

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Application of the City of Philadelphia - :
for approval of (1) the alteration and re- :
construction of the crossing where a bridge :
carrying Spring Garden Street(State Highway :
Route 67002) crosses above the grade of the :
tracks of the Pennsylvania Railroad Company : DOCKET NO.
and below the grade of the tracks of the : 89603
Pennsylvania Railroad Company High Line, :
west of the Schuylkill Expressway, in the :
City of Philadelphia, (2) the allocation :
of the costs and expenses incident thereto :
and (3) an exemption from the requirements :
of Part 3 of the Commission's Railroad :
Regulations. :

BRIEF ON BEHALF OF CITY OF
PHILADELPHIA, APPLICANT

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

EDWARD G. BAUER, JR.
CITY SOLICITOR
DAVID L. GERMAN, JR.
ASSISTANT CITY SOLICITOR

703 City Hall Annex
Philadelphia 7, Pa.

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STATEMENT OF THE CASE

Under the above application number, the City of Philadelphia is seeking, inter alia, the Commission's requisite approval of the alteration and reconstruction of the crossing where a bridge carrying Spring Garden Street, a city street and also a state highway (L.R. 67002), east of 31st street crosses above the grade of the tracks of the Pennsylvania Railroad Company and under the grade of the tracks of the Pennsylvania Railroad high line west of the Schuylkill Expressway (L.R. 67057) in the City of Philadelphia and for the allocation of cost and expense incident thereto. A formal hearing on the above application was held on February 13, 1963 before Examiner Claude O. Lanciano, Esquire at which hearing counsel for Philadelphia Transportation Company attempted to introduce in evidence testimony tending to show increased costs to his client as a result of the detour of its No. 43 bus line necessitated by the clearing of the bridge during its reconstruction. This was objected to by counsel for the applicant and the objection was sustained by the Examiner. This objection was also joined in by counsel for the Pennsylvania Department of Highways. Subsequent to the hearing, Philadelphia Transportation Company petitioned your Honorable Commission for a rehearing pursuant to the provisions of Rule 54(b) of your Honorable Commission's Rules of Practice and set forth in paragraph 6 thereof certain alleged increased costs to it as a result of the detour of its bus route 43, which request for a rehearing was based on the Examiner's rulings on evidence which appear on pages 44, 45, 49, 50 and 51 of the notes of testimony. Applicant filed an answer to the said petition in which it denied the relevancy and

materiality of the excluded testimony and averred that your Honorable Commission has no jurisdiction under Sections 409 and 411 of the Public Utility Law to order either the City or the Commonwealth to pay consequential damages to a passenger carrying public utility company caused by detours, necessitated by improvements to public highways. On April 1, 1963 your Honorable Commission entered an order denying the petitioner's request for a rehearing and a reversal of the Examiner's rulings on evidence above referred to, stating therein your Honorable Commission's opinion that "We are of the opinion that these matters, even if assumed to be relevant, are too remote for our concern in this proceeding."

STATEMENT OF QUESTION INVOLVED

Should a passenger carrying public utility authorized by your Honorable Commission to operate a bus line over a bridge carrying a city street and state highway, at a formal hearing before your Honorable Commission, held pursuant to an application by a municipality for the alteration and reconstruction of said bridge, be allowed to introduce in evidence at said hearing testimony tending to show increased costs to said public utility as a result of a detour necessitated by said construction work.

ARGUMENT

A permit to use and occupy streets confers a privilege only; it does not confer a property right. The streets belong to the Commonwealth and any private right or grant founded in whole or in part on the use of the public streets of a locality is necessarily taken subject to the regulation and supervisory powers of the Commonwealth and its general police power and must be considered to be so limited at the time it is accepted, Philadelphia Suburban Water Co. v. P.U.C. 168 Pa. Super Ct. 360(371); and the Public Utility Commission exercises the police power of the Commonwealth in crossing cases. Erie Railroad v. Public Service Commission 271 Pa. 409. Section 411 of the Public Utility Law did not create a liability for a new tort. Pennsylvania c. v. Philadelphia 351 Pa. 214.

The general rule has always been that the Commonwealth or its agency cannot be required to bear the costs of relocating facilities of any public utility. The only exception to this rule is that imposed by the legislature in Section 411; that the Commonwealth may in the discretion of the Commission, be required to pay the relocation costs of the facilities of a transportation public utility (as described in Section 409) and only then when such costs have been expended in the construction, relocation, alteration, protection or abolition of a highway-rail crossing accomplished under the procedure prescribed in Section 409.

The Commission's authority must either arise from the express words of the statute or by strong and necessary implication therefrom. "...the Commission's power is statutory; and the legislative grant of power to act in any particular case must be clear. It must be found in Sections 409 to 412 of the P.U.C. code."

A legislative intent to effect any departure from a firmly established policy of the law must be expressed in clear and unequivocal language. Well settled and established principles of law are not to be regarded as changed unless the terms of the new legislation unmistakably and unambiguously indicate such a change. In the absence of express declaration, the law presumes that the act did not intend to make any change in the common law, for if the legislation had that design they would have expressed it. Delaware River Port Authority v. Pa.P.U.C. 393 Pa. 639.

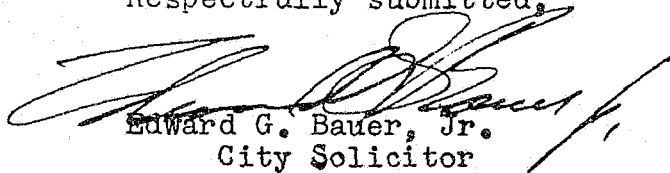
We are dealing here with a bridge which carries a state highway which is also a city street. In authorizing the Philadelphia Transportation Company to operate its No. 43 bus line over this bridge the Commission expressly took cognizance of the likelihood of the bridge being closed for repairs and reconstruction and provided therein (Appl. 59145, Folder 104) for a detour. The transportation company accepted this license to operate the bus line with the knowledge that sooner or later detours would be necessary.

It is the contention of the applicant that the Commission lacks the necessary legal authority to impose on the City or the Commonwealth, consequential damages of the character that the transportation company seeks to obtain. The allowance of such damages would be unjustified and would be far reaching in its implications and tend to retard necessary and vital public improvements having as their purpose the protection of the travelling public. In short, it is an entirely new conception in public utility law, if passenger carrying public


utility companies, who know when they are authorized to use public highways that from time to time repairs and replacements to such highways and bridges constituting an integral part of such highways, should be allowed to claim against the Commonwealth or against any municipality or subdivision of the Commonwealth, damages as a result of the rerouting of their passenger carrying activities required by the repairs to and replacements to highways and bridges made necessary to provide proper protection for the travelling public.

The Examiner's rulings on the evidence submitted on behalf of the Transit Company's claims were correct and your Honorable Commission was eminently justified in sustaining his rulings and in refusing the Philadelphia Transportation Company's request for a rehearing in the above entitled proceeding.

Respectfully submitted,



Edward G. Bauer, Jr.
City Solicitor



David L. German, Jr.
Assistant City Solicitor
for City of Philadelphia

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served by First-Class United States Mail, properly addressed, a copy of the foregoing Brief upon all parties of record in this proceeding.

Dated at Philadelphia, Pennsylvania, this 23rd day of April, 1963.



David L. German, Jr.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RE: APPLICATION OF THE CITY OF PHILADELPHIA FOR APPROVAL :
OF (1) THE ALTERATION AND RECONSTRUCTION OF THE CROSSING :
WHERE A BRIDGE CARRYING SPRING GARDEN STREET (STATE HIGH- :
WAY ROUTE 67002) CROSSES ABOVE THE GRADE OF THE TRACKS OF DOCKET
THE PENNSYLVANIA RAILROAD COMPANY AND BELOW THE GRADE OF :
THE TRACKS OF THE PENNSYLVANIA RAILROAD COMPANY HIGH LINE, A.89603
WEST OF THE SCHUYLKILL EXPRESSWAY, IN THE CITY OF PHILA- :
DELPHIA; (2) THE ALLOCATION OF THE COSTS AND EXPENSES IN- :
CIDENT THERETO AND (3) AN EXEMPTION FROM THE REQUIREMENTS :
OF PART 3 OF THE COMMISSION'S RAILROAD REGULATIONS. :
:

BRIEF ON BEHALF OF PROTESTANT,
PHILADELPHIA TRANSPORTATION COMPANY

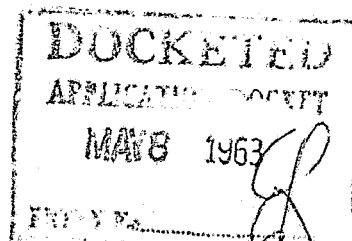
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PENNSYLVANIA PUBLIC UTILITY COMMISSION

Tyson W. Coughlin
Peter Platten,
Attorneys for
Philadelphia Trans-
portation Company

Of Counsel:

Ballard, Spahr, Andrews & Ingersoll
1035 Land Title Building
Philadelphia 10, Pennsylvania

Dated: April 24, 1963



BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RE: APPLICATION OF THE CITY OF PHILADELPHIA FOR APPROVAL :
OF (1) THE ALTERATION AND RECONSTRUCTION OF THE CROSSING :
WHERE A BRIDGE CARRYING SPRING GARDEN STREET (STATE HIGH- :
WAY ROUTE 67002) CROSSES ABOVE THE GRADE OF THE TRACKS OF DOCKET
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CIDENT THERETO AND (3) AN EXEMPTION FROM THE REQUIREMENTS :
OF PART 3 OF THE COMMISSION'S RAILROAD REGULATIONS. :

BRIEF ON BEHALF OF PROTESTANT,
PHILADELPHIA TRANSPORTATION COMPANY

The City of Philadelphia ("City") has filed its applica-
tion for approval of the alteration and reconstruction of the Spring
Garden Street Bridge, Philadelphia, Pennsylvania, and for the allo-
cation of costs and expenses incident thereto.

Philadelphia Transportation Company ("PTC") is a protestant
in this proceedings. PTC is a transportation company in the business,
inter alia, of transporting passengers by subway, elevated, street
railway, trackless trolley and bus in the City of Philadelphia and
its environs under certificates of convenience and necessity issued
by this Honorable Commission. PTC's Bus Route 43 presently crosses
Spring Garden Street Bridge (N.T. 41).

PTC does not oppose the alteration and reconstruction of
the Spring Garden Street Bridge. However, the proposed alteration

and reconstruction will close the Bridge to vehicular traffic for a period of possibly nine months (N.T. 28) necessitating that Bus Route 43 travel an extended detour (PTC Exhibit 1) resulting in substantial increased out-of-pocket expense to PTC.

The Commission, under the Public Utility Law, has the power to determine that the City and/or the Commonwealth shall bear the costs of alteration of a highway-public utility crossing where the public utility involved is engaged in the transportation of passengers (12 P.S. §1179, 1181). PTC is such a public utility (12 P.S. §1102 (17)(c)).

PTC respectfully submits to your Honorable Commission that in view of the severe length of time during which the Spring Garden Street Bridge will be impassable to vehicular traffic and the drastic detour which will be required of Bus Route 43, the City and Commonwealth should justly bear the increased out-of-pocket expenses of PTC.

At the hearing in this matter, PTC introduced testimony of Harold C. Joram, an Assistant Vice President, who first testified that Bus Route 43 presently involved 134 round trips on weekdays, 112 on Saturdays and 107 on Sundays (N.T. 42). Mr. Joram then testified that the required detour would add an additional 2.11 miles to each trip and would extend the trip time by fifteen minutes (N.T. 44), and further would require the addition of two extra buses to maintain the present headway on the route (N.T. 44).

The Hearing Examiner refused to permit Mr. Joram to testify as to the increase in cost to PTC directly caused by the distance of the required detour and the expected duration (N.T. 44-45; 49-50)^{1/}. If testimony had been allowed in this regard it would have revealed:

- a) increased fuel and oil costs - \$76.00 per week.
- b) increased labor and maintenance costs - \$469.00 per week.
- c) increased cost of tire rentals - \$116.00 per week; and
- d) increased costs resulting from more claims for injuries and damages - \$72.00 per week.

All the above items are functions of the increased trip mileage. The total weekly out-of-pocket expense thus to be incurred by PTC is \$733.00 and, on the basis of the record will exceed \$21,000.00 over the nine-month period the Bridge is impassable to Bus Route 43.

Argument

At the outset it must be emphasized that the detour which will be required of Bus Route 43 is not the ordinary detour of short

^{1/} PTC petitioned your Honorable Commission for a rehearing to permit the introduction of testimony regarding increased costs. This petition was denied on the grounds that the increased costs "are too remote for our [Commission's] concern".

length and duration. It is extensive. It will last over a period of possibly nine months. It will involve considerable cost to PTC. This is the reason PTC seeks relief through allocation of costs.

Your Honorable Commission has full power to grant PTC this relief. The Act of May 28, 1937, P.L. 1053, Art. IV, §409, as amended, and §411 (12 P.S. §1179, §1181) read in part as follows:

"(a) No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated or abolished. . . ."

". . . the expense of such construction, relocation, alteration, protection, or abolition of any crossing, 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 . . ."

As stated by our Supreme Court in the case of Delaware River Port Authority v. Pennsylvania Public Utility Commission, 393 Pa. 639 (1958) at page 648:

"The general rule has always been that the Commonwealth or its agency cannot be required to bear the costs of relocating facilities of any public utility. The only exception to this rule is that imposed by the Legislature in §411: that the Commonwealth may, in the discretion of the Commission, be required to pay the relocation costs

of the facilities of a transportation public utility
(as described in §409) and only when such costs
have been expended in the construction, relocation,
alteration, protection or abolition of a highway-rail
crossing accomplished under the procedure prescribed
in §409 . . ." (emphasis supplied)

Your Honorable Commission should grant PTC the relief it
requests.

The expenses involved in the detour of Bus Route 43 are
relocation costs directly caused by the alteration of a highway-
rail crossing and arise from the required relocation of the facili-
ties of the PTC, a transportation public utility. The expenses
listed are of a nature readily derived from increased miles operated
computed on the length of detour here involved.

The City argued at the hearing before your Honorable Com-
mission that in authorizing the operation of its Bus Route 43, PTC
was given the right to digress from the route when temporarily closed
by municipal or state authorities (Docket A. 59145, Folder 101) and
that this provision prevents the allocation of cost presently re-
quested by PTC. The City's reasoning is fallacious. The proviso
relating to digression clearly is to permit detours without the
necessity of filing additional applications before the Commission.
It has no relation to costs. It relates solely to procedure.

In view of the power of your Honorable Commission to
allocate the costs as requested by PTC, it is respectfully submitted
that the offered testimony regarding the increased costs involved

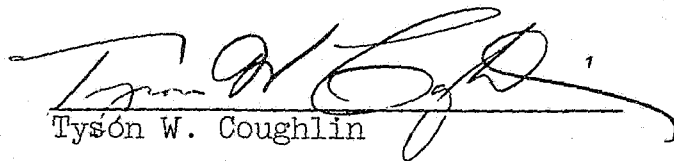
in the required detour was material, relevant, and not too remote to this proceeding. These costs which the testimony would have revealed to be in excess of \$21,000.00 are an expense of the proposed reconstruction and should be justly borne by the City and Commonwealth not only because of their substantiality but more important because PTC's Bus Route 43 is being extended over a long detour as a result of the proposed alteration without receiving any benefit from the alteration. There will be no change in the grade or alignment of the Bridge nor any material increase in the width. There will be no shortening of the distance Bus Route 43 will travel nor any removal of street intersections. Bus Route 43 at the completion of the alteration will travel over the same roadway it did prior thereto. The alteration is intended only to replace a bridge, not to improve traffic conditions. Receiving no benefit PTC should not be required to shoulder any increased expenses in connection with the reconstruction.


Conclusion

We respectfully submit that for the foregoing reasons the instant application should be approved provided that the City and Commonwealth bear the expenses incurred by the PTC in operating Bus Route 43 over the required detour during the time Spring Garden

Street Bridge remains impassable to vehicular traffic.

Respectfully submitted,


Tyson W. Coughlin


Peter Platten
Attorneys for Philadelphia
Transportation Company

Of Counsel:

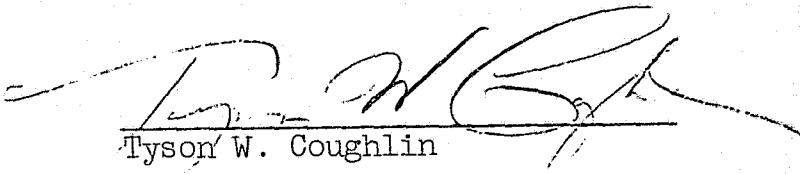
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Philadelphia 10, Pennsylvania

Dated: April 24, 1963

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served by First-Class United States Mail, properly addressed, a copy of the foregoing Brief upon all parties of record in this proceeding.

Dated at Philadelphia, Pennsylvania, this 24th day of April, 1963.


Tyson W. Coughlin

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