

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

NATIONAL RAILROAD PASSENGER :  
CIVIL ACTION :  
CORPORATION, :  
Plaintiff, :  
v. :  
COMMONWEALTH OF PENNSYLVANIA PUBLIC :  
UTILITY COMMISSION and TOWNSHIP OF :  
TREDYFFRIN, :  
Defendants. :  
NO. 86-5357 :

Newcomer, J. September , 1997

**M E M O R A N D U M**

Before this Court are National Railroad Passenger Corporation's Motion for Modification of this Court's Order of January 2, 1991, and Pennsylvania Public Utility Commission's response thereto, and the Township of Tredyffrin's response thereto, and plaintiff's reply thereto. For the following reasons, the Court will deny plaintiff's motion.

Also before this Court are Pennsylvania Public Utility Commission's Motion for Dissolution of this Court's Injunction, and National Railroad Passenger Corporation's response thereto, and Pennsylvania Public Utility Commission's reply thereto. For the following reasons, the Court will deny defendant's motion.

Also before this Court are National Railroad Passenger Corporation's Conditional Motion for Leave to Amend Complaint, and Pennsylvania Public Utility Commission's response thereto. For the following reasons, the Court will deny plaintiff's motion.

I. Background

This case was originally initiated by a complaint filed by the National Railroad Passenger Corporation ("Amtrak"), on September 10, 1986, seeking equitable and declaratory relief to prevent the enforcement of defendant Pennsylvania Public Utility Commission's ("Commission") order dated June 13, 1986, directing Amtrak to pay approximately twenty percent of the cost of replacing a bridge situated in Tredyffrin Township, Pennsylvania. The Commission order which was being challenged by Amtrak allocated the remaining eighty percent of the cost to defendant Tredyffrin Township which, in turn, would be reimbursed by the Commonwealth of Pennsylvania. The Commission also ordered Amtrak to assume certain maintenance costs of the proposed new bridge and adjoining pedestrian walkway.

On June 30, 1987 this Court entered an Order permanently enjoining the Commission from assessing costs against Amtrak for the maintenance of the Cassatt Avenue bridge structure. National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Comm'n, 665 F. Supp. 402 (E.D. Pa. 1987), aff'd, 848 F.2d 436 (3d Cir. 1988), cert. denied, 109 S. Ct. 231 (1988). Reviewing the legislative history of Amtrak's tax exemption, as codified at 45 U.S.C. § 546b,<sup>1</sup> this Court

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1. 45 U.S.C. § 546b was repealed by § 7(b) of the Act of July 5, 1994, Pub. L. 103-272, 108 Stat. 1379; it was reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(l) by § 1(e) of the same Act, 108 Stat. 904. See H.R. Rep. No. 180, 103d Cong. 2d Sess. 1, 3, 4 (1993), reprinted in (continued...)

determined that the statute was designed to "guarantee Amtrak's fiscal integrity, and indeed its survival." 655 F. Supp at 411. The Act creating Amtrak was found to demonstrate "a federal commitment to maintain and improve rail passenger service, federal controls over Amtrak management and operations and federal financial support for Amtrak." Id.

Against this backdrop, this Court decided that it "would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by defendants." Id. Thus the Court found that "Title 45 of the United States Code section 546b exempts Amtrak from the payment of special assessments such as that imposed by the [Commission]." Id. at 412. Accordingly, the Commission was permanently enjoined from assessing Amtrak for costs associated with the design, construction or maintenance of the Cassatt Avenue bridge.

Despite this permanent injunction, on July 3, 1990, the Commission entered an order imposing on Amtrak the costs of maintaining the substructure and superstructure of the Cassatt Avenue Bridge. Amtrak subsequently filed a motion to enforce the permanent injunction previously issued in the Order of June 30, 1990. By Order of January 2, 1991, this Court permanently enjoined the Commission from imposing on Amtrak any costs of maintenance of the Cassatt Avenue Bridge structure under its July

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1. (...continued)  
1994 U.S.C.C.A.N. 818, 820, 822. For the purposes of this opinion, the Court will cite to the statute as 49 U.S.C. § 24301(1).

3, 1990 Order. National Railroad Passenger Corporation v. Commonwealth of Pennsylvania Public Utility Commission, No. CIV.A.86-5357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991).

Amtrak presently moves this Court to modify this Court's Order of January 2, 1991. By this motion, Amtrak requests this Court to broaden the permanent injunction to include any assessment of responsibility to Amtrak for the repair, maintenance or replacement of highway bridges in the Commonwealth of Pennsylvania. Amtrak argues that a recent decision of the Commonwealth Court in City of Philadelphia v. Pennsylvania Public Utility Comm'n, 676 A.2d 1298 (Pa. Cmwlth.), petition for allowance denied, 546 Pa. 657, 684 A.2d 558, (1996), cert. denied, --- U.S. ---, 117 S. Ct. 1334 (1997),<sup>2</sup> and

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2. This state court case arose out of an order which was issued by the Commission on December 10, 1993, requiring Amtrak to prepare and submit plans and carry out construction necessary to restore the piers and bearings of the 41st Street Bridge in Philadelphia to their original load-carrying capacity at the initial cost of the City. Amtrak filed a Petition for Reconsideration, Amendment, and Supersedeas of the order with the Commission on the grounds that the order was prohibited by the Rail Passenger Service Act.

After a hearing, a Commission administrative law judge issued a Recommended Decision finding that Amtrak's tax exemption precluded the Commission from assessing Amtrak responsibility for Pennsylvania highway bridge maintenance and recommending that the costs be allocated to the City of Philadelphia and Consolidated Rail Corporation ("Conrail"). The Commission adopted the recommended decision by order dated March 31, 1995. Both the City and Conrail appealed the decision to the Pennsylvania Commonwealth Court. Amtrak did not intervene in those proceedings. The appellants each questioned the allocation of costs among themselves and made arguments regarding the effect of a 1927 contract between the City and an alleged predecessor-in-interest of Conrail and Amtrak on the allocation of costs with respect to the 41st Street Bridge.

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statements made by the Commission that it is bound by the decision of the Commonwealth Court, create the imminent prospect

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2. (...continued)

In its opinion, the Pennsylvania Commonwealth Court sua sponte examined the Commission's jurisdiction in rail-highway crossing cases and analyzed the decisions in the federal court cases, including the decisions issued by this Court and the Third Circuit, which limit the Commission's authority to impose taxes or fees against Amtrak due to the language in 49 U.S.C. § 24301(1). The Commonwealth Court decided that the federal courts were incorrect in finding that the Commission assessments against parties in rail-highway crossing cases are "taxes or other fees" within the meaning of the federal statute; therefore, according to the Pennsylvania appellate court's interpretation of the federal tax exemption statute, Amtrak should be considered to be a "party in interest" for purposes of allocating costs and responsibilities. The Commonwealth Court then vacated the Commission's order in that case and remanded the case with specific instructions "to apportion costs for planning, repair and maintenance of the bridge between the present parties and [Amtrak] in accordance with the foregoing opinion."

The Commission's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied. Thus, the Commonwealth Court decision represents that final determination of the state courts on the tax exemption issue.

In light of the Commonwealth Court's decision, the Commission filed a petition for a writ of certiorari with the United States Supreme Court. The Commission argued in its petition that the state court case raises a recurring question which has not been decided by the Supreme Court: whether the Commission assessment of costs and responsibilities under its jurisdiction over safety issues in rail-highway crossing cases are taxes or fees within the meaning of 49 U.S.C. § 24301(1)? The Commission argued that a decision by the Supreme Court was necessary because: (1) case law reveals a serious and irreconcilable conflict between the Third Circuit and the state courts of Pennsylvania; (2) case law also reveals a conflict between the decisions in the Third Circuit and the Second Circuit on the same issue; (3) the Commission cannot decide any cases where Amtrak or SEPTA is a party without running afoul of either the federal or state courts, which prevents the Commission from fulfilling its statutory mandate regarding safety issues in rail-highway crossing cases until this question is resolved; and (4) the characterization of Commission assessments as a "tax" has serious ramifications in other cases.

On March 31, 1997, the Supreme Court denied the Commission's petition for a writ of certiorari.

that the Commission will attempt to impose responsibility for bridge maintenance on Amtrak in the still-ongoing Commission proceedings concerning the Cassatt Avenue Bridge and in numerous other Commission proceedings involving highway bridges over Amtrak's right-of-way. Amtrak argues that modification of this Court's Order of January 2, 1991 is therefore necessary to protect Amtrak's rights under federal law and to fulfill the original purpose of this Court's declaratory judgment and injunctions.

Defendants, of course, oppose any modification of this Court's Order of January 2, 1991. Defendants argue that the permanent injunction entered on January 2, 1991 should not be entered because (1) there is no live case or controversy, (2) the Commission has not violated this Court's January 2, 1991 order, (3) a broadening of this Court's order would violate the due process rights of other parties who have not been joined, and (4) Amtrak improperly seeks to expand the injunction beyond the intent of the statute.

The Commission, after responding to Amtrak's motion for modification, filed its own motion to dissolve the permanent injunction. In support of its motion, the Commission contends that the permanent injunction entered herein was based on this Court's interpretation of 49 U.S.C. § 24301(1) and that this statute was enacted pursuant to the Interstate Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3. The Commission notes that in 1996, the United States Supreme

Court held that Congress cannot abrogate a state's Eleventh Amendment immunity from suit in federal court under the authority of the Interstate Commerce Clause. Seminole Tribe v. Florida, -- U.S. ---, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Without Congressional abrogation of the Eleventh Amendment immunity, the Commission argues that a state cannot be sued in federal court unless it consents to such a suit. The Commission correctly notes that Pennsylvania has not consented to be sued in the federal courts.

Making a critical leap of logic, the Commission argues that it is entitled to Eleventh Amendment immunity to the same extent as Pennsylvania because it is an "arm" or "alter ego" of Pennsylvania. As such, the Commission argues that this Court cannot modify or maintain the permanent injunction entered against it because there has been no consent to suit in federal court and Congress has not validly abrogated its Eleventh Immunity under the Interstate Commerce Clause.<sup>3</sup>

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3. The abrogation argument necessarily revolves around 49 U.S.C. § 24301(1) which provides:

**Exemption from taxes levied after September 30, 1981 . -**

-(1) Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981. However, Amtrak is not exempt under this subsection from a tax or fee that it was required to pay as of September 10, 1982.

(2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

(continued...)

In response, Amtrak rejoins that the Commission is not entitled to Eleventh Amendment immunity. Amtrak argues that since it is a federal entity for the purposes of tax immunity, the Commission cannot rely on the Eleventh Amendment for protection from suit in federal court. Amtrak also contends that the Commission is not an arm or alter-ego of Pennsylvania, and as such, the Commission is not entitled to Eleventh Amendment immunity.

In addition, Amtrak argues that if this Court finds that the Eleventh Amendment does bar suit against the Commission, it should grant its conditional motion for leave to amend the complaint so that Amtrak can amend the complaint to name the Commissioners under the doctrine of Ex Parte Young. If the complaint was amended to add the Commissioners, Amtrak argues that the Commission's Eleventh Amendment argument would be moot because the Eleventh Amendment does not bar suit against state officials when the suit seeks only prospective relief to end a continuing violation of federal law.

## II. Discussion

### A. Eleventh Amendment Immunity

Because the Commission's Eleventh Amendment argument is necessarily a threshold question in that it challenges this Court's authority to modify, or for that matter, even maintain the current permanent injunction, the Court first examines

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3. (...continued)  
49 U.S.C. § 24301(1).

whether the Commission is entitled to the protection of the Eleventh Amendment, and thus whether the Commission's motion to dissolve the permanent injunction should be granted.

1. Is Amtrak a Federal Entity?

As stated above, Amtrak argues that the Commission cannot use the Eleventh Amendment as a shield to protect it from instant law suit and injunction because the Eleventh Amendment has never barred federal court suits by the United States government against a state. From this rule of law, Amtrak reasons that it can sue the Commission in federal court because it is a federal entity, and thus not subject to the bar of the Eleventh Amendment. The Commission rejoins that Amtrak's argument must fail because Amtrak is not a federal entity.

It is well established that federal court suits brought by the United States against states are not barred by the Eleventh Amendment. Employees of Dept. of Pub. Health and Welfare v. Dept. of Pub. Health and Welfare, 411 U.S. 279, 286, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973); United States v. Mississippi, 380 U.S. 128, 140, 85 S. Ct. 808, 13 L. Ed. 2d 717 (1965). Citing Dept. of Public Health and Mississippi, Amtrak argues that federal entities are not subject to the Eleventh Amendment bar of bringing suit in federal court against a state. Although Amtrak's position seems logical, neither the Dept. of Public Health nor Mississippi do not state explicitly that a federal entity enjoys the same freedom to bring suit in federal

court against a state. Indeed, Amtrak does not provide this Court with any authority to support its position. Nonetheless, for the purposes of this motion, the Court will assume that federal entities can sue states in federal court to the same extent that the United States government can be sue in federal court.

However, in order to be entitled to this same freedom from the bar of the Eleventh Amendment, Amtrak must prove that it is a federal entity. This Amtrak cannot do. The clear and unequivocal language of 49 U.S.C. § 24301(a)(3) states that Amtrak "is not a department, agency or instrumentality of the United States Government."<sup>4</sup> Thus, it is evident to this Court that Congress did not intend to extend department, agency or instrumentality status to Amtrak on a wholesale basis. Based on

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4. Section 24301 provides:

**Status and applicable laws.**

(a) **Status.** -- Amtrak --

(1) is a rail carrier under section 10102 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government.

(b) **Principal office and place of business.** -- The Principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction or the district courts of the United States in a civil action.

49 U.S.C. § 24301(a)-(b).

the explicit language of § 24301(a)(3), Amtrak cannot argue that it is a federal entity for the purposes of avoiding the bar of the Eleventh Amendment.

In an attempt to circumscribe the language of § 24301(a)(3), Amtrak relies on the Supreme Court's decision in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), wherein the Court concluded that Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. In that case, plaintiff Lebron filed suit, claiming that Amtrak had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature. The district court ruled that Amtrak was a government actor for First Amendment purposes because of Amtrak's close ties with the federal government. The Court of Appeals for the Second Circuit reversed, noting that Amtrak was, by the terms of the legislation that created it, not a government entity, and concluding that the government was not so involved with Amtrak that the latter's decisions could be considered federal action.

In its decision in Lebron, the Supreme Court began its analysis by addressing whether the clear language of 45 U.S.C. § 541, the predecessor statute to 49 U.S.C. § 24301(a)(3), was dispositive of Amtrak's agency or instrumentality status. The Supreme Court found that the status ascribed to Amtrak was not dispositive of Amtrak's status as a government entity for the

purposes of determining the constitutional rights of citizens affected by its action. 115 S. Ct. at 971. The Court, however, did state that:

Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control--for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities . . . . And even beyond that, we think § 541 can suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate. We have no doubt, for example, that the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit, . . . and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States . . . .

Id. Under the Supreme Court's interpretation of § 541 (now § 24301(a)), Amtrak's status as an agency or instrumentality of the United States depends on the facts and circumstances of the case and § 24301(a)'s language is not always dispositive of this inquiry. The question which is posited to this Court at this point is what status should Amtrak be deemed to have under the facts of this case.

Amtrak argues that although Congress characterized Amtrak's status as "not a department, agency, or instrumentality of the United States Government" which "suffice[s] to deprive all of those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate," id., in 49 U.S.C. § 24301(l) Congress explicitly reserved for Amtrak an immunity "from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on

it after September 30, 1981" and described that immunity in the legislative history as being "to the same extent the United States is exempt from the payment of such taxes and other fees."<sup>5</sup> From its review of the reasoning in Lebron and the language of and legislative history of § 24301(1), Amtrak correctly concludes that Congress expressly reserved for Amtrak the immunity from state and local taxes and other fees to the same extent that the United States is exempt. Because Amtrak has been given immunity from state and local taxes and other fees, Amtrak contends that it "is an entity of the federal government for purposes of enforcing its exemption from state and local taxes and is not subject to the Eleventh Amendment." (Amtrak's Br. Opp'n Def.'s Mot. Dissolve at 7). It is at this point that Amtrak's reasoning loses its logical consistency.

While it may be true that Congress intended to extend to Amtrak the same immunities from state taxation that the federal government enjoys, it does not follow that Congress therefore intended to make Amtrak a federal entity for the purpose of denying Eleventh Amendment rights to states. Although there exists statutory language that extends the federal government's immunity from state and local taxes to Amtrak, no such statutory language exists that indicates that Congress intended Amtrak to be considered a federal entity for the purposes of the Eleventh Amendment. Indeed, statutory language

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5. H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981).

exists that indicates that Congress itself believed that Amtrak was not a federal entity for the purposes of the Eleventh Amendment.

Section 24301(1) provides that "[t]he district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak." 49 U.S.C. § 24301(1)(2). If Congress had actually decided that Amtrak was a federal entity for the purposes of the Eleventh Amendment, then the language of § 24301(1)(2) would be superfluous. However, if the Rail Passenger Service Act does not make Amtrak a federal entity for the purposes of the Eleventh Amendment, as this Court finds today, then the language in § 24301(1)(2) is not surplusage.

Instead, § 24301(1)(2) becomes critically important under this statutory scheme because it is this language, together with the language in subsection(1)(1), that evinces Congress' intent to abrogate state immunity under the Eleventh Amendment.<sup>6</sup>

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6. Under Eleventh Amendment jurisprudence, federal courts are charged with determining whether Congress has unequivocally demonstrated its intent to abrogate the states' immunity from suit. Seminole Tribe, 116 S. Ct. at 1123. This intent must be "unmistakably clear in the language of the statute." Id. (citations omitted). The Court finds that Congress in § 24301(1)(1)-(2) provided an "unmistakably clear" statement of its intent to abrogate the states' immunity. Subsection (1)(1) provides that "Amtrak . . . is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981." (emphasis added). Subsection(1)(2) provides that "[t]he district courts of the United States have original jurisdiction over a civil action  
(continued...)

Because Amtrak is not a federal entity for the purposes of Eleventh Amendment immunity, Congress enacted the language of § 24301(1)(2) to ensure that states could not assert the defense of sovereign immunity in federal court. In addition, there was nothing to prevent Congress from legislating that Amtrak should be considered a federal entity for the purposes of the Eleventh Amendment if that is what Congress actually intended to do.

As the statutory language and legislative history demonstrates, it is probable that Congress intended Amtrak not to be an agency, entity or instrumentality of the United States government for the purposes of extending those privileges and immunities which are only available to the United States, except where Congress explicitly stated that Amtrak should be so treated. Thus, the Court rejects Amtrak's argument that it is a federal entity for the purposes of Eleventh Amendment immunity.

2. Is the Commission an Arm or Alter Ego of the Commonwealth?

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6. (...continued)

Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak." This language makes it unmistakably clear that Congress intended to allow Amtrak to bring suit against a state or political subdivision of the state in federal court. Thus, the Court finds that Congress intended, through the language of § 24301(1), to abrogate the states' sovereign immunity from suit. Although the Court finds that Congress intended to abrogate, the Court does not decide at this point whether Congress abrogated the states' sovereign immunity pursuant to a constitutional provision that grants Congress the power to abrogate.

In light of Seminole Tribe, Amtrak would be hard pressed to demonstrate that Congress did abrogate pursuant to constitutional provision that authorizes Congress to abrogate. Indeed, Amtrak never even advances this argument.

Amtrak next argues that the Commission can not raise the shield of the Eleventh Amendment because it is not an arm or alter ego of the state. The Commission, on the other hand, argues that it is entitled to be protected by the Commonwealth's sovereign immunity because it is an arm or alter ego of the state.

In Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995), the Third Circuit restated the criteria to be considered in determining whether an entity is an alter ego or arm of the state for the purposes of the Eleventh Amendment. The test entails three separate inquiries:

(1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys.

Id. at 1144-45 (citations omitted).

The party asserting Eleventh Amendment immunity bears the burden of proving its applicability. Id. at 1144 (citing ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993)). The Third Circuit has stated that "[b]ecause Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal matter jurisdiction in the ordinary sense."

Id. Agreeing with the ITSI TV court, the Third Circuit has held that "'whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]'" and "'[l]ike any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance.'" Id. (quoting ITSI TV, 3 F.3d at 1291). Thus, in this case, the Commission is charged with the obligation to prove its entitlement to the defense of sovereign immunity.

"[A]lthough no single factor is dispositive of the Eleventh Amendment inquiry, the 'most important' factor is whether a judgment against the entity in question . . . would be paid out of the state treasury." Christy, 54 F.3d at 1145. Indeed, the Supreme Court has noted that: "[T]he vast majority of Circuits have concluded that the state treasury factor is the most important factor to be considered and, in practice, have generally accorded this factor dispositive weight." Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 115 S. Ct. 394, 404, 130 L. Ed. 2d 245 (1994) (citations omitted).

Pursuant to the Commission's statutory authority, the annual operating budget of the Commission is derived from a percentage of the "total gross intrastate operating revenues of the public utilities under its jurisdiction for the preceding calendar year." 66 Pa. Cons. Stat. § 510(a). The assessments against public utilities are paid into the General Fund of the State Treasury. 66 Pa. Cons. Stat. § 511(a). The funds,

however, are then specifically earmarked for redistribution to the Commission and are not available for other uses:

All such assessments and fees, having been advanced by public utilities for the purpose of defraying the cost of administering this part, shall be held in trust solely for that purpose, and shall be earmarked for the use of and annually appropriated to, the commission for disbursement solely for that purpose.

66 Pa. Cons. Stat. § 511(b). Beyond these assessments the Commission may also apply for and use federal funds pursuant to the National Energy Act subject to appropriation by the General Assembly. 66 Pa. Cons. Stat. § 511.1. In addition, the Commission can obtain funds by fees for filing, record copying and instrument testing. 66 Pa. Cons. Stat. § 317.

A review of the sources for the Commission's funding indicates that funding for the Commission is derived from an annual assessment on the revenues of public utilities, and is not obtained from State Treasury funds that could otherwise be used to satisfy expenses or obligations. Additional funds for the Commission are derived from fees paid for filing, record copying and instrument testing, which is another source of funding which does not come directly from the State Treasury. These sources of funding lend strong support to the conclusion that the Commission is not the alter ego of Pennsylvania.

The Commission argues that it has no independent authority to raise funds and that those funds necessary for the operation of the Commission must come through the budget process. In essence, the Commission argues that payment for a judgment

against it would come from State Treasury because the budget of the Commission is subject to legislative approval. This argument, however, is without merit. Indeed, in Christy, the Third Circuit stated that "state control over an entity's ability to obtain funds is inadequate to demonstrate state ownership of the funds where the state is not shown to have a financial interest that would be directly and adversely affected by the diminution of the funds in question." Christy, 54 F.3d at 1146. Here, the state's authority to review and approve the Commission's budget under 66 Pa. Cons. Stat. § 510(a) falls short of indicating state ownership of the funds obtained through the assessments of public utilities and the fees raised by the Commission. The argument that the state controls the Commission's ability to obtain funds does not demonstrate that the state has a financial interest that would be directly and adversely affected by the Commission having to satisfy a judgment against it.

The Commission also has not demonstrated that it would not have enough money to satisfy a potential judgment against it. Failure to offer any evidence on this issue is fatal to the Commission's argument that it could not satisfy a judgment. In Christy, the Court stated that "[s]ince the [Turnpike] Commission bears the burden of proving its entitlement to Eleventh Amendment immunity, the [Turnpike] Commission's failure to provide pertinent information regarding its ability, or lack thereof, to satisfy a potential judgment against it simply means that the

[Turnpike] Commission has failed to satisfy its burden of proof on this important question." Id. at 1146. The same reasoning equally applies in this case. Because the Commission has not offered any evidence with respect to this issue, it has failed to satisfy its burden of proof on this important question.

In addition, the Commission has not demonstrated that the State Treasury is responsible for paying any obligations incurred by the Commission. The Commission, in its brief, merely states that the Commonwealth would be responsible for such obligations without providing this Court with any affirmative support for this proposition. Thus, the Court will not rely on this unsubstantiated claim by the Commission. See id. at 1147 (holding that "the [Turnpike] Commission has failed to establish that Pennsylvania is under any affirmative obligation to pay the Commission's unassumed liabilities"). Although states "might well choose to appropriate money to the [Turnpike] Commission to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state simply 'do not trigger [Eleventh Amendment] immunity.'" Id. (quoting Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 661 (3d Cir. 1989)).

The Commission has failed to establish that (1) a judgment against it would be the equivalent to a judgment against the Treasury of the Commonwealth; (2) the Commission lacks financial resources to satisfy a judgment against it; or (3) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. Thus, the Court finds that the funding

factor, the most important factor, weighs heavily in support of the finding that the Commission is not an arm or alter ego of the Commonwealth and does not enjoy Eleventh Amendment immunity from suit in federal court.

The second factor that must be considered in determining whether the Commission is an arm or alter ego of the Commonwealth of Pennsylvania is the status of the Commission under Pennsylvania law. Christy, 54 F.3d at 1144. The goal here is to "determine whether Pennsylvania law treats the [Commission] as an independent entity, or as a surrogate for the state." Id. at 662. The Commission cites to cases wherein the courts of Pennsylvania have held that the Commission is an arm of the legislature whose members perform legislative work delegated by the General Assembly. See Lacy v. East Broad Top RR & Coal Co., 168 Pa. Super. 351, 77 A.2d 706 (1951); Commonwealth ex rel. v. Benn, 284 Pa. 421, 131 A. 253 (1925). In contrast, Amtrak has not provided the Court with any case law which would counter the position of the cases that were produced by the Commission. Thus, the Court finds that the Commission's cases lend support to its argument that under Pennsylvania law, the Commission is a surrogate of the state.

In addition to these cases, the Commission alleges that under Pennsylvania law it is an arm of the state because it is immune from suit in state court pursuant to 42 Pa. Cons. Stat. § 8522. In Christy, the Circuit noted that "the Pennsylvania sovereign immunity statute itself is some evidence of the

[Turnpike] Commission's status before the law of Pennsylvania. And as some evidence of the [Turnpike] Commission's status at state law, it is relevant to our Eleventh Amendment inquiry." 54 F.3d at 1149 n.9. In this case, the fact that the Commission has been given immunity from suit in state court is relevant to the Eleventh Amendment immunity inquiry and weighs in favor of finding that under the law of Pennsylvania, the Commission is an agency. However, as the Christy court noted the state's grant of sovereign immunity to an agency "is far from determinative of [the Eleventh Amendment] inquiry." Id.

Amtrak, in support of its argument that the Commission is not an agency under the eyes of Pennsylvania law, states that the Commission was established as an "independent administrative commission." 66 Pa. Cons. Stat. § 301(a). While it notes that this term is undefined by statute, Amtrak argues that this language clearly indicates a legislative intent to establish an entity that is separate and distinct from agencies that are intended to be arms of the state. Although this language may evince a legislative intent to establish an agency that is not an arm of the state, the actual status that the Commission is afforded under state law indicates that the Commission is probably most properly characterized as an arm of the state under state law. Thus, the Court finds that "status under state law" factor weighs in favor of finding Eleventh Amendment immunity.

The third factor requires this Court to determine what degree of autonomy the agency enjoys. Id. at 1144. To begin,

the Court notes that the Commission's membership is controlled by the executive and legislative branches of the Commonwealth. 66 Pa. Cons. Stat. § 301(a) (the five commissioners are appointed by the Governor, with the advice and consent of the members of the Senate). In addition, the Governor appoints the Chairman of the Commission. 66 Pa. Cons. Stat. § 301(a). State authority over the appointment of the Commission members lends support to a finding of sovereignty. Id. at 1149.

In addition to this the lack of autonomy, other information indicates that the Commission may not be autonomous. Indeed, the Commission cannot enter into contracts in its own name, it cannot purchase or own property, and has a limited source of independent funding.

Nonetheless, the Commission also possesses a great deal of autonomy in certain areas. The Commission describes itself as an "independent agency with complete autonomy over its operations." (Comm'n Br. Supp. Mot. Dissolve at 6) (emphasis added). As acknowledged by the Commission, it possesses broad regulatory authority to conduct its day-to-day business. See 66 Pa. Cons. Stat. § 501. Moreover, the Commission admits "that the Commissioners are not directly answerable to the Governor and that neither the Governor or the members of the General Assembly can order the [Commission] to adjudicate a case a certain way . . . ." (Reply Br. at 7). However, the Commission argues that such autonomy is needed to provide the parties, who come before it, with due process. Nevertheless, the Commission itself admits

that it has certain attributes that would support a finding that it is autonomous from the state.

Although the Commission is autonomous in many respects, the Court finds that "the significant control the Commonwealth exercises through the power to appoint the commissioners weighs slightly in favor of [Commission] immunity from suit." Christy, 54 F.3d at 1149 (citation omitted).

Having carefully considered the three factors above, the Court must now consider the three factors in their totality. Id. at 1150. To begin, the most important factor, funding, weighs heavily against the Commission. In contrast, the second factor, "status under state law," weighs in favor of the Commission. The third factor, autonomy, weighs ever so slightly in favor of the Commission. If the balancing was as simplistic as counting the number of factors that weigh in favor of one party, then the result in this case would be simple – the Commission would prevail because two factors weigh in its favor. However, the balancing test required by Eleventh Amendment jurisprudence is not so simplistic.

As stated above, the first factor, funding, is the most important factor, and thus it is given the greatest weight. "The special emphasis . . . place[d] upon the funding factor is supported by the Eleventh Amendment's central goal: the prevention of federal court judgments that must be paid out of the State's treasury." Id. at 1145 (citation omitted). In this regard, the Supreme Court has noted that this factor is given

dispositive weight by most Circuit Courts. Hess, 115 S. Ct. at 404. Indeed, when the state is not required to pay the obligations of the entity in question, "the Eleventh Amendment's core concern is not implicated." Id. at 406.

In this case, the funding factor weighs heavily against the Commission. The Commission has been unable to satisfy its burden that (1) a judgment against it would be equivalent to a judgment against the Treasury of the Commonwealth; (2) the Commission lacks financial resources to satisfy a judgment against it; or (3) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. Thus, the core concern of the Eleventh Amendment is not implicated by the facts of this case.

Because the core concern of the Eleventh Amendment is not implicated herein, the two remaining factors must weigh so heavily in the Commission's favor to justify a finding of Eleventh Amendment immunity. However, the second and third factors, although weighing in favor of the Commission, simply do not tip the scales in favor of a finding of sovereign immunity for the Commission. Indeed, this Court has determined that the third factor only slightly weighs in the Commission's favor because the Commission is autonomous in much of its operations. Moreover, although the second factor weighs more decidedly in the Commission's favor, this factor is not without its ambiguities. Consequently, the Court finds that the balance of factors is struck against a finding that the Commission is entitled to be

protected by the state's cloak of sovereign immunity. Because the Commission cannot raise the Eleventh Amendment as bar to suit in this Court, the Commission's motion to dissolve the permanent injunction is denied.

B. Conditional Motion for Leave to Amend

In response to the Commission's motion to dissolve, Amtrak conditionally moves for leave to amend the complaint if the Court grants the motion of the Commission. Because the Court has denied the Commission's motion to dissolve, the Court denies Amtrak's conditional motion for leave to amend complaint as moot.<sup>7</sup>

C. Amtrak's Motion for Modification of the Permanent Injunction

Disposing of the Commission's motion to dissolve and Amtrak's conditional motion to amend, the Court now turns its attention to the motion which gave rise to the instant dispute between the parties – the motion of Amtrak for modification of this Court's Order of January 2, 1991.

It is well established that a court that has entered an injunction has continuing jurisdiction over the case to oversee implementation of the injunction. United States v. Swift & Co., 286 U.S. 106, 114, 52 S. Ct. 460, 76 L. Ed. 999 (1932). The court further has inherent power to modify the injunction. Id.

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7. In its motion, Amtrak argues that it should be entitled to amend the complaint to add the actual commissioners as defendants under the Ex Parte Young doctrine. The Court, however, will not reach the merits of Amtrak's motion because the Court has denied its motion as moot.

In this light, the Third Circuit has held that "[t]he hornbook rule regarding plaintiff's request for modification of injunctive relief is that 'modification is proper if the original purposes of the injunction are not being fulfilled in any material respect.'" United States v. Local 560 (I.B.T.), 974 F.2d 315, 331 (3d Cir. 1992) (quoting Charles Wright and Arthur Miller, 11 Federal Practice and Procedure, § 2781, at 605 (1973)).

The Supreme Court has held that the appropriate test to be used to determine whether an injunction should be modified is "whether 'time and experience have demonstrated' that 'the decree has failed to accomplish' its objectives." Id. at 332 (citing United States v. United Shoe Machinery Corp., 391 U.S. 244, 249, 88 S. Ct. 1496, 1500, 20 L. Ed. 2d 562 (1968)). The Supreme Court also noted that each consideration of the request for modification "must be based upon the specific facts and circumstances that are presented." Id. Thus, the question presented to this Court is whether Amtrak has demonstrated that the injunction has failed to accomplish its objectives.

In this regard, Amtrak argues that "the original purpose of the Court's injunction was to effectuate the Congressional intent to protect Amtrak from the imposition of state and local taxes and fees by prohibiting the [Commission] from imposing on Amtrak assessments for bridge maintenance and repair." (Amtrak's Br. Supp. Mot. Modification at 15). Amtrak contends that although the terms of the injunction were limited to the Cassatt Avenue Bridge, this Court's original opinion and

the Third Circuit's affirmance of that decision make it clear that any imposition on Amtrak or responsibility for bridge maintenance is unlawful.

Amtrak contends that the objectives of this Court's permanent injunction are not being fulfilled based on the conduct of the Commission in the aftermath of the Commonwealth Court's decision in City of Philadelphia v. Pennsylvania Public Utility Comm'n, supra. In the City of Philadelphia, the Commonwealth Court rejected this Court's and the Third Circuit's interpretation of § 24301(1). In its view, § 24301(1) does not preclude the Commission from assessing costs against Amtrak for the maintenance of highway-roadway crossings. Accordingly, the Commonwealth Court ordered the Commission to make a new allocation of costs considering all parties, including Amtrak. The Commission appealed this order. The Supreme Court of Pennsylvania denied the Commission's appeal.

Because the Commission was presented with what it felt were two irreconcilable orders – one from this Court and one from the Commonwealth Court, it filed a writ of petition for certiorari with the Supreme Court of the United States. The Supreme Court denied the petition. However, in this petition, the Commission stated that it agreed with the Commonwealth Court's interpretation of § 24301(1). Based on these statements, Amtrak argues that the Commission's "stated intent to impose responsibility for bridge maintenance on Amtrak, pursuant to the decisions of the Pennsylvania Commonwealth Court, is a clear

violation of this Court's prior judgment and orders." (Amtrak's Br. Supp. Mot. Modification at 16). Amtrak argues that modification of this Court's Order of January 2, 1991 is therefore necessary to protect Amtrak's rights under federal law and to fulfill the original purpose of this Court's declaratory judgment and permanent injunction.<sup>8</sup>

Despite Amtrak's arguments to the contrary, the Court concludes that Amtrak has not demonstrated that the purposes of the permanent injunction entered on January 2, 1991 are not being fulfilled. Amtrak has failed to persuade the Court that the Commission has violated the January 2, 1991 order in either letter or spirit. The result of the case before this Court is that the Commission has repeatedly recognized that the federal courts barred the Commission assignment of any costs or responsibilities for replacement or maintenance of a highway bridge over an Amtrak right-of-way. Moreover, the Commission has not allocated any costs or responsibilities on highway structures crossings above Amtrak facilities to Amtrak. In sum, Amtrak cannot point to any actual incidents, wherein the Commission

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8. Amtrak requests the Court to modify its January 2, 1991 Order to cover all crossings of Amtrak's right-of-way in the Commonwealth of Pennsylvania. Both defendants argue that Amtrak's request is overbroad because it asks this Court to issue a blanket injunction involving numerous local governments whose rights are not even represented here. Moreover, the defendants argue that Amtrak's request is overbroad because it includes facilities which are purely railroad facilities in nature. Although this Court believes that there is some merit to defendants' arguments, the Court will not address these arguments because Amtrak cannot demonstrate that it is entitled to a modification of the permanent injunction, as discussed infra.

violated the permanent injunction issued by this Court on January 2, 1991.

Amtrak's claim that it is imminent that the Commission will violate either the letter or spirit of this Court's injunction is based on pure speculation and conjecture. Amtrak merely speculates that the Commission will violate the purposes of the permanent injunction because the Commission has stated in its petition for a writ of certiorari that it agreed with the Commonwealth Court's interpretation of § 24301(1).<sup>9</sup> The speculative nature of Amtrak's contention is best demonstrated by the fact that a person could argue with equal persuasiveness that the Commission will violate the order of the Commonwealth Court because of the permanent injunction entered in this case. Amtrak, as well as this Court, simply cannot divine what the Commission will do in the face of these competing orders. However, speculation as to what the Commission will do in light of these competing orders is insufficient to establish an imminent threat of harm against Amtrak.

As stated above, Amtrak has not pointed to any evidence which would indicate that the purposes of the Court's permanent injunction are not being fulfilled. In addition, Amtrak has not

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9. The filing of the petition of a writ of certiorari actually cuts against Amtrak's argument that the objectives of this Court's Order of January 2, 1991 are not being fulfilled, or are in imminent danger of being violated. One could plausibly argue that the Commission filed its writ of certiorari because it did not want to violate either the Commonwealth Court's order or this Court's order. Indeed, the Commission makes this argument, and the Court finds it to be persuasive.

demonstrated how the Commission has actually violated the terms of the Order of January 2, 1991. Without its speculative arguments, Amtrak simply cannot demonstrate that the letter or purposes of this Court's Order of January 2, 1991 are not being fulfilled. As such, Amtrak is not entitled to a modification of this Court's Order of January 2, 1991.<sup>10</sup>

III. Conclusion

Accordingly, for the foregoing reasons, the Commission's motion for dissolution of this Court's injunction is denied; Amtrak's conditional motion for leave to amend complaint is denied as moot; and Amtrak's motion for modification of this Court's Order of January 2, 1991 is denied.

An appropriate Order follows.

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Clarence C. Newcomer, J.

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10. If the Commission does violate the terms of the Order of January 2, 1991, Amtrak would surely be entitled to move this Court to enforce the terms of that Order. However, at this present time, Amtrak's motion is premature in that it merely speculates that the Commission will violate the Order in place.

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

NATIONAL RAILROAD PASSENGER	:
CIVIL ACTION	:
CORPORATION,	:
Plaintiff,	:
	:
v.	:
	:
COMMONWEALTH OF PENNSYLVANIA PUBLIC	:
UTILITY COMMISSION and TOWNSHIP OF	:
TREDYFFRIN,	:
Defendants.	:
NO. 86-5357	:

**O R D E R**

AND NOW, this           of September, 1997, upon  
consideration of the following Motions, and any responses and  
replies thereto, it is hereby ORDERED that:

1.    Pennsylvania Public Utility Commission's Motion  
for Dissolution of this Court's Injunction is DENIED;

2.    National Railroad Passenger Corporation's  
Conditional Motion for Leave to Amend Complaint is DENIED as  
moot; and

3.    National Railroad Passenger Corporation's Motion  
for Modification of this Court's Order of January 2, 1991 is  
DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.