

powered to amend leases during the renewal terms thereof to include a utility escalation clause without any consideration passing from the lessor in exchange, and, further, that even if there were consideration for the amendment, the Department could not enter into it without the consent of the Bureau of Employment Security.

Very truly yours,

W. W. ANDERSON

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OFFICIAL OPINION NO. 78-32

Department of Transportation—Public Utility Commission—Transportation Commission—Administrative Code—Public Utility Law—Pennsylvania Constitution, Article VIII—Capital Facilities Debt Enabling Act—Act No. 149 of 1978—Capital Budget—Capital Projects—Operating Funds

1. The Public Utility Commission has legal authority to order the Department of Transportation to repair or reconstruct a railroad bridge regardless of whether or not the repair work or reconstruction constitutes a capital project.
2. The Transportation Commission is required to set the order of priority for the capital projects to be undertaken by PennDOT under the 12 Year Capital Program and to recommend the program to the Governor, the General Assembly and the Secretary of Transportation.
3. The provisions of Article VIII, Sections 7 and 12 of the Pennsylvania Constitution have been implemented, as to the proceeds of obligations, by the Capital Facilities Debt Enabling Act. (72 P.S. §§ 3920.1 *et seq.*).
4. The legislation implementing Article VIII, Section 12(b) of the Constitution, as it relates to operating funds, is Act No. 149 of September 27, 1978.
5. Act No. 149 does not define "capital project"; this means that even those capital projects with a useful life of less than five years or with an estimated financial cost of less than \$100,000 must be included in the capital budget.
6. A P.U.C. order validly issued pursuant to its authority supersedes and sets aside any action of the Transportation Commission to the contrary.

December 29, 1978

Honorable George S. Pulakos
Secretary
Department of Transportation
1200 Transportation and Safety Building
Harrisburg, PA. 17120

Dear Secretary Pulakos:

We have received a request for an opinion concerning the legal authority of the Department of Transportation (PennDOT) to comply with an order of the Public Utility Commission (P.U.C.) directing the

construction or reconstruction of rail-highway bridges where the total cost, including design, right-of-way and construction, exceeds \$100,000 and the useful life is five (5) years or more, until such projects have been included in a Capital Budget and approved by the General Assembly. In particular, the question is whether the P.U.C. may order PennDOT to complete repairs to the Matsonford Bridge within 60 days of the order and to submit plans to the Commission for the reconstruction of the bridge within six (6) months of the order, absent inclusion of the project in a Capital Budget approved by the General Assembly.

We have been advised that the required repairs have been made but the order to submit plans cannot be complied with because, in PennDOT's opinion, the reconstruction of the Matsonford Bridge is a capital project which has not been included in a Capital Budget as required by the Pennsylvania Constitution. It is our opinion, and you are advised, that the P.U.C. does have legal authority to order PennDOT to repair or reconstruct a railroad bridge regardless of whether or not the repair work or reconstruction constitutes a capital project.

The P.U.C.'s authority is contained in Sections 409 and 411 of the Public Utility Law, Act of May 28, 1937, P.L. 1053, as amended (66 P.S. §§ 1179 and 1181) which vest in the P.U.C. exclusive jurisdiction over matters pertaining to rail-highway crossings. Section 409(c) specifies that:

the commission shall have exclusive power. . .to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended 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, suspension 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 added)

PennDOT contends, however, that it cannot comply with a P.U.C. order that pertains to a capital project having a total cost of at least \$100,000 and a life expectancy of at least five (5) years unless the project is first included in PennDOT's 12 Year Transportation Program pursuant to the Act of May 6, 1970, P.L. 356 (No. 120) (71 P.S. § 511 *et seq.*) and then included in a Capital Budget containing proposed expenditures from the proceeds of obligations or from operating funds.

Act 120, referred to in the preceding paragraph, amended the Administrative Code of 1929 to create the Department of Transportation and, in Section 18 (71 P.S. § 521), to establish the State Transportation Commission. Section 13(a)(13) of the Act (71 P.S. § 512) provides that PennDOT is required to prepare, in even-numbered years, a 12 Year Capital Program to be submitted to the State Transportation Commission:

(a) The Department of Transportation in accord with appro-

priations made by the General Assembly. . .shall have the power and its duty shall be:

* * * * *

(13) To prepare and submit every even-numbered year. . .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. . .(emphasis added)

Section 18(c) (71 P.S. § 521(c)) 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. . .in the Commonwealth* to determine. . .services which should be constructed or reconstructed and the recommended order of priority in which such. . .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. . .*(emphasis added)

Thus, the Transportation Commission is required to set the order of priority for the capital projects to be undertaken by PennDOT under the 12 Year Capital Program and to recommend the program to the Governor, the General Assembly and the Secretary of Transportation. Once the program is determined by the Transportation Commission, it cannot be changed, deleted or altered except by the Commission. The program is forwarded by PennDOT to the Governor who includes it in the Capital Budget submitted to the General Assembly for enactment, in accordance with Article VIII of the Pennsylvania Constitution.

Section 7(a) of Article VIII authorizes the incurring of debt for capital projects:

(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. (emphasis added)

Section 7(b) provides:

All debt incurred for capital projects shall mature within a period not to exceed the estimated useful life of the projects as stated in the authorizing law, and when so stated shall be conclusive.

Section 12 requires the Governor each year to submit a Capital Budget to the General Assembly:

Section 12. Annually, at the times set by law, the Governor shall submit to the General Assembly:

* * * * *

(b) A capital budget for the ensuing fiscal year setting forth in detail proposed expenditures to be financed *from the proceeds of obligations of the Commonwealth* or of its agencies or authorities or *from operating funds*. . . (emphasis added)

These provisions have been implemented, as to the proceeds of obligations, by the Capital Facilities Debt Enabling Act (72 P.S. §§ 3920.1 *et seq.*). In Section 2 of the Act the term "Capital Project" is defined as follows:

(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). . . (72 P.S. § 3920.2(1)).

That Act does not apply, however, to capital projects to be financed from operating funds. The legislation implementing Article VIII, Section 12(b) of the Constitution as it relates to operating funds is Act No. 149 of September 27, 1978, which provides in Section 613 as follows:

As soon as possible after the organization of the General Assembly. . . the Governor shall submit to the General Assembly copies of agency budget requests and a State budget and program and financial plan embracing:

* * * * *

(2) 'A capital budget for the ensuing fiscal year setting forth *capital projects to be financed* from the proceeds of obligations of the Commonwealth or of its agencies or authorities or *from operating funds*. (emphasis added)

1. The enrolled bill designated this as subparagraph (iii) under paragraph (1); however, it will be printed as paragraph (2) to carry out the intention of the General Assembly which was for Section 613 to correspond to Article VIII, Section 12 of the Constitution. (Paragraph (2) will be printed as paragraph (3)).

Act No. 149 does not define "capital project"; this means that even those capital projects with a useful life of less than five years or with an estimated financial cost of less than \$100,000 must be included in the Capital Budget.

Since the reconstruction of the Matsonford Bridge is a capital project, regardless of its useful life or its cost, it must be included in the Capital Budget submitted by the Governor to the General Assembly whether it is to be financed from obligations or from operating funds.

In the case of the Matsonford Bridge, the project was submitted to the Transportation Commission but the Commission failed to include it in the 12 Year Capital Program and as a result, it was left out of the Capital Budget.

The question becomes whether the Transportation Commission, pursuant to the authority granted to it by Act 120, can nullify an order of the P.U.C. issued pursuant to its authority in the Public Utility Law by failing to include a P.U.C. ordered project in the 12 Year Capital Program. This is an apparent conflict between two statutes.

The solution is found, however, in Section 22 of Act 120 which 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. . .

It would be hard to find a clearer expression of legislative intent. There can be no doubt that the Legislature intended for a P.U.C. order validly issued pursuant to its authority under the Public Utility Law to supersede and set aside any action of the Transportation Commission to the contrary.

Therefore, it is our opinion, and you are advised, that a capital project ordered by the P.U.C. must be submitted by PennDOT to the Governor for inclusion in the Capital Budget submitted to the General Assembly, regardless of whether or not the project is included by the Transportation Commission in a 12 Year Capital Program.²

The answers to the seven specific questions at the end of the letter requesting the opinion are as follows:

1. Where the P.U.C. orders PennDOT to design, acquire right-of-way and/or construct a rail-highway crossing improvement project and the project in question will have a useful life of five (5) years or more and a total cost of more than \$100,000, PennDOT can comply with the order even though the project is not on the department's 12 Year Capital Program as required by Act 120. Moreover, PennDOT *must* comply with the order.

2. Of course, PennDOT's compliance with the P.U.C. order will have to await approval of the Capital Budget by the General Assembly.

2. PennDOT cannot use bond funds to comply with such a P.U.C. order if the project is not included in a Capital Budget approved by the General Assembly for obligation funds in accordance with the Capital Facilities Debt Enabling Act and Article VIII, Sections 7(a) and 12 of the Pennsylvania Constitution, but it is required to include the project in the Governor's Capital Budget for submission to the General Assembly.

3. PennDOT cannot use operating funds to comply with such a P.U.C. order if the project is not included in a Capital Budget approved by the General Assembly as required by Article VIII, Section 12 of the Pennsylvania Constitution, but it is required to include the project in the Governor's Capital Budget for submission to the General Assembly.

4. Where a highway or rail-highway project will have a cost, including design, right-of-way acquisition and/or construction, in excess of \$100,000 to be funded by debt obligation and will have an expected life of five (5) years or more, each phase of the project must be on a Capital Budget even though one or more individual phases are less than \$100,000. For example, the costs of design in the Matsonford Bridge case are only \$75,000, but since the total project exceeds \$100,000, the engineering cost cannot be financed from obligations without being included in the Capital Budget. As to funding individual phases from operating funds, they must be included in the Capital Budget regardless of their cost or the cost of the total project, since the implementing legislation for capital projects to be financed from operating funds does not define capital projects in terms of cost.

5. If operating or obligation funds are not budgeted for the project when a P.U.C. order is received, the department must attempt to secure a supplemental Capital Budget authorization from the General Assembly to comply with the order and may not merely place the ordered project in the next regularly scheduled budget submission.

6. If operating funds are used to comply with a P.U.C. order to construct a rail-highway crossing improvement project, the funds must come from the appropriation passed by the General Assembly for the Capital Budget. It would not be proper for PennDOT to utilize funds from other General Assembly appropriations which were designated for other purposes.

7. The P.U.C.'s order does not necessarily supersede a directive of the Governor's Budget Secretary to suspend currently approved capital projects financed by obligation funds, as long as the order can be complied with by obtaining General Assembly approval to utilize operating funds.

The State Treasurer and the Auditor General have been given an opportunity to comment on a draft of this opinion by virtue of Section 512 of the Administrative Code (71 P.S. § 192) but have not done so.

The Auditor General did submit comments on an earlier draft, however, and indicated concurrence generally with our conclusions.

Very truly yours,

W. W. ANDERSON
Deputy Attorney General

GERALD GORNISH
Attorney General
