

DECISIONS OF

Pennsylvania Public Utility Commission

VOLUME 39



HARRISBURG, PENNSYLVANIA

1962

DEPARTMENT OF HIGHWAYS OF THE COMMONWEALTH
OF PENNSYLVANIA

v.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, (now ERIE-LACKAWANNA RAILROAD
COMPANY), ET AL.

COMPLAINT DOCKET No. 10756

*Crossing Improvement Proceedings—Jurisdiction—Railroad-Highway Crossings
—Telephone Cables.*

The Commission has the responsibility and exclusive jurisdiction to prescribe the manner in which and the conditions under which facilities of nontransportation utilities may occupy rail-highway crossing structures.

John R. Rezzolla, Jr. and Nelson M. Galloway for Department of
Highways.

John B. King and E. Everett Mather for Bell Telephone Company
of Pennsylvania.

Leo A. Achterman for County of Monroe.

David P. Reese for Delaware, Lackawanna and Western Railroad
Company (now Erie-Lackawanna Railroad Company).

BY THE COMMISSION, *September 18, 1961:*

This matter is before us upon petition of The Bell Telephone Company of Pennsylvania, requesting that it be made a party in the complaint proceeding docketed at C. 10756 and that the Commission approve the alteration of the existing rail-highway crossing, below grade, by the attachment of petitioner's facilities thereto.

No answers having been filed to the petition and no objections having been interposed against petitioner's request to be made a

party, the Commission, by order dated August 22, 1960, granted The Bell Telephone Company's request to be made a party to the proceeding and directed that the case be set down for hearing. Testimony was concluded at the hearing held October 24, 1960, and briefs have been filed by The Bell Telephone Company of Pennsylvania, Department of Highways of the Commonwealth of Pennsylvania, and The Delaware, Lackawanna and Western Railroad Company (new Erie-Lackawanna Railroad Company).

This proceeding originated May 24, 1935, when Department of Highways filed a complaint with our predecessor, The Public Service Commission of the Commonwealth of Pennsylvania, alleging that the existing rail-highway crossing at a location in the Borough of Mt. Pocono, Monroe County, where the three tracks of then The Delaware, Lackawanna and Western Railroad Company cross State Highway Route 168 (Traffic Route 611) was dangerous and should be eliminated for the safety, accommodation, and convenience of the public.

The original complaint, which named only The Delaware, Lackawanna and Western Railroad Company, Mt. Pocono Borough, and the County of Monroe as respondents, was amended by our order dated July 31, 1935 by making the Township of Paradise a party respondent.

On April 20, 1936 after hearings, The Public Service Commission of the Commonwealth of Pennsylvania issued its report and order in this proceeding which sustained the complaint, directed the abolition of the crossing, at grade, by the relocation of the highway, the relocation of the railroad tracks, and the construction of a new bridge to carry the relocated tracks over the relocated highway, all in accordance with the general plan prepared by Department of Highways and submitted at the hearing of November 7, 1935 as complainant's Exhibits Nos. 5 and 6.

That order laid out and established the new highway, approximately 3,700 feet in length, from a point in Paradise Township, approximately 2,650 feet southeast of the crossing, to a point in the Borough of Mt. Pocono, approximately 1,050 feet northwest of the crossing, and appropriated all property, except that of the railroad company, required for the purpose of the construction of the improvement. The order approved the general and detailed plans showing the location at which and the manner in which the rail-highway crossing project was to be constructed and allocated among the parties the entire construction cost, future maintenance and damages resulting from the construction of the improvement. The railroad company was

required to relocate its tracks, station, signals, and other facilities to the new locations shown on the approved plans and, in addition, to construct the new platform at, and the foundation for, the relocated station building. Department of Highways was required to construct the remainder of the rail-highway crossing project, including the new highway laid out and established by the Commission and the new bridge structure required to carry the tracks of the railroad company over said highway.

Under the provisions of the order of April 20, 1936 the railroad company was required to bear the cost incurred by the carrier in constructing the platform building foundations and service connections for the relocated station and, in addition, to bear the cost of all new material, except ballast, required in the relocation of the railroad tracks. Department of Highways was required to bear the remainder of the construction costs of the improvement, including the cost of the new highway, the new bridge, and the cost incurred by the railroad company in relocating its tracks, station, signal, and other facilities.

County of Monroe was required to pay all property damages, subject to a contribution of \$9,000 from Mt. Pocono Borough and subject to the railroad company and Department of Highways each paying one-third of the remainder of said damages.

In allocating the future maintenance of the rail-highway crossing project, the order of the Commission provided that, upon completion of the improvement and its opening to public use, The Delaware, Lackawana and Western Railroad Company maintain the entire substructure and superstructure of the new bridge; that the Borough of Mt. Pocono maintain the sidewalks under the new bridge and on the highway approaches thereto, the portion of Barkley Avenue directed to be altered, Belmont Avenue, and that portion of a new access road, about 500 feet in length, located in the borough; and that Paradise Township maintain that portion of the new access road located within the limits of the township. Department of Highways of the Commonwealth of Pennsylvania was required to maintain the state highway approaches to the new railroad bridge, exclusive of the sidewalk located under the new bridge and on the approaches thereto.

The Bell Telephone Company of Pennsylvania now proposes to place two telephone cables on the bridge structure, one immediately and one prospectively. The facilities consist of one steel carrier strand which would be attached at three points to the face of the southwesterly

bridge abutment, and which in turn would support two 200 pair, 24-gauge cables.

Beyond the abutment wall, these wire line facilities would be supported on two new poles, one on each side of the bridge, to be erected by the telephone company outside of the sidewalk or shoulder area and upon private property of the railroad company. Plan No. 3W-12163, prepared by the telephone company and admitted at the hearing held October 24, 1960 as The Bell Telephone Company's Exhibit No. 1, shows the above-described facilities, their location, and manner of making the attachment to the bridge substructure.

According to this plan the two cables and their supporting steel strands would be attached at three points to the sidewalk face of the southwesterly bridge abutment. This abutment is located 10 feet 6 inches back of the curb line and 7 feet back of the line of supporting piers erected along the said curb line. The 7-foot space between the face of the abutment and the face of the supporting piers is occupied by a concrete sidewalk. The attachments therefore would be located in this sidewalk area approximately 10 feet 6 inches beyond the curb line which line was designated on the approved plans, prepared by Department of Highways, as "right of way width to be ordained."

Testimony adduced at the hearing of October 24, 1960 shows that the attachments, for which approval is now sought, were actually complete prior to the hearing. The witness for the telephone company stated that telephone service to the area south of the tracks was formerly provided by cables located in wooden conduits; that these facilities had started to fail; and that in order to furnish continuous and uninterrupted service to this area, it was necessary for the company to install new facilities and that attachment to the bridge as above-described was the most logical and practical means of providing this service.

The record further discloses that the telephone company is willing to bear the entire cost of constructing the new facilities on the bridge and of maintaining these facilities in the future. Also, in event the attachment of these facilities to the bridge, as proposed, in any way adds to the expense of any party responsible under the Commission's order for the maintenance of the bridge, The Bell Telephone Company is also willing to relieve the party of the burden of such additional

expense in such reasonable proportion as the Commission may determine.

Although the record does not indicate, and the parties do not contend, that the attachment of the facilities of the telephone company to the bridge will in any way adversely affect the bridge structure or interfere in the slightest with the convenient and safe use of the rail-highway crossings by the public, Department of Highways and The Delaware, Lackawanna and Western Railroad Company vigorously object to the Commission assuming exclusive jurisdiction of the matter and granting the prayer of the instant petition.

The railroad company opposes the petition chiefly upon the grounds that the telephone company has refused to enter into an agreement providing for the attachment of the facilities to the bridge abutment and for the payment, to the carrier, of a nominal annual rental for the privilege of occupying a portion of the bridge. The railroad company contends that it owns the crossing and, without its approval and permission, the Commission is without jurisdiction to approve the instant petition.

Department of Highways was represented by counsel at the hearing of October 24, 1960, who cross-examined the witness of The Bell Telephone Company, but the department offered no direct testimony for or against the occupancy of the bridge by the telephone company.

Counsel for Department of Highways, by letter dated October 26, 1959, which was in reply to an inquiry of the telephone company to the Department of Highways concerning the proposed attachment, stated its position as follows:—"I see no particular legal difficulties in this proposal, but I do hereby advise you that the Bell Telephone Company must apply for a permit to occupy the highway right-of-way involved, including the right-of-way which is also occupied by the railroad bridge." Thus, the Department of Highways, which is itself a party to these proceedings, would claim the right to require application to it by another party to the same proceeding.

In its brief, Department of Highways asserts that the only question involved is:—

“Is it necessary in this case for your Honorable Commission to determine whether or not you have jurisdiction over all matters pertaining to grade crossings in the Commonwealth of Pennsylvania? No.”

Department of Highways then summarized its position as follows:

“The Department of Highways agrees with the brief of the Delaware, Lackawanna and Western Railroad Company on the statement that your Honorable Commission’s jurisdiction is limited to questions to the effectuation of prevention of accidents and the promotion of safety of the public.”

The Department of Highways then argues:—

“It is respectfully submitted that the position taken by the Railroad Company in this proceeding with respect to your Honorable Commission’s jurisdiction is correct. The Department of Highways hereby disclaims any substantial interest, upon the history of this particular crossing, and upon the facts involved with relation to rights of way, etc., in the Bell Telephone Company’s occupancy of the abutment of this bridge. The primary interest of the Department of Highways is in re-asserting its position that all of these problems of the occupation of crossing structures by nontransportation utility facilities is, from every aspect of practicability, a matter in which the very genius of administrative law must be invoked.”

Inasmuch as Department of Highways “disclaims any substantial interest, upon the history of this particular crossing, and upon the facts involved with relation to rights of way, etc., in the Bell Telephone Company’s occupancy of the abutment of this bridge,” it appears that the sole concern of Department of Highways is that the Commission, in adjudicating the instant case, will determine that, under the law, it has the responsibility and exclusive jurisdiction to prescribe the manner in which and the conditions under which facilities of nontransportation utilities may occupy rail-highway crossing structures.

This fundamental question of the Commission’s jurisdiction over rail-highway crossings has been raised repeatedly by Department of Highways and now, The Delaware, Lackawanna and Western Railroad Company raises the same jurisdictional question.

We have consistently and emphatically rejected all these contentions whenever raised before us.

This Commission is given the exclusive power and duty to control the planning, design, construction, protection, maintenance, alteration, operation, and abolition of such crossings, at grade, and above or below grade; it is given the exclusive power and duty to appropriate property necessary for such crossings, and to allocate the costs and expenses of all of the foregoing; it is given the exclusive right to exercise the Commonwealth's police power with respect to such crossings; and it is given the exclusive custody and control of such crossing facilities constructed and acquired as aforesaid.

Upon full consideration of the matters and things involved, we find and determine that the installation, on the existing crossing, below grade, of the facilities of The Bell Telephone Company, as above described should be approved; **THEREFORE,**

IT IS ORDERED:

1. That the instant petition of The Bell Telephone Company of Pennsylvania to install its facilities on the existing rail-highway crossing, below grade, and the immediate approaches thereto, in Mt. Pocono Borough, Monroe County, be and is hereby approved.

2. That The Bell Telephone Company of Pennsylvania, at its sole cost and expense, furnish all material and do all work necessary to install its facilities on the existing bridge and on the immediate highway approaches thereto, generally in accordance with the sketch plan admitted at the hearing of October 24, 1960 as The Bell Telephone Company's Exhibit No. 1, which plan is hereby approved and is made part hereof.

3. That The Bell Telephone Company of Pennsylvania, at its sole cost and expense, furnish all material and do all work necessary to properly maintain its facilities installed pursuant to the provisions of this order.

4. That in all respects, not inconsistent herewith, our orders issued April 20, 1936, August 22, 1960, and the supplements and amendments thereto remain in full force and effect.