testified that the plans for replacement of the main structure are about 50 per cent complete (T. 65). Mr. Peterson was asked by Counsel for Staff:

"Q. Do you know, Mr. Peterson, where the funds came from to complete 50 per cent of the plans?

"A. No.

"Q. You do not know?

"A. I do not know.

"Q. But you do know you had the money to do it?

"A. I know that the money was charged to the project and there was no objection made -- raised during the time the design work was taking place."  
(T. 67)

Mr. Peterson further acknowledged that before PennDOT starts the design of a project it is necessary for him to file

papers in Harrisburg for accounting purposes. (T. 67). He was aware that the nature of the project had changed from rehabilitation to reconstruction and had, in fact, advised PennDOT to file a petition requesting modification of the nature of the project. This petition was filed on November 16, 1974 (T. 68).

Mr. Peterson, when asked the amount of time he anticipated would be necessary to complete the remaining 50 per cent of the detailed construction plan and cost estimate, responded that it would be about a year (T. 70-72). This approximation was based on several assumptions: (1) that there will be no difference with respect to the ramps; (2) that the project proposed and completed will not include ramps at either Conshohocken or West Conshohocken; (3) that there will be a lot of engineering involved in providing alternate access in West Conshohocken or the Conshohocken side to those points at track level; (4) that there will be a lot of engineering involved in providing alternate accommodations to pedestrians presently using the bridge; and (5) that there will be no argument from the environmentalists (T. 71-72). He further testified that it is reasonable to assume none of the above will occur (T. 72).

When asked why it is still taking twelve months to complete plans which are already 50 per cent complete, Mr. Peterson pointed out that there have been layoffs in PennDOT and that he currently has a larger work load including other commitments involving the P.U.C. (T. 73). Further, a lot of work on the plans took place prior to the

April 1975 hearing on PennDOT's Petition for Modification of the scope of the project (T. 73).

Mr. Peterson was also questioned regarding the amount of money required to complete the remaining 50 per cent of the construction plans. He answered:

"Assuming all the things I assumed before with the twelve month estimate, I would assume seventy-five thousand dollars." (Emphasis supplied)

This figure represents the straight salaries of his staff and his colleagues who would be reviewing the plans (T. 75).

As to the present safety condition of the structure Mr. Peterson testified that it is safe for the present conditions on which it operates; that it was last inspected in April and December of 1976; and that since the greatest deterioration occurs in the winter he is anxious to thoroughly inspect the bridge this spring (T. 76).

When asked whether any significant deterioration had been noted at the December inspection he responded that there was increased deterioration but not enough to change the bridge to an unsafe condition. The deterioration is an ongoing phenomenon, however, and the bridge is not in a static condition (T. 77). Mr. Peterson does not feel reducing the posting of the structure would significantly preserve its life or have any value to the safe operation. If nothing is done in the future to remedy the condition of the structure, the sidewalks would have to be closed and then the bridge (T. 78).

Mr. Peterson admitted that he had testified at the last hearing that he did not want to close the bridge for construction

until the bridge nearby carrying the Blue Route over the river and railroad was ready to be used for a detour. He stated that while he has no first hand information, it is his understanding that that this would be ready in a year or eighteen months (T. 79).

Mr. Peterson stated that the sidewalks on the structure are rough and crumbled and that PennDOT does not intend to do any restoration or repairs to the sidewalks or curbs (T. 80). PennDOT is not in a position to make the sidewalk surface smooth (T. 82). There is no funding available for repair that has no value and might be detrimental by increasing the dead load of the bridge (T. 83); PennDOT will make reasonable attempts to repair serious holes in sidewalks as they open (T. 85).

Frank Moran was called by the Borough of Conshohocken and testified that he is a licensed engineer in Pennsylvania, employed by F. X. Ball Associated Inc. which holds the position of Engineer to the Borough of Conshohocken (T. 90-91).

Mr. Moran stated that he had made a visual inspection of the bridge on February 18, 1977 and rechecked the inspection March 9, 1977 (T. 91). He observed deteriorated sidewalks causing hazards to pedestrian traffic (T. 91, 96); curbs which are non-existent or deteriorated (T. 91, 96); inlets which cause bad traffic conditions (T. 91, 96-97); light standards knocked over and not repaired (T. 91); and parapets that are hazardous where the reinforcing is out (T. 91-92). He recommends that sidewalks be repaired, rather than closed, by repairing the curb and the sidewalk and cleaning away broken gunite or concrete poxy (T. 97-99).

Mr. Moran was unable to estimate the cost of such a repair or the amount of time it would take to make such repairs (T. 100).

SUMMARY OF ARGUMENT

THE PETITION OF PENNDOT SEEKING MODIFICATION OF THE P.U.C.'S OCTOBER 21, 1975 ORDER IN THIS CASE SHOULD BE DENIED.

I. PennDOT first contends that Act No. 120, Act of May 6, 1970, P.L. 356, the Act creating PennDOT, requires P.U.C. projects to be placed on the Commonwealth's twelve year highway program before such projects can be budgeted. Clearly, PennDOT has ignored Section 22 of Act 120 which specifically provides that nothing in said Act shall:

". . . affect in any manner the powers and duties of the Pennsylvania Public Utility Commission. . . "

Further, the P.U.C.'s authority to compel concerned parties to participate in rail-highway crossing projects is statutory. It is well established that Sections 409 and 411 of the Public Utility Law, as amended, 66 P.S. §§1179, 1181, vest in the P.U.C. exclusive jurisdiction and power over all matters pertaining to public railroad highway crossings within the Commonwealth of Pennsylvania.

II. Next, PennDOT contends that before it can proceed with the preparation of the detailed construction plan and cost estimate, funds for the design of the Matsonford Bridge must be approved by the Legislature on a Capital Budget. This allegation is made by PennDOT even though it completed 50 per cent of the plans with funds which were not approved by the Legislature. In addition, analysis of the Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §§3920.1, et seq., reveals that while capital

projects are carefully defined by Section 2 of the Act, nowhere is there any provision or intent expressed or to be implied that P.U.C. projects are "Capital" projects.

III. Finally, assuming arguendo that the Capital Facilities Debt Enabling Act includes P.U.C. ordered projects within the category of "Capital" projects, the design of the Matsonford Bridge project does not require legislative approval, since PennDOT estimates the plans can be completed for \$75,000. "Capital projects" are, among other things, projects with an estimated financial cost in excess of \$100,000. Section 2(1) of the Capital Facilities Debt Enabling Act, 72 P.S. §3920.2(1)..

Accordingly, PennDOT has failed to make out a case sufficient to warrant the relief requested.

ARGUMENT

A. THE P.U.C. HAS EXCLUSIVE JURISDICTION AND POWER  
OVER PUBLIC RAIL-HIGHWAY CROSSINGS

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Sections 409 and 411 of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended, 66 P.S. §§1179, 1181, vest exclusive jurisdiction and power in the P.U.C. to determine and prescribe by regulation or order the manner in which public rail-highway crossings may be constructed, altered, relocated and abolished and the manner and conditions under which such crossings shall be maintained operated and protected for the prevention of accidents and the promotion of public safety:

"Section 409 . . . (b) The Commission is hereby 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, or abolished, and the manner and conditions in or under which such crossing shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. . ."  
(Emphasis supplied).

"(c) Upon its own motion or upon complaint, the Commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order such crossing heretofore or hereafter constructed to be relocated or altered, or to be abolished upon such reasonable terms and conditions as shall be prescribed by the Commission. . . . The Commission may order the work of construction, relocation, alteration, protection or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth. . . ."  
(Emphasis supplied).

"Section 411 . . . (b) . . . The cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as hereinafter provided, by the public utilities or municipal corporations concerned, or by the Commonwealth in such proper proportions as the Commission may, after due notice and hearing determine, unless such proportions are mutually agreed upon and paid by the interested parties. . . ." (Emphasis supplied).

The exclusive and comprehensive jurisdiction and power conferred upon the P.U.C. under the aforesaid provisions of the Public Utility Law, 66 P.S. §§1179, 1181, relative to all public rail-highway crossing facilities within the Commonwealth, are well established:

Pennsylvania Railroad Co. v. Pa. P.U.C.,  
136 Pa. Super. Ct. 1, 4-5 (1939);

Pittsburgh Railways Co. v. Pa. P.U.C.,  
198 Pa. Super. Ct. 415, 424 (1962);

Department of Highways v. Pa. P.U.C.,  
198 Pa. Super. Ct. 405 (1971);

Department of Transportation v. Pennsylvania  
Public Utility Commission, 21 Pa. Commw.  
Ct. 407 (1975);

Department of Transportation v. Pennsylvania  
Public Utility Commission, 21 Pa. Commw.  
Ct. 415 (1975).

Section 902 of the Public Utility Law, 66 P.S. §1342, further provides:

". . . the Commission shall have full power and it shall be its duty, to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular provisions of this act, and the full intent thereof; . . . "

It is evident from the clear and unambiguous nature of these provisions that the General Assembly intended to delegate to the P.U.C. exclusive authority over public rail-highway crossings within the Commonwealth of Pennsylvania. Accordingly, the P.U.C. has exclusive power to entertain the instant complaint and to issue and enforce all necessary orders incidental thereto in fulfilling its statutory mandate of effectuating the prevention of accidents and the promotion of the safety of the public.

B. ACT 120 DOES NOT AFFECT IN ANY MANNER THE POWERS AND DUTIES OF THE P.U.C.

Act 120, Act of May 6, 1970, P.L. 356, creates the Department of Transportation and defines its powers, functions, and duties. The Pennsylvania General Assembly in enacting this legislation specifically and unequivocally excluded any intrusion upon the powers and duties of the P.U.C.

Section 22 of Act 120 provides:

"Nothing contained in this Act shall impair, suspend, contract, enlarge or extend or affect in any manner the powers and duties of the Pennsylvania Public Utility Commission or any authority created according to the provisions of the Metropolitan Transportation Authority's Act of 1963." (Emphasis supplied).

The legislative history of Act 120 clearly indicates that the General Assembly intended to protect the authority and integrity of the P.U.C. At page 1117 of the Senate Journal for 1970, the late Senator Frame in response to a question concerning the relationship of the P.U.C. to PennDOT responded as follows:

"[I]t has been the understanding of all of us who have been involved in the development of this legislation that the passage of [Act 120] . . . would in no way affect, diminish or enlarge the jurisdiction of the Public Utility Commission." (Emphasis supplied)

PennDOT contends that Act 120 requires P.U.C. projects to be placed on a 12 year highway program before such projects can be budgeted. (T. 15, 35, 36, 49). Such a requirement is obviously in derogation of P.U.C. authority and contravenes the express mandate of Act 120.

The P.U.C.'s authority to compel concerned parties to participate in rail-highway crossing projects is statutory. See: Sections 409 and 411 of the Public Utility Law, 66 P.S. §§1179, 1181. It is well established that pursuant to Sections 409 and 411 of the Public Utility Law, all matters pertaining to railroad crossings over highways are within the exclusive jurisdiction of the P.U.C. Somerset County v. Pennsylvania Public Utility Commission, 132 Pa. Super. Ct. 585, 1 A.2d 806 (1938); Borough of Bridgewater v. Pennsylvania Public Utility Commission, 181 Pa. Super. Ct. 84, 124 A.2d 165 (1956).

Once the P.U.C. has issued an order finding and determining that a party to a proceeding should perform work or contribute to the cost of a crossing project, that party must take all reasonable steps to comply with the P.U.C.'s order. A review of the record of the March 10, 1977 hearing leaves no doubt that PennDOT has not taken all reasonable steps to comply with the P.U.C.'s October 21, 1975 order.

Counsel for PennDOT, at the March 10, 1977 hearing, stated for the record that the department had been unable to complete the detailed construction plans and estimate as ordered by the P.U.C. because the Matsonford Bridge project is not on the Commonwealth's 12 year highway program or on an approved Capital Budget (T. 4-5).

Further, according to Mr. Chiles, PennDOT's Director of Economic Research & Programming, Act 120 requires that a transportation improvement program be developed every two years on even numbered years (T. 8). PennDOT's policies dictate that only those

projects on this program be budgeted, regardless of whether the project is one of PennDOT's highway projects or a P.U.C. ordered project (T. 15, 35-36, 49). On cross-examination by Commission Staff, Mr. Chiles acknowledged that PennDOT would not submit a P.U.C. project to the Legislature if not included on the highway program (T. 35-36), and also that according to the laws under which PennDOT operates, there is no way a P.U.C. project can be expedited faster than another project (T. 33, 39).

The record further reveals that P.U.C. projects are not even given priority in the development of the Commonwealth's 12 year highway program. In the instant case, the Pottstown Expressway project was included on the program instead of the Matsonford Bridge project, at the request of Representative Beren, a member of the Transportation Commission from Montgomery County (T. 24, 29, 30-34).

Mr. Chiles, in response to questions by Staff's Counsel, attempted to explain this by stating that PennDOT's policy is based on the provisions of Act 120, and that pursuant thereto PennDOT has no authority to overturn the Transportation Commission's decisions regarding which projects are placed on the 12 year highway program. He further testified that as he understands Act 120 PennDOT can hardly insist that a P.U.C. project be submitted to the Legislature if not on a 12 year program (T. 34, 35, 49).

Obviously, despite the clear mandate of the Legislature, that Act 120 not affect the powers and duties of the P.U.C., PennDOT has failed to proceed with the completion of a detailed construction

plan and cost estimates in compliance with the October 21, 1975 order. Instead, PennDOT has chosen to ignore its statutory obligation to take all reasonable steps to comply with the P.U.C.'s order, thereby jeopardizing the safety of the public by allowing the continued deterioration of the Matsonford Bridge. Accordingly, the Staff submits that PennDOT's current petition for modification, requesting a time extension until 12 months after the design funds for the Matsonford Bridge are approved by the Legislature on a Capital Budget, should be denied.

C. P.U.C. PROJECTS ARE NOT CAPITAL PROJECTS  
WITHIN THE CONTEXT OF THE "CAPITAL  
FACILITIES DEBT ENABLING ACT"

The Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §§3920.1, et seq., is the implementing legislation for the constitutional debt authorization provision contained in Article VIII, Section 7(a), clause (4), of the Constitution of Pennsylvania.

Section 7(a), clause (4) provides, in pertinent part:

"(4) Debt may be incurred without the approval of the electors for capital projects specifically itemized in a capital budget. . ."

Capital projects are defined in Section 2 of the Capital Facilities Debt Enabling Act (Act). Section 2 provides, in pertinent part, as follows:

"Capital project means and includes (i) any building, structure, facility, program or physical public betterment or improvement; or (ii) any land or rights in land; (iii) any furnishings, machinery apparatus or equipment for any public betterment or improvement; or (iv) any undertaking to construct, repair, renovate, improve, equip, furnish or acquire any of the foregoing, provided that the project is designated in the capital budget as a capital project, has an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand dollars (\$100,000), and shall include projects to be financed by the incurring of debt, such projects being separated into the following categories:

'Community College Projects,' . . .

'Highway Projects,' . . .

'Flood Control Projects,' . . .

- 'PIDA Projects,' . . .
- 'Site Development Projects,' . . .
- 'Public Improvement Projects,' . . .
- 'Transportation Assistance Projects,' . . .
- 'Other Capital Projects,' . . .

Analysis of the language of Section 2 of the Act clearly indicates that P.U.C. projects do not come within the parameters of the Act. First, the Act qualifies capital projects as those projects that meet longevity and cost requirements and "include projects to be financed by incurring of debt, such projects being separated into the following categories . . ." (Emphasis Supplied)

There follows this provision the enumeration of specific categories of projects. Significantly, there is no reference in the language of the Act to P.U.C. ordered railroad-highway crossing projects. Clearly, the General Assembly being cognizant of the financial implications of the thousands of rail-highway crossings within the Commonwealth, as indicated in both the Public Service Company Law of 1913 and the Public Utility Law of 1937, as amended,<sup>1</sup> would have included P.U.C. projects as one of the specific categories if it had intended such projects to be considered as Capital Projects subject to the provisions of the Act.

Further, analysis of the specifically enumerated categories of capital projects clearly demonstrates that P.U.C. projects are not included within the scope of any category. P.U.C. projects obviously do not fall within the categories of "Community College Projects",

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<sup>1</sup>/ Section 12 of the Public Service Company Law, Act of July 26, 1913, P.L. 1374; as amended.  
 Sections 409 and 411 of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended, 66 P.S. §§1179, 1181.

"Flood Control Projects", "PIDA Projects" (Pennsylvania Industrial Development Authority Projects), "Redevelopment Assistance Projects", "Site Development Projects", "Public Improvement Projects", or "Transportation Assistance Projects", as defined by the Act.

As to the remaining specific category, "Highway Projects":

1. "Highway Projects" are projects authorized under the State Highway & Bridge Authority Act, Act of April 18, 1949, P.L. 604, 36 P.S. §§3601 et seq.<sup>2</sup> P.U.C. railroad-highway crossing projects are clearly not contemplated or even alluded to in the language of said Act.<sup>3</sup> Moreover, the authorization for P.U.C. ordered railroad-highway crossing projects, as distinguished from PennDOT highway improvements, is derived from the exclusive authority set forth in Sections 409 and 411 of the Public Utility Law which governs each phase of a P.U.C. ordered project from initiation to construction and maintenance.

It is well-established that while the Legislature placed matters pertaining to the state highway system, its construction and maintenance, under the authority of PennDOT, such authority is subject to the limitation that where any highway is crossed by the facilities of a public utility, then matters pertaining to the crossing are subject to the exclusive jurisdiction of the P.U.C. Borough of Bridgewater v. Penna. P.U.C., supra.; Department of Highways v. Penna. P.U.C., 141 Pa. Super. Ct. 376, 14 A.2d 611 (1940); Somerset County v. Penna. P.U.C., supra. Additionally, Act 120, the Act creating PennDOT, specifically provides in Section 22 that nothing contained in said Act shall "affect in any manner the powers and duties of the P.U.C."

Clearly, then, the category termed "Highway Projects" does not encompass P.U.C. projects within its scope.

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<sup>2/</sup> Authority under the provisions of this Act has been transferred to PennDOT. See generally: The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, §§2001-2009 71 P.S. §§511-519, and Act 120, Act of May 6, 1970, P.L. 356.

<sup>3/</sup> See: Section 4 of the State Highway and Bridge Authority Act 36 P.S. §3604, which sets forth the purposes and powers of the Authority.

Last, the category "Other Capital Projects" is defined by the Act as follows:

4. "'Other Capital Projects' means and includes only that undertaking to equip and furnish those public improvement projects which are specifically enumerated under the heading of 'Other Capital Projects' in Subsection (d) of Section 3, Act of July 20, 1968 (Act No. 218), known and cited as the 'Capital Budget Act for the 1968-1969 Fiscal year.' Upon final completion of said undertaking as authorized by subsection (d) of Section 3 of such Act, no equipment or furnishing undertaking or any other undertaking or project shall be listed in any capital budget act for the fiscal year 1969-1970 or any fiscal year thereafter under the heading of 'Other Capital Projects' but the same shall be listed in future capital budget acts as 'Capital Project' as defined by this act under one of the categories enumerated in such definition in clause (1) of Section 2 of this act, provided that the undertaking or project comes within the meaning of 'Capital Project' as defined in clause (1) of Section 2 of this act." (Emphasis supplied)

Careful analysis of the term "Other Capital Projects" demonstrates that the P.U.C. ordered Matsonford Bridge project is not included within the context of this final category. First, the Matsonford Bridge project is not, as required by the Act, specifically enumerated under the heading of "Other Capital Projects" in the Capital Budget Act for the 1968-1969 Fiscal Year.

Second, the language of the Act is quite clear that if a project is not specifically enumerated under the heading of "Other Capital Projects" in the Capital Budget Act for the 1968-1969 Fiscal Year it cannot thereafter be listed in the general category "Other Capital Projects" but must be listed

as a "Capital Project", as defined by one of the specific categories enumerated in Section 2(1) of the Act. As shown above, P.U.C. projects are not enumerated as one of the specific categories of "Capital Projects" under the Act.

It is readily apparent that the Matsonford Bridge project does not qualify as a capital project within the category of "Other Capital Projects". It is further evident that the General Assembly would have specifically listed P.U.C. ordered railroad-highway crossing projects as one of the specific categories of "Capital Projects" had it intended P.U.C. ordered projects to be subject to the provisions of the Act.

Additionally, consistent with the canons of statutory construction it must be presumed that the General Assembly does not intend a result that is absurd or unreasonable. Goodman v. Kennedy, 459 Pa. 313, 329 A.2d 224 (1974); 128 (1975). See also: 1 Pa. C.S.A. §922(1). It would be unreasonable to suggest here that the legislature intended to jeopardize the safety of the public at the expense of administrative in-fighting over the advisability of a project. By interpreting the Act to include P.U.C. ordered projects as capital projects, the public would be placed in jeopardy, simply because PennDOT would be able to delay or frustrate P.U.C. orders, as in this case, by crying lack of funds and no legislative authorization to finance a project.

It is obvious from the language of Sections 409 and 411 of the Public Utility Law that the General Assembly, in the interest of preventing accidents and promoting public safety, intended to vest in the P.U.C. exclusive jurisdiction and power over public railroad high-

way crossings. Somerset County v. Penna. P.U.C., supra.; Borough of Bridgewater v. Penna. P.U.C., supra. Also see: Section 12 of the Public Service Commission Law, supra.

The canons of statutory construction specifically provide:

"(a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S.A. §1921.

Clearly, PennDOT cannot now assert that P.U.C. ordered projects must be approved by the Legislature on a capital budget, and thereby ignore the legislative mandate in Sections 409 and 411 of the Public Utility Law.

The Matsonford Bridge project must not be permitted to deteriorate further simply because PennDOT disagrees with the P.U.C. as to the necessity of the project, shielding this disagreement behind its alleged impotency to comply. Accordingly, PennDOT's Petition for Modification, requesting a time extension until twelve (12) months after the subject project is approved by the Legislature on a Capital Budget, must be denied.

D. EVEN ASSUMING ARGUENDO THAT THE CAPITAL FACILITIES DEBT ENABLING ACT INCLUDES P.U.C. ORDERED PROJECTS WITHIN THE CATEGORY OF "CAPITAL PROJECTS", THE FUNDS FOR THE DESIGN OF THE MATSONFORD BRIDGE PROJECT DO NOT REQUIRE LEGISLATIVE APPROVAL.

Capital projects are defined in Section 2 of the Capital Facilities Debt Enabling Act (Act). Section 2 provides, in pertinent part, as follows:

"Capital project means and includes (i) any building, structure, facility, program or physical public betterment or improvement; or (ii) any land or rights in land; or (iii) any furnishings, machinery apparatus or equipment for any public betterment or improvement; or (iv) any undertaking to construct, repair, renovate, improve, equip, furnish or acquire any of the foregoing, provided that the project is designated in the capital budget as a capital project having an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand dollars (\$100,000), and shall include projects to be financed by the incurring of debt, such projects being separated into the following categories: . . . "

(Emphasis Supplied).

The General Assembly, acting in accordance with this Act, has regularly fragmented overall approval of construction projects by endorsing funds for design separate and apart from construction funds. See: Governor's Executive 1977-78 Budget, pgs. 231-264. The practical effect of legislative approval is that capital projects are broken into distinct components and approved as such. PennDOT is obviously aware of this practice, since PennDOT specifically requests by its current petition that the P.U.C. modify its October 21, 1975 order to require completion of a detailed construction plan and cost

estimate within 12 months from the date the Legislature approves a Capital Budget "providing for funds for the design of the bridge structure". (Emphasis supplied).

At the March 10, 1977 hearing, PennDOT's engineering witness, Paul C. Peterson testified that PennDOT estimates its design costs for the completion of the plan for the Matsonford Bridge project at approximately seventy-five thousand dollars (\$75,000) (T. 74-76). Clearly, even under PennDOT's definition of capital projects, the detailed construction plan can be completed by PennDOT without Legislative approval on a Capital Budget since the cost of said plan is not in excess of one hundred thousand dollars (\$100,000), as provided for in Section 2 of the Act.

PennDOT's own actions, in fact, demonstrate that PennDOT did not consider legislative approval necessary when it began preparation of the detailed construction plan. According to Mr. Peterson, the plans are about 50% complete, even though funds have not been approved by the Legislature (T. 65). When asked on cross-examination where the department got the funds to complete 50% of the detailed construction plans, Mr. Peterson testified that he did not know where the money came from, but that he did know the money was charged to the project and that there was no objection raised by PennDOT during the time the design work was taking place (T. 67).

It is quite evident that even under PennDOT's definition of capital project the design funds for the Matsonford Bridge do not require legislative approval on a Capital Budget since the estimated

financial cost is not in excess of one hundred thousand dollars (\$100,000). Accordingly, PennDOT should proceed immediately to complete the detailed construction plan and cost estimate, as directed by the P.U.C. in its October 21, 1975 order.

## CONCLUSION

A consideration of the above raised points will make it evident that PennDOT's grounds for modification of the P.U.C.'s October 21, 1975 order cannot be deemed sufficient in law to justify the relief requested.

Accordingly, PennDOT's request for an extension of time to complete the detailed construction plan and cost estimate for the reconstruction of the Matsonford Bridge, until twelve (12) months after the project has been approved by the Legislature on a Capital Budget, must be denied.

PROPOSED FINDINGS AND CONCLUSION

The following proposed Findings of Fact and Conclusions of Law are submitted in accordance with the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.192(a)(3).

Findings of Fact

1. At PennDOT's specific request, the P.U.C. by order issued October 21, 1975, directed PennDOT, inter alia, to prepare and submit to the P.U.C. and all parties of record, within 12 months from the service date of said order, a detailed construction plan and cost estimate for the reconstruction of the Matsonford Bridge.

2. PennDOT has not completed the detailed construction plan and cost estimate as ordered by the October 21, 1975 order (T. 4).

3. The basis for PennDOT's instant petition is that due to the present financial condition within PennDOT the Matsonford Bridge project is not on the Commonwealth's twelve year highway program or on an approved Capital Budget; since there are no funds under those programs to proceed with the Matsonford Bridge project PennDOT has been unable to complete a detailed construction plan and cost estimate as ordered by the P.U.C. (T. 4, 5).

4. Development of the Commonwealth's current twelve year highway program was begun in April 1976 and completed on October 6, 1976. The Matsonford Bridge project was not placed on the program (T. 6, 7).

5. Transportation improvement program is developed every two years on even numbered years, pursuant to Act 120 of the Session of 1970 (T. 8).

6. The Matsonford Bridge project was on an approved Capital Budget for the fiscal year of 1972-1973 as a bridge rehabilitation project at a cost of approximately \$300,000 in construction (T. 8).

7. By P.U.C. order issued October 21, 1975, the nature of the Matsonford Bridge project was changed, at the specific request of PennDOT, from a rehabilitation project to a reconstruction project (T. 10, T. 68).

8. Funds for reconstruction of the Matsonford Bridge were never approved by the Legislature on a Capital Budget (T. 11-15).

9. It is PennDOT's policy only to budget those projects included on a twelve year highway program (T. 15).

10. The Matsonford Bridge project was submitted to the Transportation Commission for inclusion on the twelve year highway program; however, at the request of Transportation Commissioner, Representative Beren, the Pottstown Expressway project was added to the program instead of the Matsonford Bridge project (T. 18-19).

11. The Transportation Commission recommends the program and adopts the projects for the twelve year highway program (T. 16).

12. The Transportation Commission uses local priorities in determining what projects should be placed on the twelve year highway program (T. 29, 30).

13. The late Secretary Sherlock pointed out to the Transportation Commission that the Matsonford Bridge project was an excellent project; however, he deferred to the wishes of the Transportation Commission rather than insisting that the P.U.C. project be placed on the program (T. 31, T. 55).

14. It is PennDOT's policy not to submit projects on its own to the Legislature for approval on a Capital Budget (T. 34,35).

15. PennDOT will not overturn the Transportation Commission as to what projects are placed on a twelve year highway program (T. 35).

16. PennDOT does not treat P.U.C. ordered projects any differently than its own highway improvement projects (T. 34-36, T. 49).

17. PennDOT will not proceed with work on a P.U.C. project if it is not included on a twelve year highway program (T. 38).

18. As a matter of policy PennDOT does not use money from the motor license fund or its operating budget for construction projects such as the Matsonford Bridge project (T. 47).

19. The Montgomery County allocation for the current twelve year period was over forty million dollars, and the resources are still available (T. 48).

20. The twelve year highway program can be modified at any time (T. 60-63).

21. The detailed construction plans for the reconstruction of the Matsonford Bridge are 50 per cent complete (T. 65).

22. PennDOT completed 50 per cent of the detailed construction plan with funds which were not approved by the Legislature on a Capital Budget. (T. 67).

23. During the time the detailed construction plan was being prepared, money was charged by PennDOT to the project and no one

within PennDOT raised any objection to the design work being performed. (T. 67).

24. Even though the plans are 50 per cent complete, PennDOT estimates it will take one year to complete the plans (T. 70-72).

25. PennDOT estimates that it will cost \$75,000 to complete the detailed construction plans (T. 75).

26. The Capital Facilities Debt Enabling Act is the implementing legislation of the constitutional debt authorization provision of Article VIII, Section 7(a), clause (4), of the Constitution of Pennsylvania. (The Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §§3920.1, et seq.)

27. The Capital Facilities Debt Enabling Act defines the term "Capital project". (Section 2(1) of the Capital Facilities Debt Enabling Act, 72 P.S. §3920.2(1).)

28. Capital projects are, inter alia, projects with an estimated financial cost in excess of \$100,000. (Section 2(1) of the Capital Facilities Debt Enabling Act, 72 P.S. §3920.2(1).)

29. P.U.C. projects are not included as one of the specific categories of capital projects enumerated by the Capital Facilities Debt Enabling Act. (See: Section 2(1) of the Capital Facilities Debt Enabling Act, 72 P.S. §3920.2(1).)

30. The Matsonford Bridge was last inspected by PennDOT in April and December of 1976. The December inspection revealed increased deterioration but not enough to change the bridge to an unsafe condition (T. 76, 77).

31. The deterioration of a bridge is an ongoing phenomenon, the greatest deterioration occurring in the winter (T. 77).

32. Reducing the posting of the Matsonford Bridge would not significantly preserve the life of the bridge or have any value to its safe operation (T. 78).

33. If nothing is done in the future to remedy the condition of the structure, the sidewalks will have to be closed and then the bridge. (T. 78).

34. The sidewalks on the Matsonford Bridge are rough and crumbled (T. 80).

35. PennDOT does not agree to do any restoration or repairs to sidewalks or curbs on the structure (T. 80), except to repair serious holes in the sidewalk as they open (T. 85).

36. PennDOT does not want to close the bridge for construction until the bridge nearby carrying the Blue Route over the river and railroad is ready to be used for a detour. This detour will be ready in approximately one year to eighteen months (T. 72).

37. The Engineer for the Borough of Conshohocken made a visual inspection of the bridge on February 18, 1977 and re-checked this inspection on March 9, 1977. Observed were: deteriorated side-walks, curbs which are non-existent or deteriorated; inlets which have been constructed causing bad traffic conditions; light standards knocked over and not repaired; and hazards at the parapets where reinforcing is out (T. 91-92).

38. Repairs to the bridge structure, including the sidewalks, are necessary, in the interest of the safety, convenience and accommodation of the public. (T. 80, 91, 96).

## Conclusions of Law

1. The P.U.C., pursuant to Sections 409 and 411 of the Public Utility, is vested with exclusive jurisdiction and power to determine and prescribe by regulation and order the manner and conditions in which public rail-highway crossings within the Commonwealth of Pennsylvania may be constructed, altered, reconstructed relocated, abolished, maintained, operated and protected, and the allocation of costs incident thereto, in order to effectuate the prevention of accidents and the promotion of the safety of the public.

2. The P.U.C., pursuant to Section 902 of the Public Utility Law, is vested with the power and duty to enforce, execute and carry out all and singular provisions of the Public Utility Law.

3. P.U.C. projects are not required by Act 120 to be placed on a twelve year highway program.

4. The provisions of Act 120 do not impair, suspend, contract, enlarge or extend or affect in any manner the powers and duties of the Public Utility Law.

5. While the legislature intended to place matters pertaining to the State highway system under the authority of PennDOT, PennDOT's authority is subject to the limitation that where any highway is crossed by the facilities of a public utility, matters pertaining to the crossing are subject to the excessive jurisdiction of the P.U.C.

6. P.U.C. projects are not Capital projects within the context of the Capital Facilities Debt Enabling Act.

7. Design funds for the Matsonford Bridge do not require approval by the Legislature on a Capital Budget before PennDOT can proceed to prepare a detailed construction plan and cost estimate.

8. PennDOT has ignored its statutory obligation to take all reasonable steps to comply with the P.U.C.'s orders thereby jeopardizing the safety of the public by allowing the continued deterioration of the Matsonford Bridge.

9. PennDOT has failed to prove that a P.U.C. project must be on a twelve year highway program or on an approved Capital Budget before detailed construction plans and cost estimates of the Matsonford Bridge can be completed.

10. The granting of a time extension to PennDOT for the preparation of a detailed construction plan and cost estimate, until twelve months after the design for the Matsonford Bridge is approved by the legislature on a Capital Budget would delay the rail-highway crossing improvement and, in so doing, compromise the accommodation, safety and convenience of the public utilizing the facilities at the crossing.

Respectfully submitted

*Candace N. Kreiger*  
Candace N. Kreiger, Assistant Counsel  
Staff of the Pennsylvania Public  
Utility Commission

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, by first class postage prepaid upon all parties of record in this proceeding, in accordance with the requirements of 1 Pa. Code §33.32. Service has been made upon the following:

Rudolph S. Pallastrone  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
Lewis Tower Building  
15th and Locust Streets  
Philadelphia, Pennsylvania 19102

Robert W. Cunliffe, Deputy Attorney General  
Pennsylvania Department of Transportation  
Capital Associates Building  
Seventh and Forster Streets  
Harrisburg, Pennsylvania

Herbert G. Zahn, Assistant Attorney General  
Pennsylvania Department of Transportation  
Capital Associates Building  
Seventh and Forster Streets  
Harrisburg, Pennsylvania

Joel E. Mazor, General Attorney  
Six Penn Center Plaza  
Philadelphia, Pennsylvania 19104

Edward F. Kane, Esquire  
Bean, DeAngelis, Kaufman & Kane  
522 Swede Street  
Norristown, Pennsylvania 19401  
(for Borough of West Conshohocken)

Walter Phipps, Jr., Solicitor  
Borough of Conshohocken  
312 Fayette Street  
Conshohocken, Pennsylvania 19428

Sheldon Seligsohn, Attorney  
The Bell Telephone Company of Pennsylvania  
One Parkway  
Philadelphia, Pennsylvania 19102

James M. Ballengee, President  
Philadelphia Suburban Water Company  
762 Lancaster Avenue  
Bryn Mawr, Pennsylvania 19010

Roger B. Reynolds, Solicitor  
County of Montgomery  
Courthouse  
Norristown, Pennsylvania 19404

Lockwood W. Fogg, Secretary  
Trustees of Reading Company  
One Plymouth Meeting  
Plymouth Meeting, Pennsylvania 19462

Dated at this 6th day of June, 1977.

Candace N. Kreiger  
Candace N. Kreiger

Of Counsel for  
Staff of the Pennsylvania Public Utility Commission

*file*

C. 19707

Candace N. Kreiger  
Assistant Counsel  
P. O. Box 3265  
North Office Building  
Harrisburg, Pennsylvania 17120

Re: Dept. of Transportation of the Commonwealth  
of Pennsylvania  
V.  
Reading Company, etc.

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Dear Madam:

This will acknowledge receipt of original and fourteen copies of brief filed by you on behalf of Staff of Pennsylvania Public Utility Commission in the above proceeding received in this office on June 6, 1977.

Very truly yours,

William Shane, Chief  
Administrative Law Judge

DOCUMENT  
FOLDER

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RECEIVED  
JUN 7 1977  
SECRETARY'S OFFICE  
Public Utility Commission

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DEPARTMENT OF TRANSPORTATION :  
OF THE COMMONWEALTH OF :  
PENNSYLVANIA, :  
COMPLAINANT :  
V. : Complaint Docket  
READING COMPANY, BOROUGH OF : No. 19707  
CONSHOHOCKEN, BOROUGH OF WEST :  
CONSHOHOCKEN, AND COUNTY OF :  
MONTGOMERY, :  
RESPONDENTS :

ERRATUM

The brief of the Staff of the Pennsylvania Public Utility Commission, filed in the captioned case, should be amended as follows:

At Page 40, Para. No. 5, line 5 the word "excessive" should read "exclusive".

Respectfully submitted,

FILE

*Candace N. Kreiger*  
Candace N. Kreiger, Assistant Counsel  
Staff of the Pennsylvania Public  
Utility Commission

Dated: June 7, 1977

DOCUMENT  
FOLDER

Sheldon Seligsohn, Attorney  
The Bell Telephone Company of Pennsylvania  
One Parkway  
Philadelphia, Pennsylvania 19102

James M. Ballengee, President  
Philadelphia Suburban Water Company  
762 Lancaster Avenue  
Bryn Mawr, Pennsylvania 19010

Roger B. Reynolds, Solicitor  
County of Montgomery  
Courthouse  
Norristown, Pennsylvania 19404

Lockwood W. Fogg, Secretary  
Trustees of Reading Company  
One Plymouth Meeting  
Plymouth Meeting, Pennsylvania 19462

Dated at this 7th day of June, 1977.

Candace N. Kreiger  
Candace N. Kreiger

Of Counsel for  
Staff of the Pennsylvania Public Utility Commission

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION  
HARRISBURG 17120  
Office of Chief Counsel

*file*



IN REPLY REFER TO

June 17, 1977

RECEIVED  
JUN 17 1977  
Secretary's Office  
Public Utility Commission

C. J. McElwee, Secretary  
Pennsylvania Public Utility Commission  
North Office Building  
Harrisburg, Pennsylvania 17120

Re: Complaint Docket No. 19707  
Montgomery County

Dear Mr. McElwee:

Enclosed for filing with the Commission are the original and fourteen (14) copies of Reply Brief of the Pennsylvania Department of Transportation in support of its petition for modification of the Order of October 21, 1975, to extend the time for preparation of plans and cost estimates, in the above-captioned case.

I hereby certify that three (3) copies of said Brief are being served this day on each party of record.

Very truly yours,

*Herbert G. Zahn*

Herbert G. Zahn  
Assistant Attorney General

220/HGZ: rmm  
Enclosures: 15

cc: K. W. Walker, P.E., Chief Utility Engineer  
District #6-0  
Parties of Record - Page 2

DOCUMENT  
FOLDER

RECEIVED  
JUN 17 1977  
Public Utility Commission

RECEIVED  
JUN 17 1977  
DEPT. OF P. U. C.  
Before the Commission

RECEIVED  
JUN 17 1977  
Secretary's Office  
Public Utility Commission

PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re:

Department of Transportation of the  
Commonwealth of Pennsylvania

v.

Reading Company, Debtor, Borough of  
Conshohocken, Borough of West  
Conshohocken and County of Montgomery

COMPLAINT DOCKET NO. 19707

REPLY BRIEF OF THE PENNSYLVANIA DEPARTMENT  
OF TRANSPORTATION IN SUPPORT OF ITS PETITION  
FOR MODIFICATION OF THE ORDER OF OCTOBER 21,  
1975, TO EXTEND THE TIME FOR PREPARATION OF  
PLANS AND COST ESTIMATES.

DOCKETED  
COMPLAINT DOCKET  
JUN 24 1977  
ENTRY No. ....

Herbert G. Zahn  
Assistant Attorney General  
Commonwealth of Pennsylvania  
Department of Transportation  
Office of Chief Counsel  
Harrisburg, Pennsylvania 17120

DOCUMENT  
FOLDER

Before the  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

---

Department of Transportation of the Commonwealth of Pennsylvania,	:	
	:	
Complainant	:	COMPLAINT
	:	
v.	:	DOCKET
	:	
	:	NO. 19707
Reading Company, Debtor, Borough of Conshohocken, Borough of West Conshohocken and County of Montgomery,	:	
	:	
Respondents	:	

REPLY BRIEF OF THE PENNSYLVANIA DEPARTMENT  
OF TRANSPORTATION IN SUPPORT OF ITS PETITION  
FOR MODIFICATION OF THE ORDER OF OCTOBER 21,  
1975, TO EXTEND THE TIME FOR PREPARATION OF  
PLANS AND COST ESTIMATES

I. HISTORY OF THE CASE

The Pennsylvania Department of Transportation (PennDOT) generally agrees with Pennsylvania Public Utility Commission (P.U.C.) staff's statement of the case in its Brief with the following exceptions and additions:

1. For emphasis, it is to be noted these proceedings were instituted by PennDOT on September 27, 1972, because of its concern for the safety of the public and prevention of accidents. A hearing was held on December 20, 1972, but it was not until January 15, 1974, over one year later, that an Order was issued by the P.U.C.

2. PennDOT's present Petition for Extension of Time set forth three reasons for the request: a) the bridge reconstruction was not on the Commonwealth's twelve year program; b) the reconstruction was not on an approved "Capital Budget," and c) PennDOT has no funds to proceed with the project.

3. The staff of P.U.C., on February 15, 1977, took the Depositions of James B. Chiles, PennDOT's Director of the Bureau of Economic Research and Programming, who is in charge of programming and budgeting bond-financed capital projects under the twelve year program, and James Vovakes, PennDOT's Director of the Bureau of Fiscal Management, who is in charge of the development and administration of PennDOT's budget which is non-bond financed. PennDOT has requested these Depositions be made part of the record in this case.

4. Again for emphasis, PennDOT's bridge engineer, who was concerned with the safety of the public and the prevention of accidents at the crossing, stated for the record that the Matsonford Bridge is a massive, 10 span concrete arch structure which is safe for a twenty ton carrying load capacity (T. 77); that the bridge is safe at the present time for the conditions on which it operates (T. 76), and that formal periodic inspections of the bridge are made by PennDOT (T. 76).

## II. ABSTRACT OF EVIDENCE

With the following exceptions and additions, PennDOT generally is in accord with the P.U.C. staff's Abstract of Evidence and Summary of the Testimony.

1. The testimony of James B. Chiles was directed and solely based upon his knowledge and experience with bond financed Capital Projects developed from the State Transportation Commission's twelve year program. His testimony that the Matsonford Bridge reconstruction was not on an approved "Capital Budget" can, therefore, only be interpreted to mean that portion of the Commonwealth's Capital Budget which is bond-financed (see infra, under "Argument", the reason for this distinction).

2. The staff's reference on page 8 of its Brief of Mr. Chiles' statement that PennDOT's policies dictate to budget only those projects which are on the twelve year program is taken out of context since he further stated, "which we feel we can afford to proceed." (T.15) This must also be associated with and refer to Mr. Chiles testimony that the program and planning is based upon "the total estimated fiscal resources for capital planning." (T. 29) So that PennDOT's "policies" are, in fact, that no Capital Projects can be budgeted if there are no fiscal resources of the Commonwealth to fund them, which is a Constitutional requirement (i.e., a balanced Budget), not a "policy".

3. In reviewing the testimony of Mr. Chiles regarding the development of the twelve year program by the Transportation

Commission, the Secretary of Transportation's recommendation of the subject bridge for the said program and whether the Transportation Commission was aware the reconstruction of the bridge was a P.U.C. project, the staff's review, on pages 8 to 11 inclusive of its Brief, omits the fact that the Transportation Commission consists of 13 members, one of whom is the Secretary of Transportation, and by law (Act 120 of 1970, as amended, Sec. 13) it is the duty of the said Commission to submit a twelve year program. Thus, even if the Secretary of Transportation insisted the Matsonford Bridge be placed on the twelve year program, the said Commission acting as a body could overrule him. The fact is, the Secretary did favor the project (T. 23), recommended it be placed on the program (T. 32) and that the Transportation Commission was aware it was a P.U.C. project (T. 31). But the staff's Brief, on page 10, attempts to slant the import of the Secretary's recommendation by pointing out the Secretary did not specifically say the bridge was a P.U.C. project. Why be redundant when they knew it was a P.U.C. project?

4. Since Mr. Chiles' expertise is in the field of bond-financed projects, it is obvious his reply to a question of the possibility of use of motor license funds or operating funds was not within the scope of his experience (T. 43, 44). James Vovakes, Director of the Bureau of Fiscal Management, testified, in his Depositions taken on behalf of the P.U.C. on February 15, 1977, part of the record in this case, as to the various appropriations of funds by the legislature (\*N.T. 52) which are made to PennDOT

for specific purposes from a prepared budget (N.T. 53), that all those funds have been committed and that there are no uncommitted funds in the Governor's recommended 1977-78 Operating Budget (N.T. 59). Mr. Vovakes went on to testify the Governor even asked for a two cent a gallon increase in the fuel tax in order to meet PennDOT's maintenance program and \$100,000,000.00 a year of highway construction from bond funds (N.T. 59, 60).

5. The staff in its Brief on page 11, uses the testimony of PennDOT's Bridge Engineer, Paul Peterson, as the basis of the source of funds for the completion of 50% of the plans for the reconstruction of the bridge. When asked if he knew the source of the funds he answered, "I do not know." (T. 67) However, the staff was aware of Mr. Vovakes testimony in his Depositions, at page 63, when the staff asked:

"Q. .... I am asking you where the preliminary funds, prior to the inclusion on the capital budget come from.

A. Those are in-house costs. We have funds on board to do those things. You have to have that kind of administrative step taken to determine the projects you want to consider." (Emphasis supplied)

"Q. And the fund for that comes from your general operating funds?

A. That's right."

### III. SUMMARY OF COUNTER ARGUMENT

THE PETITION OF PENNDOT FOR MODIFICATION OF  
THE ORDER OF OCTOBER 21, 1975, SHOULD BE  
GRANTED.

1. There is no doubt that Act 120 of 1970 does not affect the powers and duties of the P.U.C. What it does affect is PennDOT and the requirements and limitations of funding. Certainly it cannot be argued that while Act 120 does not affect the "powers" of the P.U.C., that the P.U.C. ever had the "power" in the first place to appropriate Commonwealth funds. While the P.U.C. is a branch of the legislature, the legislature never intended, nor can it delegate to the P.U.C. the power or authority to appropriate Commonwealth funds.

P.U.C. has exclusive jurisdiction over the construction, improvements, protection, abolition and suspension of rail-highway crossings and the allocation of costs thereof, but PennDOT must legally obtain the funds in order to abide by the P.U.C.'s orders.

2. The Capital Facilities Debt Enabling Act, Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §3920.1, et seq., provides, inter alia, a detailed procedure for incurring debts pursuant to Article 8, Section 7a, Clause 4 of the Constitution of Pennsylvania, and a definition of "Capital Project" as used in the aforesaid Clause 4. The P.U.C. project in question is a Capital Project under that definition and falls into the category of "highway projects" because it is of a type which the State Highway and Bridge Authority is authorized to construct, improve, equip,

maintain, acquire, or operate under the provisions of the "State Highway and Bridge Authority Act".

3. Merely because the completion of the plans for the Matsonford Bridge is estimated to cost less than \$100,000.00, this does not remove the requirement for legislative approval or eliminate the design from being a "Capital Project" under Section 2 (1) of the Capital Facilities Debt Enabling Act.

Section 2 (1) of the said Enabling Act defines a "Capital Project" having ".... an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand (\$100,000.00) dollars...." (underlining supplied)

"Financial cost" means the total cost of the project, as provided in Section 2 (6), which reads:

"(6) 'Financial cost' includes acquisition cost and construction cost where applicable as well as an allocated portion of ... (ii) ... fees and expenses of architects, engineers, and other professionals for making preliminary studies reports, estimates of costs, preparing plans and specifications. ..." (underlining supplied)

Since the total estimated financial cost for the reconstruction of the Matsonford Bridge is five million dollars (and has an estimated useful life in excess of five years), the portion of that cost attributable to preparation of the plans, even though under \$100,000.00, is a "Capital Project".

While the Capital Facilities Enabling Act has been interpreted to implement the Article VIII, Section 12(b) of the

Constitution regarding bond financing, the Governor has specified in his Capital Budget instructions to the various departments of the Commonwealth, regarding the budgeting from non-bond funds, that a "Capital Project" means and includes any ... public betterment or improvement ... that ... has an estimated useful life in excess of five years and an estimated total cost in excess of twenty-five thousand dollars (\$25,000.00). It is clear, therefore, that the Matsonford Bridge, if operating funds are to be used in place of bond funds, is a "Capital Project".

#### IV. COUNTER ARGUMENT

1. P.U.C. HAS EXCLUSIVE JURISDICTION AND POWER OVER RAIL-HIGHWAY CROSSING, BUT DOES NOT HAVE THE POWER TO APPROPRIATE FUNDS FOR CAPITAL PROJECTS.

PennDOT agrees that under Sections 409 and 411 of the Public Utility Law, P.U.C. is vested with the exclusive jurisdiction and power to determine and prescribe the manner in which public rail-highway crossings may be constructed, altered, relocated, abolished and suspended and the allocation of the costs thereof. However, the P.U.C. does not have the power to appropriate funds for projects which fall within its jurisdiction and are Capital Projects.

The Constitution in Article II, Section 1, gives the General Assembly the legislative power of this Commonwealth. Section 12(a) of Article VIII, of the Constitution requires the Governor to annually submit to the General Assembly a balanced operating budget:

(a) "... setting forth in detail (i) proposed expenditures classified by department or agency and by program and (ii) estimated revenues from all sources. If estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency ....."

And in Section 12(b) of said Article VIII the Governor is required to annually submit to the General Assembly:

(b) "a capital budget ... setting forth in detail proposed expenditures to be financed from the proceeds of obligations of the Commonwealth or its agencies or authorities or from operating funds."  
(underlining supplied)

Thus, the Governor is required not only to submit to the General Assembly, for its approval and passage of legislation, a balanced operating budget based on available funds from all sources, but a capital budget based on proceeds from obligations and from operating funds. In Section 12(c) of said Article VIII, projected operating expenditures in the budget must be classified by department or agency and by program in reasonable detail; projected Capital Projects must be specifically itemized by purpose. [The annual budget for the Commonwealth, for operations and capital projects, are enacted into law by specific acts of the General Assembly.]

It is basic constitutional law that the power conferred upon the legislature to make laws cannot be delegated to any other body or authority: Appeal of O'Hara, 389 Pa. 35 (1937); Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168 (1975).

What the General Assembly can do is enact a law to delegate a power to another body to determine some facts or state of things upon which it makes or intends to make its own action depend: Pennsylvania Human Relations Commission v. Chester School Dist., 427 Pa. 157 (1967). This is exactly what the General Assembly did in the Public Utility Law; it gave the power to the P.U.C. to determine the state of things regarding public rail-highway cross-

ings -- but it did not, and could not, delegate to the P.U.C. the power to budget Capital Projects to be financed from bond or operating funds.

2. ACT 120 MAY NOT AFFECT THE POWERS AND DUTIES OF THE P.U.C. BUT IT DOES AFFECT PENNDOT'S FUNDING.

PennDOT agrees that Act 120, May 6, 1970, P.L. 356, does not impair the powers and duties of the P.U.C. However, as pointed out, infra, the P.U.C. never had the "power" to legislate or budget monies from state operating funds or proceeds of state obligations. What Act 120 does is control what PennDOT is required to do even though the jurisdiction of the P.U.C. is involved.

The General Assembly created PennDOT by enacting Act 120, and within that Act, in Section 18 (71 P.S. 521), the State Transportation Commission was established. In Section 13(a) (13) of Act 120, as amended, (71 P.S. 512) it is provided:

"(a) The Department of Transportation in accordance with appropriations made by the General Assembly ... shall have the power and its duty shall be:

\* \* \* \*

(13) To prepare and submit every even-numbered years ... to the State Transportation Commission for its consideration, a program which it recommends to be undertaken by the Department of Transportation during the twelve fiscal years next ensuing. Each two years thereafter, the Department of Transportation, taking into consideration the recommendations of the State Transportation Commission, and other relevant information, shall review, revise, adjust and extend its construction program for two years. The preparation and consideration of the program shall be coordinated with the preparation and consideration of the Commonwealth's Capital Program by the State Planning Board ...." (underlining supplied)

Section 18(c) of Act 120, setting up the State Transportation Commission (71 P.S. 521) provides:

"(c) The Commission shall have the power, and its duties shall be to gather and study all available information, data, statistics and reports relating to the needs for highway construction or reconstruction ... and services in the Commonwealth to determine ... and recommend order of priority ... facilities and services should be constructed or reconstructed and to certify from time to time the results of such determination to the Governor, to the General Assembly and to the Secretary of Transportation, for their consideration. Transportation programs so determined shall not be changed, deleted or altered, except by the Commission ...." (underlining supplied)

Article VIII, Section 7(a)(4) of the Constitution, which limits the Commonwealth's indebtedness, provides a debt may be incurred for "Capital Projects" specifically itemized on a Capital Budget which will not cause the amount of all net debt outstanding to exceed 1 3/4 times the average annual tax revenues in the previous five years. This portion of the Constitution addresses itself to bond-financed Capital Projects in a Capital Budget.

The Capital Facilities Debt Enabling Act of 1968 (72 P.S. 3920) is considered to implement said Section 7(a)(4) of the Constitution and in Section 2(1) of the said Enabling Act (72 P.S. 3920.1) a "Capital Project" for bond-financed projects is defined as having "an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand dollars (\$100,000)." Section 3(a) of the said Enabling Act (72 P.S. 3920.3(a)) provides for a Capital Budget to be prepared in accordance with the

said Act and submitted by the Governor each fiscal year to the legislature, and the legislature thereafter is to proceed to consideration of the Capital Budget in accordance with Article III of the Constitution (which sets forth the legislative procedure). The Debt Enabling Act also provides (72 P.S. 3920.7) for the issuance of Commonwealth bonds to provide the funds for the approved Capital Projects in a Capital Budget.

"Capital Projects", however, are not only those on a Capital Budget which are funded from bond revenues, they are also funded from operating revenues. Section 12(b) of Article VII, as stated, *infra*, requires the Governor to submit to the General Assembly each year a Capital Budget showing which of the proposed expenditures are to be financed from bonds or from operating funds. There is no legislation which defines what a Capital Project is that is to be financed from operating funds. However, the Governor's Budget Secretary, in the yearly instructions to the various Departments for the preparation of the Capital Budget, defines a "Capital Project" to include "any building, structure, facility, or physical public betterment or improvement" which "has an estimated useful life in excess of five years and an estimated total cost in excess of twenty-five thousand dollars (\$25,000)." These instructions list Capital Projects into four categories: a) Public Improvement Projects; b) Public Improvements -- Original Furnishings and Equipment; c) Transportation Assistance Projects; and d) Highway Projects. The Highway Projects are defined to include the design, purchase of right-of-way construction, reconstruction, and other improvements to highways and bridges on the state highway system.<sup>1</sup>

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<sup>1</sup> This is a matter of public record and judicial notice should be given it.

As an example of the appropriations of current revenues in the Capital Budget, the Governor's Executive 1977-78 Budget, on page 266<sup>1</sup> programed \$59,000.00 from current revenues for lighting at Capital City Airport (the total cost being \$230,000.00 of which \$171,000.00 would be federally funded).

A further example of an appropriation from current revenues for Capital Projects is Act No. 352, P.L. 1091,<sup>2</sup> of the 1974-75 Capital Budget approved December 30, 1974, where in the category of "public improvement projects," the General Assembly provided funds from the General Fund, for itemized projects with their respective estimated costs, to the Department of Agriculture in the total sum of \$60,000.00, to the Department of Education in the total sum of \$1,031,500.00, to the Historical and Museum Commission in the total sum of \$218,000.00, to the Department of Military Affairs in the total sum of \$99,000.00, and to the Department of Public Welfare in the total sum of \$466,000.00.

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<sup>1</sup> The P.U.C. has a copy of the 1977-78 Budget; it is a public record and judicial notice should be given.

<sup>2</sup> Judicial notice of an Act of the General Assembly should be given.

Under Section 11 of Article VIII of the Constitution of 1968, which changed the prior law, "all proceeds from gasoline and other motor fuel excise taxes, motor registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation after providing therefrom for (a) cost of administration and collection, (b) payment of obligations incurred in the construction and reconstruction of public highways and bridges shall be appropriated by the General Assembly to agencies of the state or political subdivisions thereof; and used solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges ... and shall not be diverted by transfer or otherwise to any other purpose ...." (Under prior law there was a continuing appropriation of these proceeds to the Secretary of Transportation (Highways) without further legislative action, who used his discretion as to the use thereof.)

A review of the foregoing demonstrates that Act 120 requires PennDOT to recommend a twelve year program to the State Transportation Commission coordinated with the preparation and consideration of the Commonwealth's capital program (bond and operating fund financed). The State Transportation Commission, in turn, recommends its twelve year program to the Governor, the General Assembly and the Secretary of PennDOT and this program can only be changed by the Transportation Commission. If a project has an estimated life of over five years and has a total cost of over \$100,000.00 to be financed from the issuance of bonds or over

\$25,000.00 from operating revenues, it is a Capital Project to be included in the Commonwealth's Capital Budget. The Constitution requires the Governor to submit a balanced budget classified as to departments and programs each year to the General Assembly and the General Assembly enacts the budget into law.

Since PennDOT gets all its funds by appropriations of the General Assembly, the appropriations specify the use to which the funds are to be made, and if a Capital Project, the Capital Project is specifically itemized in the law. Neither in the Constitution nor in the various laws, concerning the appropriation of funds, is the P.U.C. or P.U.C. projects mentioned. A P.U.C. project, if it is classified as a Capital Project, and on the Capital Program, is included in the budget and PennDOT may be appropriated those funds only in the event the General Assembly includes that project in its appropriations. It is not the P.U.C. which provides the funds to PennDOT; it is the General Assembly.

The Staff's Brief tries to infer that PennDOT did not do enough or give sufficient priority to the Matsonford Bridge project to have it included on the Transportation Commission's twelve year program. A review of Mr. Chiles testimony on behalf of PennDOT will clearly show that a P.U.C. project is given priority within PennDOT, that the Secretary of Transportation favored the project, recommended it to the Commission and that the Commission was aware it was a P.U.C. project. Even if the Secretary had insisted it be placed on the program, he is only one of many members on the Commission which could overrule him. It was the Transportation

Commission which neglected to place this project on the twelve year program, not PennDOT. Representative Anthony J. Scirica, in his testimony at the hearing of March 10, 1977 (T. 22 to 27, 54), gave a complete resume of the proceedings before the Transportation Commission when PennDOT attempted to place the bridge on the twelve year program and he stated, "From the remarks made by Secretary Sherlock, it was apparent to me that he favored the Matsonford Bridge Project over the other Montgomery projects." (T. 54)

Not only is it required that the said bridge project be placed on the twelve year program in order it be funded with state funds, it is also a requirement in order to be federally funded (T. 15). It is a well known fact that because of inadequacy of current revenues,<sup>1</sup> PennDOT has only considered capital construction projects, in the last several years, which are eligible for bond financing and for federal funding. In order to qualify for federal funds the project must be on the twelve year program. The Matsonford Bridge project will qualify for such federal funding when it is placed on the said program.

It is clear, therefore, PennDOT's Petition to extend the time until twelve months after the Matsonford Bridge project is on an approved Capital Budget, should be granted. PennDOT has no

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<sup>1</sup> The Governor, in his Budget message to the General Assembly on February 15, 1977, asked for a two cent a gallon increase of the gasoline tax just to maintain the some 45,000 miles of State Highways and construct highway improvements at the rate of \$100,000,000.00 a year from bond funds.

funds to proceed with the design, not because P.U.C. lacks jurisdiction over the project, but because the General Assembly has not appropriated funds for this Capital Project. PennDOT is as concerned as the P.U.C. with the need for reconstruction of the subject bridge crossing, for it was PennDOT that initiated these proceedings. From an engineering view point, however, the bridge presently is in a safe condition so that the safety of the public is not jeopardized.

3. THE P.U.C. PROJECTS ARE CAPITAL PROJECTS  
WITHIN THE CONTEXT OF THE "CAPITAL FACILITIES  
DEBT ENABLING ACT".

The Commonwealth of Pennsylvania is limited by Article VIII,  
Section 7(a) in Clauses 1 through 4 of the Constitution of Penn-  
sylvania to four methods for incurring debts. The Clauses 1 through  
4 provide:

"(1) Debt may be incurred without limit to suppress insurrection, rehabilitate areas affected by man-made or natural disaster, or to implement unissued authority approved by the electors prior to the adoption of this article.

(2) The Governor, State Treasurer and Auditor General, acting jointly, may (i) issue tax anticipation notes having a maturity within the fiscal year of issue and payable exclusively from revenues received in the same fiscal year, and (ii) incur debt for the purpose of refunding other debt, if such refunding debt matures within the time of the original debt.

(3) Debt may be incurred without limit for purposes specifically itemized in the law authorizing such debt, if the question whether the debt shall be incurred has been submitted to the electors and approved by a majority of those voting on the question.

(4) Debt may be incurred without the approval of the electors for capital projects specifically itemized in a capital budget if such debt will not cause the amount of all net debt outstanding to exceed one and three-quarters times the average of the annual tax revenues deposited in the previous five fiscal years as certified by the Auditor General. For the purposes of this subsection, debt outstanding shall not include debt incurred under clauses (1)

and (2) (i), or debt incurred under clause (2) (ii) if the original debt would not be so considered, or debt incurred under subsection (3) unless the General Assembly shall so provide in the law authorizing such debt."

Of the four methods which are permitted for the incurring of debt, PennDOT can only conveniently use funds which have been generated by the method permitted under Clause 4 to finance rail-highway projects ordered by the Commission. "The Capital Facilities Debt Enabling Act", Act of July 20, 1968, P.L. 550, as amended, 72 P.S. §3920.1, et seq., has implemented Clause 4 by providing, inter alia, two things: First a detailed procedure for incurring debts pursuant to Clause 4, and second a definition of "Capital Project". In this section of the brief, we will consider whether any Commission ordered rail-highway crossing project can meet the requirements of the definition "Capital Project" provided in the Act. In Section 4 below, we will consider whether the project in question is a "Capital Project".

The definition of a "Capital Project" provided by the "Capital Facilities Debt Enabling Act" is in two parts, the first part provides a set of criteria and the second a list of nine categories into one of which all "Capital Projects" must fall. Many Commission ordered rail-highway crossing projects clearly meet the criteria set forth in the first part of the definition, namely:

"1. 'Capital Projects' means and included (i) any building, structure, facility, or physical public betterment or improvement; or (ii) any land or rights in land: or (iii)

any furnishings, machinery, apparatus, or equipment for any public betterment or improvement; or (iv) any undertaking to construct, repair, renovate, improve, equip, furnish or acquire any of the foregoing, provided that the project is designated in a Capital Budget as a Capital Project, as an estimated useful life in excess of five years at an estimated financial cost in excess of one hundred thousand dollars; provided, that the one hundred thousand dollars limitation shall not apply to original equipment and furnishings for previously authorized public improvement projects and shall include projects to be financed by the incurring of debt ...."

The question remains whether any Commission ordered rail-highway crossing project can fit into one of the nine categories provided. The most promising candidate category for them is

"Highway projects, means and includes projects of a type which the State Highway and Bridge Authority is authorized to construct, improve, equip, maintain, acquire, or operate under the provisions of the Act of April 18, 1949 (P.L. 604), known as the 'State Highway and Bridge Authority Act.'" (Emphasis added.)

Since the definition of the category "Highway Projects" refers to the type of project authorized by the "State Highway and Bridge Authority Act", a thorough examination of what type of project can be "Highway Projects" requires a consideration of the history of the Act and its relationship to the "Capital Facilities Debt Enabling Act".

The Pennsylvania Constitution of 1874 in Article IX, Section 4 restricted the amount of debt which the Commonwealth

could incur in its name for the financing of highway projects. In order to avoid the restriction, in 1949 the "State Highway and Bridge Authority" was established with the authority to issue bonds in its own name, rather than in the name of the Commonwealth. As was stated in Adam Eidemiller, Inc. v. Commonwealth, 182 A.2d 911, 913, 408 Pa. 195, 1962, "the authority is nothing more than a vehicle to facilitate financing of state highway projects". Through the Authority, the amount of funds generated by indebtedness with which the then State Highway Department could build projects, could be greater than the constitutionally established limit. The "State Highway and Bridge Authority Act" did not increase the authority of the then Highway Department with respect to the type of project it could construct, but only raised the limit on the amount of funds it could use.

The type of project authorized by the "State Highway and Bridge Authority Act" is:

"... constructing, reconstructing, improving, equipping, furnishing, maintaining and operating State highways, bridges, viaducts, toll bridges, tunnels, traffic circles on State highways, maintenance sheds, offices and garages and roadside rests (any and all of the foregoing being herein called 'projects') ...." 1949, April 18, P.L. 604, as amended, 36 P.S. 3604.

Commission ordered rail-highway crossing projects fit into this description and are authorized under the Act for Authority bond financing. Although the issue was never tested in Court, such projects were considered by the Authority to be so authorized, and

have been routinely financed by bonds issued by the Authority in the past.

With the adoption of the present Pennsylvania Constitution, the State Highway and Bridge Authority lost its importance due to Article VIII, Section 7(a). The Authority has not issued any new bonds or let any construction contracts since 1968. Its only function at present is to close out construction contracts and right-of-way claims dating from that time. The "Capital Facilities Debt Enabling Act" refers to the "State Highway and Bridge Authority Act" not in order to require that the "Capital Projects" under the first Act be projects which are authorized by the second. At present, no projects are being authorized by the State Highway and Bridge Authority. Rather, the "Capital Facilities Debt Enabling Act" permits the financing of the type of project authorized by the "State Highway and Bridge Authority Act" to be accomplished instead under the procedures set forth in the "Capital Facilities Debt Enabling Act". Commission ordered rail-highway crossing projects are that type of project, fit the definition of "Highway Project" in the "Capital Facilities Debt Enabling Act", and can therefore fit the definition of "Capital Project" in the Act. Again, although the issue has never been tested in the courts, many such projects are considered by PennDOT to be "Capital Projects", and furthermore the legislature itself has routinely approved such projects on its Capital Budget for bond financing as "Capital Projects."

It may be useful to briefly examine the financial situation as it would exist if Commission ordered rail-highway

crossing projects could never be "Capital Projects" as defined by the "Capital Facilities Debt Enabling Act". In that event, no Commission ordered rail-highway crossing project could be contained on a Capital Budget as a "Capital Project", and no legislative authority could be obtained for debt financing under the "Capital Facilities Debt Enabling Act" and Article VIII, Section 7(a), Clause 4. As a result, the only way in which the Commonwealth could constitutionally finance a Commission ordered rail-highway crossing project with proceeds from debts would be through the use of one of the three other methods outlined by Article VIII, Section 7(a), Clauses 1 through 4. The method permitted by Clause 1 (quoted above) is not appropriate to such projects by the terms of the clause. Clause 2 (quoted above) imposes conditions on the repayment of debts incurred by that method which are too restrictive to be of practical assistance for such projects. The terms of Clause 3 (quoted above) could be appropriate for such projects and the conditions for repayment established could be sufficiently flexible, but obtaining the approval of the electors as required by the clause is more difficult and time consuming than obtaining the approval of the legislature. We believe that none of the other three clauses provides a method which can practically be used for the generating of funds from debts to finance Commission ordered rail-highway projects, and that no one would welcome a situation in which one of those alternative methods had to be used.

It is clear from a close reading of the definitions contained in the "Capital Facilities Debt Enabling Act," and the

other relevant statutes, that Commission ordered rail-highway crossing projects can be "Capital Projects", and can therefore be approved by the legislature as such on a Capital Budget for bond financing.

4. FUNDS REQUIRED FOR DESIGN OF A CAPITAL PROJECT UNDER THE CAPITAL FACILITIES DEBT ENABLING ACT OR THE GOVERNOR'S CAPITAL BUDGET INSTRUCTIONS REQUIRES LEGISLATIVE APPROVAL.

The P.U.C.'s Staff Brief has taken the position that since the design costs for the completion of the design for the Matsonford Bridge is only \$75,000.00, this is less than \$100,000.00 and, therefore, does not require legislative approval on a Capital Budget.

What the Staff has overlooked in the said Enabling Act, is Section 2(1)(6) of the "Definitions" (72 P.S. 3920.2). In Section 2(1) it is provided:

"(1) 'Capital project' means and includes (i) any building, structure, facility or physical public betterment or improvement ... provided that the project is designated in a capital budget as a capital project, has an estimated useful life in excess of five years and an estimated financial cost in excess of one hundred thousand dollars (\$100,000) ...." (underlining supplied.)

In Section 2(6) of said Enabling Act it is provided:

"(6) 'Financial cost' includes acquisition cost and construction cost where applicable as well as an allocated portion of ... fees and expenses of architects, engineers, and other professionals for ... preparing plans and specifications ...." (Underlining supplied.)

Further, the Governor's instructions, via his Budget Secretary, for the Capital Budget, supra, which relate, inter alia,

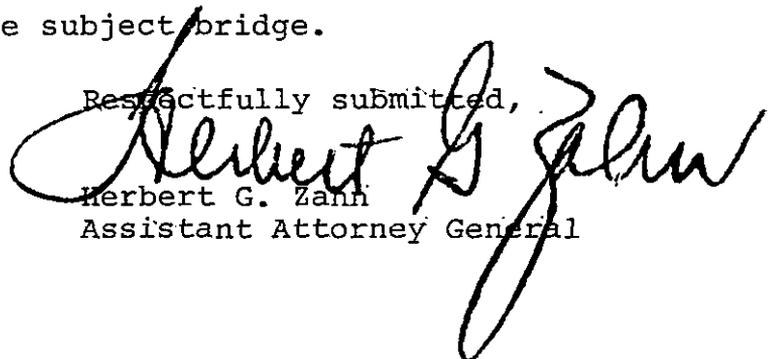
to proceeds from operating revenues define an improvement to be a "Capital Project" which includes "any building, structure, facility, or public betterment ... and that the project has an estimated useful life in excess of five years and an estimated total cost in excess of twenty-five thousand dollars (\$25,000) ...." (Underlining supplied.)

Thus, both for bond and current revenue financed projects, it is the total cost of the project that determines whether any of its component parts are determined to be a Capital Project which requires inclusion in the Capital Budget which the Governor is required to submit to the General Assembly for its approval.

In this case, the design of the Matsonford Bridge, being a part of the "financial cost" as defined in the Debt Enabling Act or part of the "total cost" as contained in the Governor's Instructions for the Capital Budget, is a Capital Project and requires legislative approval for funding.

It has been testified by Mr. Chiles that PennDOT has obligated all funds which have been appropriated to PennDOT by the legislature (T. 40). The conclusion is that PennDOT has no funds, either for operations or Capital Projects, to proceed with completing the design for the subject bridge.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Herbert G. Zahn". The signature is written over the typed name and title.

Herbert G. Zahn  
Assistant Attorney General

*file*

June 9, 1977

C. 19707

Thomas C. Sadler, Jr.  
Attorney at Law  
123 South Broad Street  
Philadelphia, Pennsylvania 19109

Department of Transportation  
v.  
Reading Company, et al.

Dear Sir:

This will acknowledge receipt of original and fourteen copies of brief filed by you in ~~Department of Transportation~~ Department of Transportation on this matter.

I note that you desire to remain a party of record in the above proceeding.

Very truly yours,

William Shane, Chief  
Administrative Law Judge

DOCUMENT  
FOLDER

JUN 10 1977

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, by first class postage prepaid upon all parties of record in this proceeding, in accordance with the requirements of 1 Pa. Code §33.32. Service has been made upon the following:

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Robert W. Cunliffe, Deputy Attorney General  
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C. J. McElwee, Secretary  
C. 19707

-2-

June 17, 1977

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Pennsylvania Public Utility Commission Engineer

June 23, 1977

Herbert G. Zahn  
Assistant Attorney General  
Department of Transportation  
Harrisburg, PA 17120

C. 19707

Re: Dept. of Transportation v. Reading Co., et al.

Dear Sir:

This will acknowledge receipt of original and 14 copies of Reply Brief filed by you on behalf of the Pennsylvania Department of Transportation in the above proceeding, received in this office June 17, 1977.

I note that you have served copies of said brief upon all parties of record.

Very truly yours,

William R. Shane, Chief  
Administrative Law Judge

WRS/lak

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FOLDER