

Uniform Cover and Calendar
(List attachments on back)

1. <u>DOCKET NO.</u>	:	2. <u>BUREAU AGENDA NO.</u>
A. 98061, A. 99374	:	
3. <u>REPORT DATE:</u>	:	MAY-78-L-311*
April 25, 1978	:	
4. <u>BUREAU:</u>	:	5. <u>PUBLIC MEETING DATE:</u>
Law	:	
6. <u>SECTION(S):</u>	:	May 31, 1978
Rail	:	
7. <u>APPROVED BY:</u>	:	
<u>DIRECTOR</u> Larkin	:	
<u>SECN SUPV(S)</u> Wilson	:	
8. <u>MONITOR:</u>	:	
Carter(98061); O'Bannon(99374)	:	
9. <u>PERSON IN CHARGE:</u>	:	
Kreiger	:	

10. CAPTION (abbreviated)
A. 98061 - App. of the City of Philadelphia for approval of (1) the construction...of a high-speed passenger line from Suburban Station to the Philadelphia International Airport, in the City of Philadelphia;
A. 99374 - App. of the City of Philadelphia for approval of (1) the alteration of the crossing by the reconstruction of the bridge carrying 53th Street...in the City of Philadelphia.

11. <u>PUBLIC RECORD</u>	:	
<u>INVESTIGATION</u>	:	
<u>INTERNAL ADVICE</u>	:	12. <u>CASE NO.</u>

13. MINUTE (include short summary of facts, issue and recommendation)
The staff recommends that the Commission direct:

1. That the Commission deny the City of Philadelphia's Petition for Modification of the Commission's order issued February 8, 1978 at A. 98061 and A. 99374.
2. That the Commission deny AMTRAK's Petition for Modification or, in the alternative, Rehearing.
3. That the Commission adopt the proposed order.

14. <u>MOTION BY:</u> Commissioner Bloom	Commissioner Chm. Carter - Yes
	Commissioner Johnson - Absent
<u>SECONDED:</u> Commissioner O'Bannon	Commissioner Goode - Yes

CONTENT OF MOTION: Staff recommendation adopted.

**DOCUMENT
FOLDER**

**DOCKETED
APPLICATION DOCKET
JUN 13 1978
ENTRY NO. BW**

15. DISSENTING OPINION(S) BY:
CONCURRING OPINION(S) BY:

PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Public Meeting held May 31, 1978

Harrisburg, PA 17120

Commissioners Present:

Louis J. Carter, Chairman

Robert K. Bloom

Helen B. O'Bannon

W. Wilson Goode

Application of the City of Philadelphia for approval of (1) the alteration of the crossing by the reconstruction of the bridge carrying 58th Street over and above the grade of the tracks of Penn Central Transportation Company, in the City of Philadelphia, (2) an exemption from the minimum overhead and side clearance requirements of Part III of the Commission's Railroad Regulations and (3) the allocation of the costs and expenses incident thereto. Docket No. A, 99374

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 III of the Commission's Railroad Regulations. Docket No. A, 98061

Petition by City of Philadelphia seeking modification of the Commission's order issued February 8, 1978.

Petition by National Railroad Passenger Corporation seeking modification of the Commission's order issued February 8, 1978 or, in the alternative, for rehearing.

DUPLICATE RECORD.
ORIGINAL CERTIFIED
TO COMMONWEALTH COURT.

ORDER REHEARING
PHILADELPHIA V. CITY OF PHILADELPHIA

BY THE COMMISSION:

The matters presently before us are: 1) a Petition by the City of Philadelphia filed on March 3, 1978, seeking modification of the Commission's February 8, 1978 order in this proceeding, with respect to the alteration and relocation of Bell Telephone Company of Pennsylvania's (Bell's) facilities; and, 2) a Petition by National Railroad Passenger Corporation (AMTRAK), filed on March 9, 1978, seeking modification of the February 8, 1978 order in this proceeding, insofar as it imposes costs on AMTRAK, or seeking, in the alternative, rehearing.

By the February 8, 1978 order (entry date February 16, 1978), this Commission granted the City's captioned applications insofar as they relate to the reconstruction of the bridge carrying 58th Street over and above the grade of the tracks of AMTRAK (formerly Penn Central Transportation Company) in the City of Philadelphia and allocated the costs of the crossing improvement. Specifically, this Commission directed, inter alia, that the City, at its initial cost and expense, bear all of the bridge reconstruction costs, with reimbursement to the City by AMTRAK of 25% of the costs incurred for the A. 99374 portions of the project. Amtrak was also directed to do all work, at its sole cost and expense, necessary to its facilities by reason of the construction of the A. 99374 portion of the 58th Street Bridge and to provide the necessary protection to ensure the safety of its facilities and equipment at this location during the time work is being performed on its electrification system.

With regard to Bell's facility relocation costs, the February 8, 1978 order directed the City to bear the costs both initially and finally for all materials and work necessary for Bell to make the required alterations or relocations to its facilities located within public right-of-way, exclusive of any betterments and salvage value. The order specifically provided that this allocation is "without prejudice to the City of Philadelphia's right to seek recovery in another forum for all or a portion of those costs pursuant to any lawful agreement existing between the City and Bell Telephone Company of Pennsylvania."

A. City's Petition for Modification of the February 8, 1978 order.

The City by its Petition for Modification requests this Commission to modify the February 8, 1978 order to provide that the work of furnishing material and the payment of costs be in accordance with a November 23, 1977 agreement between the City and Bell.

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The thrust of the City's petition is that the agreement was filed with the Commission prior to the issuance of the February 8, 1978 order and that this Commission instituted no proceedings under Section 911 of the Public Utility Law, 66 P.S. §1351. The City also states that it realizes that this Commission recognized the validity of the existing agreements between the parties; however, it requests that the order be modified to provide that the relocation work and costs involved in re-locating Bell's facilities be in accordance with the November 23, 1977 agreement.

Bell in its Answer to the City's petition admits that the November 23, 1977 agreement between the City and Bell was filed with this Commission under Section 911 of the Public Utility Law and that the agreement provides for the relocation of its facilities made necessary by the proposed projects, which are subject to the captioned proceeding. Bell further avers that it fully intends to comply with the terms and conditions of said agreement. Bell, therefore, requests that the City's petition be denied as unnecessary since the order adequately accounts for the existence of an agreement between Bell and the City.

After careful review of the record in this proceeding, including the City's Petition, Bell's answer thereto, and the February 8, 1978 order, we hereby conclude that the City's petition should be denied. The February 8, 1978 order specifically accounts for the existence of an agreement between the City and Bell and recognizes the validity of specific agreements between the parties. Paragraph 42 of the order provides, in pertinent part:

"42. That this order, insofar as it imposes

certain costs upon City of Philadelphia is

without prejudice to the right of the City

to recover part or all of such costs, thus

incurred in furnishing material and in per-

forming work in accordance with this order,

from . . . Bell Telephone Company of Pennsyl-

vania, or others, in such proportions and

in accordance with the terms of any lawful

agreement existing, or subsequently consummated

between it and such other party." (Emphasis

added).

Further, the City has not by its petition raised any claim of new evidence, substantial change in circumstances, or error of law in accordance with Section 1007 of the Public Utility Law, 66 P.S. §1397; (but, merely seeks reopening of the record for a change in the language of the order, which order even the City admits recognizes the validity of existing agreements between parties. Accordingly, in view of the

clear and specific language of Paragraph 42 of the order, we conclude that the City's grounds for modification are insufficient to justify the relief requested.

B. AMTRAK's Petition for Modification of the February 8, 1978 order or, in the alternative, for Rehearing.

1. Amtrak alleges that Paragraphs 7 and 9 of this Commission's order fails to take into consideration that electrical work and other work, ordered to be done at AMTRAK's sole cost and expense, is directly connected to the reconstruction of the 58th Street Bridge.

This Commission in issuing the February 8, 1978 order considered all evidence of record, and based upon the facts as found, concluded that AMTRAK should perform work and bear costs relating to the A. 99374 portion of the proposed improvement. This Commission specifically found that the total reconstruction of the existing 58th Street Bridge is separated into two distinct parts, Stage A relating to partial bridge reconstruction under A. 99374 and Stage B relating to partial bridge reconstruction under A. 98061, and that there are two separate modes of funding for work to be performed under the two application dockets (Finding Nos. 7, 8). The A. 99374 portion of the project is not related to the construction of the Airport High Speed Line, and the majority of costs involved in the A. 99374 portion were not covered by existing agreements but were allocated by the Commission pursuant to its powers under Section 411 of the Public Utility Law, 66 P.S. §1181. (Finding Nos. 9, 10). AMTRAK was directed to perform work and to bear a portion of the costs relating only to the A. 99374 portions of the proposed improvement.

Amtrak was clearly found to be a "concerned" party at the crossing within the context of Sections 409 and 411 of the Public Utility Law, 66 P.S. §§1179, 1181 (Finding No. 25). Further, Amtrak admits to ownership and responsibility for the operation and maintenance of the existing railroad, tracks, electrification facilities, and attendant rail-related equipment (Finding No. 22).

Accordingly, we concluded by our February 8, 1978 order that because AMTRAK owns the rail line and facilities involved at the A. 99374 portion of the project, including the electrification facilities installed or attached to the bridge; and since AMTRAK is operating numerous high speed passenger trains over five tracks at this location (Finding Nos. 21, 24); said trains having the advantage of passing under the highway, AMTRAK should bear a portion of the costs relating to the A. 99374 portions of the proposed improvement, including any costs for temporary or permanent adjustments to its facilities. (Order of February 8, 1978, page 22).

AMTRAK has not here demonstrated that we erred in making this conclusion nor has it, more specifically, raised any claim sufficient to justify modification of Paragraphs 7 or 9 of the February 8, 1978 order.

2. AMTRAK requests modification of the February 8, 1978 order for the reason that the engineering service costs ordered to be paid in whole or in part by AMTRAK, in Paragraphs 25 and 26 of the order, are directly connected to the reconstruction of the 58th Street Bridge and should be borne by the users of the bridge or parties who permitted deferred maintenance of the bridge, if any, to occur.

Review of the record in this proceeding, clearly reveals that AMTRAK was justly and lawfully ordered to bear 25% of the costs incurred by the City for engineering services and in the preparation of the construction drawings for the A. 99374 portion of the project (Paragraph 25), and to bear the costs incurred for engineering services and in the preparation of electrification drawings for the A. 99374 portion of the project. As demonstrated above, Amtrak is a "concerned" party at the crossing, substantially benefiting from the separation of the crossing, and admits to ownership and maintenance responsibility for the electrification facilities.

Amtrak argues that the costs should be borne by the "users" of the bridge or by the parties permitting deferred maintenance. Amtrak, however, as the record clearly shows is a "concerned" party at the crossing and a "user" of the bridge by having electrification facilities attached to the bridge and facilities and operations beneath the structure. As to the question of deferred maintenance, deferred maintenance was never established to our satisfaction on the record nor was it established on the record that the reconstruction is required as a result of deferred maintenance. Further, while the Pennsylvania Railroad and its successor, Penn Central, historically and by reasons of performance have been responsible for maintenance and perpetuation of the crossing structure (Finding No. 19), no obligation to maintain the structure was established by Commission order.

Accordingly, we conclude that AMTRAK has failed to establish any reason why this Commission should modify Paragraphs 25 and 26 of its February 8, 1978 order.

3. Amtrak requests modification of the February 8, 1978 order for the reason that the assessment of bridge costs against AMTRAK ignores the fact that the bridge was built to handle highway traffic of a nature completely unrelated to that existing at the present time.

The findings made by this Commission in its February 8, 1978 order made evident that this Commission, in its assessment of construction costs against AMTRAK, considered the highway traffic at the involved crossing. In Finding No. 26, we specifically stated that the traffic at this location consists of 8,000 movements per day, which the City anticipates will increase to 9,000 per day by 1985. In fact, this Commission allocated the major share of the Stage A construction costs to the City, concluding at page 21 of the text of the February 8, 1978 order;

"Inasmuch as Stage A of this project, relating to all work attendant to the City's application at A. 99374, involves alteration of the crossing by reconstruction of the bridge carrying 58th Street over and above the grade of the tracks of National Railroad Passenger Corporation; since 58th Street serves as a vital link between areas within the City principally to meet the transportation needs of the traveling public in the City of Philadelphia, we deem it fair and equitable that the City bear the major share of the costs and expenses for the proposed improvement." (Emphasis added).

Additionally, this Commission determined by the February 8, 1978 order that the City should be responsible for future maintenance of the bridge structure.

Accordingly, since the Commission clearly considered all evidence of record relating to the City's "concern" at the crossing, including the City's testimony relating to the volume of traffic at the crossing, we conclude that there is no reason for reconsidering the February 8, 1978 order, as requested by AMTRAK.

4. AMTRAK requests modification of the February 8, 1978 order for the reason that the order entered by the Commission errs in failing to place responsibility for deferred maintenance of the 58th Street Bridge structure, if any, upon the Trustees of Penn Central Transportation Company; and that this oversight ignores the language of 45 U.S.C.A. 743(b) conveying rail property "free and clear of any liens and encumbrances..."

Review of the record in this proceeding shows that no party proved that existing structural conditions resulted from deferred maintenance, that the reconstruction of the 58th Street Bridge is required as a result of deferred maintenance, or that any party had a legal responsibility to maintain the structure pursuant to Commission order.

Further, this Commission recognized that AMTRAK might have existing rights under agreements with either Penn Central Transportation Company or Consolidated Rail Corporation, specifically providing by Paragraph No. 43 of the February 8, 1978 order as follows:

"43. That this order, insofar as it imposes certain costs upon National Railroad Passenger Corporation is without prejudice to the right of the railroad to recover all or part of such costs thus incurred in furnishing material and in performing work in accordance with this order, from Penn Central Transportation Company or Consolidated Rail Corporation, in such proper proportions and in accordance with any lawful agreement existing between it and such other party." (Emphasis added).

Accordingly, since no deferred maintenance has been established and since, as shown above, the costs assessed against AMTRAK are supported by the evidence of record, we conclude that this Commission's determination not to place responsibility for deferred maintenance upon the Trustees was not an error of law.

5. Amtrak requests modification of the February 8, 1978 order for the reason that the costs which are sought to be imposed upon AMTRAK in this proceeding all flow from the construction of a transit line to the Philadelphia Airport, and should be borne by the parties constructing said transit line.

The February 8, 1978 order specifically designates all costs imposed upon AMTRAK in this proceeding as costs relating to the A. 99374 portions of the project.

The evidence of record, and this Commission's specific findings, clearly show that the City's application docketed at A. 99374, relating to the work attendant to the proposed partial bridge reconstruction is separate and distinct from the application under docket A. 98061, relating to all work attendant to the Airport High Speed Line (Finding Nos. 7, 8, 9, and 10). Finding No. 4 of the February 8, 1978 order specifically states:

"4. The application docketed at A. 99374 pertains solely to the proposed reconstruction of those remaining portions of the existing 58th Street Bridge structure not otherwise affected by the AHSL project."

Therefore, since it is clear from the record that the costs sought to be imposed upon AMTRAK do not flow from the construction of the Airport High Speed Line, there is no reason for reconsidering or modifying the February 8, 1978 order on that basis.

Thus, since it is clear that the costs imposed upon AMTRAK in this proceeding relate only to the A. 99374 portion of the project and since it has been demonstrated that AMTRAK is a proper and "concerned" party to these proceedings, significantly benefiting from the fact that the 58th Street Bridge crossing is a separated crossing, we conclude that the costs allocated against AMTRAK by the February 8, 1978 order are just and reasonable, and that AMTRAK has shown no reason for reconsidering or modifying the order.

Accordingly, upon full consideration of the Petitions filed by the City and AMTRAK, respectively, we conclude that neither Petitioner has made a case sufficient to warrant the relief requested; THEREFORE,

IT IS ORDERED:

1. That the City of Philadelphia's Petition for Modification of the February 8, 1978 Commission order issued at A. 99374 and A. 98061 be and is hereby denied.
2. That National Railroad Passenger Corporation's Petition for Modification of the February 8, 1978 Commission order issued at A. 99374 and A. 98061 or, in the alternative, for Rehearing be and is hereby denied.

BY THE COMMISSION,

C. J. McElwee
Secretary

(SEAL)

ORDER ADOPTED: May 31, 1978

ORDER ENTERED:

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