COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NO. MAR77-I-127*

CALENDAR
PUBLIC MEETING

March 14 19 77
(DATE)

A. DOCKET NO. 98061

IN THE MATTER OF

Re: Application of the City of Philadelphia for approval of (1) the construction, alteration or reconstruction of the crossings of Penn Central Transportation Company, Debtor, Reading Company, Debtor, The Baltimore and Ohio Railroad Company and SEPTA involved in the construction of a high speed passenger line from Suburban Station to the Philadelphia International Airport, in the City of Philadelphia, (2) the allocation of the costs and expenses incident thereto, and (3) exemptions from the minimum overhead and side clearance requirements of Part XIII of the Commission's Railroad Regulations.

(City of Philadelphia's Petition for Modification and/or Rescission of Order -- Recommend Denial)

The staff recommends that the Commission enter an order directing that the petition filed by City of Philadelphia on August 4, 1976, seeking modification and/or rescission of certain specified ordering Paragraphs of the Commission's July 13, 1976 order in this proceeding, at Application Docket No. 98061, be and is hereby denied in its entirety.

EB

Motion by: Commissioner	Kelly	Commissioner	Chm. Carter	Yes	XXX
Seconded by: Commissioner	Bloom	Commissioner	O'Bannon	Yes	XXX
CONTENT OF MOTION: Staff recommendation		Commissioner	Johnson	Yes	XXX

DOCKETED
APPLICATION DOCKET
MAR 24 1977
ENTRY No. BW

RECORD
FOLDER

PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Public Meeting held March 14, 1977
Harrisburg, PA 17120

Commissioners Present:

Louis J. Carter, Chairman
James McGirr Kelly
Robert K. Bloom
Helen B. O'Bannon
Michael Johnson

Application Docket No. 98061 - Application of the City of Philadelphia for the approval of (1) the construction, alteration or reconstruction of the crossings of Penn Central Transportation Company, Debtor, Reading Company, Debtor, The Baltimore and Ohio Railroad Company and SEPTA involved in the construction of a high speed passenger line from Suburban Station to the Philadelphia International Airport, in the City of Philadelphia, (2) the allocation of the costs and expenses incident thereto and (3) exemptions from the minimum overhead and side clearance requirements of Part III of the Commission's Railroad Regulations.

Petition of City of Philadelphia seeking modification and/or rescission of the Commission's order adopted July 13, 1976.

O R D E R

BY THE COMMISSION:

This matter is before us upon petition filed August 4, 1976 by City of Philadelphia, applicant herein, seeking modification and/or rescission of certain portions of the Commission's order in this proceeding adopted July 13, 1976. No answers to the petition have been filed.

By the referenced order, Pennsylvania Public Utility Commission, inter alia, approved in part the application of City of Philadelphia as above-captioned, and directed construction of all public rail-highway crossings in the vicinity of Philadelphia International Airport, where the proposed Airport High Speed Rail Commuter Line (AHSL) will be crossed above or below grade by various public thoroughfares, all in accordance with the proposals and plans of the city. As a part of that order, this Commission defined the limits of the project over which it will exercise its jurisdiction for the subject portion of the AHSL construction, appropriated the necessary properties required for the various crossings under consideration, allocated the costs and expenses incident thereto, and established a completion date for the work. A total of 29 ordering paragraphs were contained in the Commission's July 13, 1976 order, covering all necessary jurisdictional issues; all of which were consistent with the evidence of record and the applicable statutory and case law.

DUPLICATE RECORD.
ORIGINAL CERTIFIED
TO COMMONWEALTH COURT.

RECORD
FOLDER

DOCKETED
APPLICATION DOCKET
MAR 30 1977
ENTRY No. BW

Now, by its August 4, 1976 petition, City of Philadelphia seeks rescission and/or modification of 16 of the 20 directives aforesaid; each individual request being spelled out in detail by the petition, with supportive argument presented for each. The changes sought by City of Philadelphia are presented and assessed as follows:

1. The City seeks modification of portions of ordering Paragraph 2 (descriptives of crossings to be constructed), so as to reflect, at three of the nine crossings, the status of construction as of the time of adoption of the order. The City argues that initial work had already progressed as of the date the July 13, 1976 order was issued, and suggests wording which, in its opinion, more appropriately describes those crossings.

   This argument suggests wording which goes contra to this Commission's long-established procedure of relating the type of crossing to the grade of the tracks, rather than to the grade of the highway, and would, as well, destroy the ablative absolute sense of the ordering paragraph.

2. The City seeks rescission of ordering Paragraphs 4, 5, 6 and 7 (wherein permanent and/or temporary appropriations were made of properties necessary for construction of the improvement), arguing that such appropriations were not requested by the City, nor in its opinion were same necessary. Further argument is presented on this issue, to the effect that appropriation of an easement, only, should have been sufficient, if indeed any appropriation were necessary at all; that the City was negotiating with the property owners for any necessary right-of-entry; and that the Commission should exercise its jurisdiction on this aspect only in the event the City cannot consummate with the owners agreements which are to its satisfaction, and then appropriate the lands to the City as grantee, and not to the Commonwealth.

   The City also seeks, in the event this Commission grants the City's request for rescission of the appropriations made in Paragraphs 4, 5, 6 and 7 of its order, rescission of ordering Paragraph 21 of the subject order (wherein the City is directed

at its initial cost to pay damages for any property taken by reason of construction of the project in accordance with said order), insofar as Paragraph 21 requires payment of compensation for property taken for said crossing.

The evidence of record clearly demonstrates that the appropriations made by this Commission in Paragraphs 4, 5, 6 and 7 of its order are necessary and appropriate for the construction of the subject improvement.

Further, Section 409 of the Public Utility Law (66 P.S. §1179), vests jurisdiction with the Commission, solely and exclusively, to appropriate property for, inter alia, the construction, alteration and reconstruction of any rail-highway crossing, which power has been exercised by this Commission since its inception, and affirmed by the Courts, in the manner employed in the subject order.

As to the City's request that this Commission exercise its jurisdiction only in the event the City cannot consummate agreements with the involved property owners for any necessary right-of-entry, this Commission cannot by its order acquiesce to unknown terms of proposed agreements. The agreements referred to by the City are not presently a part of the record in this proceeding and the exact status of these agreements is not established by this petition or anywhere else on the record.

With regard to the City's contention that appropriation of an easement should have been sufficient for the purposes of the involved improvement, this Commission's appropriation of property for the purposes of a rail-highway crossing project does not subject the property to any greater uses than the nature of the project requires, by virtue of this Commission's order.

Our appropriations of property are pursuant to our statutory powers under Section 409 of the Public Utility Law, and are consistent with the well established case law, including, Cavaliers Appeal, 408 Pa. 295 (1962), Bachner v. Pittsburgh, 339 Pa. 535 (1940), Pittsburgh Forge and Iron Company v. Allegheny County, 308 Pa. 328 (1932), and Wilson v. Scranton City, 141 Pa. 621 (1891). For the purposes of the instant proceeding, consistent with the aforesaid, it was our intention to appropriate easements as required by the nature of the involved structures; i.e., overhead or under-grade, and their related piers, appurtenances, and supports.

Further, in rail-highway crossing projects involving the construction of new crossings, it is mandatory that this Commission establish exact limits, by metes and bounds, of the area required for an ultimately encompassing each such rail-highway crossing, so as to eliminate any future question as to the extent of such rights-of-way through the crossing area. Paragraph 4 of this Commission's July 13, 1976 order describes the area required for this project by specific metes and bounds in accordance with the City's Exhibit No. 4.

The recording requirement imposed by Paragraph 4 of this Commission's order, consistent with the above, is imposed to serve further notice on any and all persons potentially involved in related transactions and records.

Further with regard to the City's averment that this Commission should by its order appropriate the property required by reason of this project to the City as grantee and not the Commonwealth of Pennsylvania, this Commission, since it is an agency of the Commonwealth, cannot appropriate property to anyone other than the Commonwealth.

3. The City seeks modification of ordering Paragraph 8 of the subject order, (whereby, inter alia, the overall limits of Commission jurisdiction are defined), so as to restrict jurisdiction to the limited areas at the actual points of crossing, to the exclusion of any jurisdiction over the approaches to the crossings.

This Commission's determination to establish the jurisdictional limits, as set forth in Paragraph 8 of the subject order is clearly consistent with the record herein and the applicable statutes and case law. This Commission in the interest of the prevention of accidents and the promotion of public safety has broad discretion to determine the physical limits of the project over which it will take jurisdiction pursuant to Sections 409 and 411 of the Public Utility Law (66 P.S. §§1179, 1181). The "crossing" encompasses not only the actual point of intersection of the highway with the involved public utility but also the highway approaches to the crossing.

4. The City seeks modification of ordering Paragraphs 10, 11, 22 and 23, of the subject order (covering work to be performed and services to be rendered by Conrail,

with reimbursements to be made by City of Philadelphia) so as to make the directives of these four paragraphs subservient to the terms of any agreements which may be consummated between the City and the railroad.

No agreements between the City and Consolidated Rail Corporation are presently a part of the record in this proceeding and in fact the City avers by its petition they are only now negotiating the terms and conditions of the agreements aforesaid with Consolidated Rail Corporation. This Commission cannot by this order acquiesce to unknown terms of proposed agreements which are not a part of the record herein. Further, Paragraph 29 of the July 13, 1976 order provides that the imposition of costs upon the City, in the first instance, is without prejudice to the City's right to recover all or part of such costs in accordance with lawful agreements among the parties.

5. The city seeks modification of ordering Paragraph 16 of the subject order (relating to detours necessary for highway traffic during construction of the improvement), so as to specifically exclude the City from any responsibility for detours which may be occasioned by reason of highway construction, as opposed to construction of the Airport High Speed Rail Commuter Line.

   The present language of Paragraph 16 is consistent with long-established standards and practice of the Commission. It relates specifically to the improvement sought to be constructed by the City's application and it is not intended nor is it likely to be interpreted by any party that the City in seeking approval by its application to construct the railroad-highway crossings attendant to the high speed commuter rail line, should be held responsible for the establishment and maintenance of detours during the time and by reason of the construction of any highway improvement.

6. The city seeks deletion of ordering Paragraph 17 of the subject order (wherein the city is directed to complete the remainder of the project in accordance with the approved plans), contending that it is repetitious of Paragraph 8, as requested to be modified, and that reference to the "remainder of the crossings" is inapplicable by reason that additional hearings will be required with respect to same.

Paragraph 17 is not repetitious of Paragraph 8 since it does not refer to the "remainder of the crossings" but rather refers to the "remainder of the proposed railroad-highway crossing improvement project" considered by the July 13, 1976 order, and further states that such work be completed "in accordance with the approved plans", which plans are restricted to those crossings in the area of the airport; all of which was clearly established within the body of the order proper.

7. The city seeks modification of ordering Paragraph 18 of the subject order (setting December 31, 1978 as the completion date for the work directed thereby), so as to explicitly limit the work referred to therein as that work required for the construction of those crossings within the limits of the Commission's jurisdiction under the instant order, and to extend the completion date to December 31, 1980.

The language of Paragraph 18, in conjunction with the language of the body of the order, clearly establishes that the work required to be completed by the December 31, 1978 completion date refers to the construction only if those crossings within the jurisdictional limits established by the Commission in the subject order.

In addition, this Commission's determination to require completion of the proposed railroad-highway crossing improvement project by December 31, 1978 was based upon careful consideration of all evidence of record. If any of the parties finds it is unable to complete its portion of the project by the December 31, 1978 completion date it may at that time appropriately petition the Commission for a time extension, setting forth the basis for its inability to comply by December 31, 1978. At this time, however, the City's request for a change of the December 31, 1978 completion date to December 31, 1980, appears to be premature and fails to show due cause for the extension of the December 31, 1978 completion date by this Commission.

8. The City seeks modification of ordering Paragraph 24 of the subject order (wherein the City is directed to reimburse the involved electrical utility company for work of altering or relocating its facilities to permit construction of the improvement project), so as to make the required payments subject to the terms of several as-yet unexecuted

agreements which the City anticipates it will enter into with the utility company. It is further argued that, in the event any or all of four pending agreements are not consummated, the City will then request additional hearings on the involved issues.

The power and duty of this Commission to allocate costs in the absence of consummated agreements among the parties to the proceeding is established under Section 411 of the Public Utility Law (66 P.S. §1181). No agreements were admitted at the Commission's hearing in this matter, none have been submitted since the time of hearing, and presumably have not yet been consummated by the parties. This Commission cannot, by its order acquiesce to unknown terms of proposed agreements. Further, it is to be noted that Paragraph 29 of the order provides that the costs imposed upon the City, in the first instance, may be recovered in part or in their entirety in accordance with lawful agreements among the parties.

9. The city seeks modification of ordering Paragraph 29 of the subject order (which guarantees the City the right of recovery of costs initially allocated against it, from other parties, named or implied, in accordance with any lawful agreement between same), so as to more specifically set forth the full names of said parties.

By including the Paragraph 29 in its order, in the standard format and phraseology which has proven legally sufficient and binding in the past, this Commission extended to City of Philadelphia every reasonable benefit of doubt, and afforded the City every avenue to exercise legal options for recovery, which it is within our province to grant.

Upon full consideration of the record in this proceeding and all specific findings aforesaid we hereby determine and conclude that the July 13, 1976 Commission order at A. 98061 is substantiated by the evidence of record and the city does not establish that there is a valid reason for or better purpose to be served by its request for modification and/or rescission of the terms of the July 13, 1976 order. Accordingly we shall deny the petition in toto; THEREFORE,

IT IS ORDERED: That the petition filed by city of Philadelphia on August 4, 1976, seeking recission and/or modification of certain specified ordering Paragraphs of the Commission's order in this proceeding at Application Docket No. 98061, adopted on July 13, 1976, be and is hereby denied in its entirety.

BY THE COMMISSION,

C. J. McElwee

C. J. McElwee
Secretary

(SEAL)

ORDER ADOPTED: March 14, 1977

ORDER ENTERED:

MAR 29 1977

MAR 30 1977