

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CITY OF PHILADELPHIA,	:	
Petitioner,	:	CIVIL ACTION
	:	NO. 04-2726
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
PUBLIC UTILITY COMMISSION,	:	
Respondent.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 13th day of December, 2004, upon consideration of The City of Philadelphia's Motion for Remand (Document No. 2, filed July 9, 2004), the Public Utility Commission's Brief in Support of Response to Motion for Remand (Document No. 4, filed July 26, 2004), and the City's of Philadelphia's Reply to the Public Utility Commission's Response to the City's Motion for Remand (Doc. No.7, filed August 18, 2004), **IT IS ORDERED** that The City of Philadelphia's Motion for Remand is **GRANTED** and the case is **REMANDED** to the Commonwealth Court of Pennsylvania.

IT IS FURTHER ORDERED thatthe Clerk of Court shall **MARK** the case **CLOSED** for **STATISTICAL PURPOSES**.

MEMORANDUM

I. BACKGROUND

A. Overview

On May 28, 2004, the City of Philadelphia (hereinafter, the “City” or “Petitioner”) filed in the Commonwealth Court a Petition for Review of an order issued by the Public Utility Commission (hereinafter, the “PUC”). The PUC removed the Petition for Review to this Court on June 21, 2004. Pending before this Court are the City of Philadelphia’s Motion for Remand, the Public Utility Commission’s Brief in Support of Response to Motion for Remand, and the City of Philadelphia’s Reply. For the reasons stated herein, Petitioner’s Motion for Remand is granted.

According to the PUC’s Notice of Removal, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331¹ for the following reasons: (1) the City’s Petition for Review raises issues of federal statutory interpretation of the Rail Passenger Service Act relating to SEPTA’s exemption from certain taxes; (2) this Court retained jurisdiction under the Consent Decree² regarding highway bridges crossing over SEPTA’s facilities; and (3) the City’s Petition for Review implicates the Commerce Clause, the Supremacy Clause, the Full Faith and Credit

¹28 U.S.C. § 1331 provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

²On January 19, 1996 this Court approved a Consent Decree entered into by the PUC and SEPTA. The Consent Decree exempted SEPTA from maintenance responsibility for highway bridges located over SEPTA facilities. Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission, No. 95-CV-4500 (E.D. Pa. January 18, 1996). It is primarily the existence of this Consent Decree that the PUC claims creates federal question jurisdiction. The Petitioner is not a party to the Consent Decree between SEPTA and the PUC.

Clause, and the Due Process Clause of the U.S. Constitution.

The City argues that removal was improper because: (1) not all defendants timely consented to or joined in the Notice of Removal; (2) the questions presented involve state law and administrative procedures which must be decided in state court; (3) the PUC is not a “defendant,” and therefore is not permitted to remove the case; and (4) the City does not seek to modify, nullify, or address the validity of the Consent Decree.

B. Factual and Procedural Background

On August 22, 1996, the PUC opened an investigation upon its own motion regarding \$11,454 in costs incurred by SEPTA for removing and securing blast plates³ under the Ridge Avenue Bridge in Philadelphia. The PUC issued an order to this effect on August 29, 1996, stating that SEPTA requested a hearing to allocate costs and maintenance responsibilities. SEPTA, the City, and the Pennsylvania Department of Transportation (hereinafter, the “DOT”) were made parties to the proceeding. The PUC, pursuant to 66 Pa. C.S. § 2704(a), has authority to assess the cost of the work it orders.

On March 23, 2000, Administrative Law Judge (ALJ) Wayne Weismandel issued a Recommended Decision, finding that the plates were railroad appurtenances as defined by Pennsylvania law, that SEPTA should bear all costs, and that the remainder of the bridge would be maintained by the City and the DOT. SEPTA thereafter filed Exceptions to the Recommended Decision, objecting to the allocation of costs. On January 26, 2001, the PUC issued an order granting SEPTA’s Exceptions, reversing the Recommended Decision, and

³The plates were installed during the days of the steam engine to prevent damage to the bridge and currently serve no structural purpose.

remanding the matter to the Office of the ALJ. The PUC asserted that the railroad blast plates were not railroad appurtenances and that it could not allocate the costs to SEPTA because of the Consent Decree the PUC entered into with SEPTA, which prohibited it from allocating the costs of repairs or maintenance to SEPTA.

On March 3, 2004, ALJ Allison K. Turner issued a Recommended Decision stating the following: the DOT, at its sole cost, should maintain the bridge wearing surface and continue to inspect the bridge at least once every two years; the City, at its sole cost, should maintain the superstructure and substructure of the bridge and reimburse SEPTA the \$11,454 it incurred for the blast pates, and maintain and repair the blast plates in the future. The PUC adopted the Recommended Decision, and the City appealed to the Commonwealth Court on May 28, 2004. The DOT intervened in the state court action.

C. The City's Petition for Review in the Commonwealth Court

The City's Petition for Review asks the Commonwealth Court to vacate the decisions of the PUC with regard to (1) maintenance of the blast plates; (2) the PUC's lack of jurisdiction to assign costs regarding railroad appurtenances; (3) the costs incurred by SEPTA to fabricate and install the plates; and (4) the legality and enforceability of the Consent Decree as it applies to entities not parties to it.

III. DISCUSSION

A. Federal Question Jurisdiction

In support of its Motion for Remand, the City argues that its Petition seeking review of the PUC order does not present a federal question because it rests solely on principles of state law cost allocation. Conversely, the PUC essentially contends that the Petition raises issues that

“arise under” the U.S. Constitution because the Consent Decree between SEPTA and the PUC is central to the dispute.⁴ The PUC claims that the City is asking the Commonwealth Court to, in effect, nullify the Consent Decree, which is an action that only the federal can could take. See Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 755 F.2d 38, 44 (3d Cir. 1985). In addition, the PUC argues that the City’s Petition implicates several other areas of federal law, including the Commerce Clause, Due Process Clause of the Fourteenth Amendment, and the Full Faith and Credit Clause. (Def. Br. at 9).

The PUC removed the case under 28 U.S.C. § 1441 on the ground that the Petition for Review filed in the Commonwealth Court implicated federal question jurisdiction. Thus, the burden of proving federal question jurisdiction rests with the PUC. Dukes v. U.S. Health Care, Inc., 57 F.3d 350, 359 (3d Cir. 1995).

“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.” Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). If a case could not have been filed originally in federal court, removal under 28 U.S.C. § 1441 is improper and the district court must remand. See Roxbury Condo. Assoc., Inc. v. Anthony S. Cupo Agency, 316 F.3d 224, 227 (3d Cir. 2003) (“Removal jurisdiction under section 1441 is ... wholly derived from original federal jurisdiction.”). “The rule makes the plaintiff the

⁴The PUC’s Brief in Support of Response to Motion for Remand states that several questions of federal law require resolution including SEPTA’s tax exemption status and whether it applies to repairs made to the blast plates; whether the Consent Decree entered as an Order by this Court applies to repairs to the blast plates; whether the Consent Decree is enforceable against parties who did not sign the decree; whether enforcing the Consent Decree against the City violates due process rights; and whether this Court’s prior ruling regarding the SEPTA tax exemption statutes and Consent Decree supercede contrary rulings by Commonwealth Court. (Def. Br. at 16).

master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”

Id.

The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Caterpillar, 482 U.S. at 392; see also Franchise Tax Board of State of Cal. v. Const. Laborers Vacations Trust for Southern Cal., 463 U.S. 1, 9-10 (1983). In general, a case may not be removed to federal court on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint.

Franchise Tax, 463 U.S. at 10.

The Court concludes that the City's cause of action is grounded in Pennsylvania state law on cost allocation. See 66 pa. C.S. § 2704(a). The Commonwealth Court has routinely apportioned costs in rail highway crossing cases, and as such, have the authority to adjudicate the cost allocation for removing and securing the blast plates under Ridge Avenue Bridge. See e.g., Wheeling & Lake Erie Ry. Co. v. PUC, 778 A.2d 785 (Pa. Commw. Ct. 2001); Bell Atl. v. PUC, 672 A.2d 352 (Pa. Commw. Ct. 1995); PECO Energy Co. v. PUC, 568 Pa. 39 (2002).

Because the City's cause of action is based on Pennsylvania state law, federal question jurisdiction is only appropriate if "it appears that some *substantial*, disputed question of federal law is a *necessary element* of one of the well-pleaded state claims." Franchise Tax, 463 U.S. at 13 (emphasis added). Courts have held that the existence of a federal Consent Decree does not create federal "arising under" jurisdiction. See In re County Collector, 96 F.3d 890, 897 (7th Cir. 1996); see also MSOF Corp. v. Exxon Corp., 295 F.3d 485 (5th Cir. 2002). In light of this authority, this Court finds that the centrality of the Consent Decree is insufficient to establish

federal question jurisdiction for removal purposes.

Contrary to the assertion of the PUC, the City has not asked the Commonwealth Court to invalidate or nullify the Consent Decree. Rather, the City's Petition asks the court to determine that the blast plates are railroad appurtenances and, as such, the cost of repairing them should not have been allocated to the City. If the Commonwealth Court were to determine that the blast plates are railroad facilities, the Consent Decree, which concerns railroad bridges, would not be applicable. Thus, a disputed question of federal law is not a "necessary element" of the City's cause of action. Franchise Tax, 463 U.S. at 13. The Supreme Court has cautioned against a finding of federal question jurisdiction when there is a mere presence of a federal issue. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809 (1986). To the extent that the Consent Decree is an issue in the case, it is only as a defense to SEPTA's liability, which is inadequate to confer federal jurisdiction. Id. at 808 ("A defense that raises a federal question is inadequate to confer federal jurisdiction.").

The Court concludes that the face of the City's Petition does not implicate the several other constitutional provisions (the Commerce, Due Process, and Full Faith and Credit Clauses) that the PUC asserts are at issue. No federal laws are specifically mentioned in the Petition. The Court can look no further than allegations contained in plaintiff's well-pleaded complaint to determine the presence or absence of federal question jurisdiction. Franchise Tax, 463 U.S. at 9-10. Any reference to the federal Consent Decree is in anticipation of the PUC's defenses, which does not confer federal question jurisdiction. Merrell Dow, 478 U.S. at 808.

"[T]he removal statute should be strictly construed and all doubts resolved in favor of remand." Brown v. Francis, 75 F.3d 860, 865 (3d Cir. 1996) (quoting Abels v. State Farm Fire &

Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985)). If there is any doubt as to the propriety of removal, a case should not be removed to federal court. Id. With these principles in mind, the Court concludes that the case should be remanded to state court.⁵

IV. CONCLUSION

For the reasons stated above, the Court concludes the Petition for Review does not arise under federal law, and therefore there is no federal jurisdiction under 28 U.S.C. § 1331. Accordingly, the City's Motion to Remand is granted. This ruling is without prejudice to SEPTA's right to enforce the Consent Decree in any appropriate manner in federal court should that become necessary.

BY THE COURT:

JAN E. DUBOIS, J.

⁵ In view of this disposition of the City's Motion for Remand, the Court deems it unnecessary to address the other arguments presented in the Motion and the Response.