

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

DISABLED IN ACTION OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 03-CV-1577
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
	:	
Defendant.	:	

**PLAINTIFF DISABLED IN ACTION OF PENNSYLVANIA’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff, Disabled in Action of Pennsylvania (DIA), by and through its counsel, files this Motion for Summary Judgment. The undisputed material facts and the relevant law establishes that Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) has discriminated against individuals with disabilities in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132, 12147(a), and 12147(b), and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794.

Specifically, as stated in Count I of Plaintiff’s Fourth Amended Complaint (Complaint), SEPTA violated the ADA and Section 504 by: (1) failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the 15th and Market Streets entrance (hereinafter 15th Street Entrance) to the Market-Frankford Subway-Elevated Line (Market-Frankford Line) 15th Street Station; and (2) by failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and

renovated the southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station. As stated in Count II of Plaintiff's Complaint, SEPTA also violated the ADA, §12147(b)(1)&(2), by failing to make the ADA statutorily established and defined "key stations" of City Hall Broad Street Subway Station and 15th Street Market-Frankford Line Station accessible to and usable by persons with mobility disabilities, including those who use wheelchairs.

In support of this Motion, Plaintiff submits the attached Memorandum of Law, including Plaintiff's Statement of Undisputed Facts, and Exhibits, which are incorporated by reference as if fully set forth herein.

Respectfully submitted,

//s// Rocco J. Iacullo

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DATED: April 5, 2006

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PENNSYLVANIA,	:	
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**PLAINTIFF DISABLED IN ACTION OF PENNSYLVANIA’S
MEMORANDUM OF LAW AND PROPOSED FINDINGS OF FACT
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff Disabled in Action of Pennsylvania (DIA), by and through its counsel, submits this Memorandum of Law and Proposed Findings of Fact and attached Exhibits in support of its Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. With no disputed material facts, the case is appropriate for a ruling on a motion for summary judgment.

The undisputed material facts and the relevant law establish that Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) has discriminated against individuals with disabilities in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132, 12147(a), and 12147(b), and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794.

Specifically, as stated in Count I of Plaintiff’s Fourth Amended Complaint (Complaint), SEPTA violated the ADA and Section 504 by: (1) failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the 15th and Market Streets entrance (hereinafter 15th Street Entrance) to the Market-Frankford Subway-

Elevated Line (Market-Frankford Line) 15th Street Station; and (2) by failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station. As stated in Count II of Plaintiff's Complaint, SEPTA also violated the ADA, §12147(b)(1)&(2), by failing to make the ADA statutorily established and defined "key stations" of City Hall Broad Street Subway Station and 15th Street Market-Frankford Line Station accessible to and usable by persons with mobility disabilities, including those who use wheelchairs.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Plaintiff Disabled in Action

1. Plaintiff Disabled in Action of Pennsylvania (DIA) is a non-profit corporation which advocates for the civil rights of and services for persons with disabilities. See Deposition of Nancy Salandra (Exhibit 2) at pgs. 13-18.

2. DIA has approximately 450 current active members, many of whom use wheelchairs and use SEPTA for their public transportation. Id. at pg.15.

3. DIA assists persons with disabilities to achieve equality with non-disabled persons and to advocate for the elimination of discrimination against people with disabilities in all aspects of community life, including transportation and housing. Id. at pgs. 23-42.

4. DIA has advocated for accessible entrances to both the Broad Street Subway City Hall Station and the Market-Frankford Elevated Line 15th Street Station. Id.

5. DIA's members and participants use and want access to SEPTA's Market-Frankford Line 15th Street Station and the Broad Street Subway City Hall Station. Id.

6. DIA is injured by SEPTA's violation of its ADA and Section 504 obligations by forcing DIA to advocate for the development and improvement of nondiscriminatory transportation services, instead of focusing its time and resources assisting persons with disabilities with other issues including accessible and affordable housing, attendant care services, equal employment opportunities and access to places of public accommodation. Id. at pgs. 40-42.

7. DIA and its members are also directly and concretely injured by SEPTA's failure to provide access to the Market-Frankford Line 15th Street Station and the Broad Street Subway City Hall Station because members are unable to use these stations to get to and from meetings, programs and advocacy activities, which further curtails the organizational activities and goals of DIA. Id. at pgs. 39-41.

B. Southeastern Pennsylvania Transportation Authority

8. SEPTA is a state-created instrumentality that provides public transportation services in southeastern Pennsylvania, including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. Pa. Cons. Stat. Ann. § 1711; see also SEPTA Fiscal Year 2006 Capital Budget and Fiscal Year 2006-2017 Capital Program (Exhibit 3) at pg. 5.

9. SEPTA operates a "vast network of fixed-route services including bus, subway, subway-elevated, regional rail, light rail, and trackless trolley, as well as customized community service." Id.

10. SEPTA's City Transit Division operates a network of 82 subway-elevated, light rail, trackless trolley, and bus routes, providing approximately 850,000 passenger trips per day. Id.

11. SEPTA receives federal financial assistance and is subject to the Rehabilitation Act, 29 U.S.C. §§ 794(a)-(b)(1)(A). Id. at pgs. 9-17. SEPTA is also a public entity as defined by Title II of the ADA, 42 U.S.C. § 12131. Id.

C. The Market-Frankford Line 15th Street Station

12. The Market-Frankford Line is a high-speed light rail line operated by SEPTA that operates in part above ground (elevated) and in part below ground (subway). See SEPTA history of Market-Frankford Subway-Elevated Line (Exhibit 4); Market-Frankford Line Route Map (Exhibit 5); see also Exhibit 3 at pg. 44.

13. The Line operates above ground from the Frankford Transportation Center located in Northeast Philadelphia through the Spring Garden Station. It then operates underground between the stations at 2nd and Market Streets and 44th Street and then continues above-ground to its 69th and Market Streets Station in Delaware County. Id.

14. The Market-Frankford Line has the following subway station stops in Center City: 2nd and Market Street, 5th and Market Street, 8th and Market Street, 11th and Market Street, 13th and Market Street, and 15th and Market Street. Exhibit 5.

15. The Market Frankford Line 15th Street Station is located underground at 15th and Market Streets, with the eastbound and westbound platforms of the station located under the bed of 15th Street adjacent to Dilworth Plaza and City Hall. See SEPTA 15th Street Station address (Exhibit 6); and City of Philadelphia City Hall Station improvement diagram (Exhibit 7).

16. The address of the 15th Street Market-Frankford Line Station is 15th and Market Streets. Exhibit 6.

17. The 15th Street Station serves as the major transfer point and interchange with other SEPTA rail lines, including the Broad Street Subway, Subway-Surface Trolleys, and

Regional Rail lines. See SEPTA Market-Frankford Line, Broad Street Subway, Subway-Surface and Regional Rail Maps and SEPTA Center City Philadelphia Street and Transit Map (Exhibit 8).

18. The Suburban Regional Rail Station serves a distinct and separate rail line than the 15th Street Station. Id. The Suburban Regional Rail Station serves SEPTA's regional rail lines and the 15th Street Station serves the Market-Frankford Line. Id.

19. The address of Suburban Regional Rail Station is 16th and JFK Boulevard. See SEPTA Suburban Station address (Exhibit 9).

20. According to SEPTA's own surveys, 15th Street Station is the busiest station on the Market-Frankford Line. See Ridership Census Reports prepared by SEPTA for the years 1991-1992; 1996; 2000; and 2004 (Exhibits 10, 11, 12, and 13).

21. In 1991-1992, 15th Street Station was observed to have 33,699 boardings and 32,370 leavings for both eastbound and westbound trains in one day for a total usage of 66,069 passengers. Exhibit 10 at SEPTA Bates Stamped Nos. 8586-8587.

22. No other station on the Market-Frankford Line exceeded or even came close to this high level of ridership, including the other Center City Market-Frankford Line subway stations. Id.

23. For example, its 13th Street Station recorded 5,551 boardings and 9,939 leavings for a total usage of 15,490; and 11th Street recorded 7,849 boardings and 7,831 leavings for a total of 15,680. Id.

24. 15th Street Station had more than quadruple the amount of passenger activity of 13th Street Station or 11th Street Station. Id.

25. In 1991-1992, the passenger boardings of 33,699 at 15th Street Station exceeded average station passenger boardings on the Market-Frankford Line, by close to 500 %.¹ Id.

26. More current data from 1996, 2000, and 2004 is consistent with the 1991-1992 data showing that 15th Street Station is **the most used station** on the Market-Frankford Line; and has maintained nearly quadruple the amount of usage of the other Center City Market-Frankford Line stations. See Exhibits 11-13.

27. In 2004, 15th Street Station was observed to have 29,435 boardings and 27,331 leavings for both eastbound and westbound trains in one day for a total usage of 56,766 passengers. Exhibit 13 at pg. 3.

28. In 2004, the total passenger boardings of 29,435 also exceeded average station passenger boardings on the Market-Frankford Line, calculated to be an average of 5,475 boardings ($153,317 \div 28$), by more than **400 %**. Id.

29. SEPTA, in its own documents, identified 15th Street Station as meeting nearly all of the U.S. Department of Transportation (DOT) ADA federal regulatory criteria for key stations. See Key Station Identification Criteria documents (Exhibit 14).

30. 15th Street Station is located in close proximity to City Hall and the Municipal Services Building, and numerous high rise office buildings, which serve as the heart of Center City business and employment, including but not limited to Two Penn Center, located at 15th Street and JFK Boulevard, Three Penn Center, located at 1515 Market Street, Centre Square Office Building, located at 1500 Market Street, PNC Bank Center, located at 1600 Market Street, Seven Penn Center, located at 1635 Market Street, One Liberty Place, located at 1650 Market Street, Two Liberty Place, located at 16th and Chestnut Streets, Four Penn Center, located at 16th

¹ There was a total observation of 165,481 boardings at all Market-Frankford Line stations. Since there are 28 stations, the average number of station boardings is 5,910 (i.e. $165,481 \div 28$). Id. Accordingly, the total boardings of 33,699 at 15th Street Station is greater than five times - 500 % - the average of 5,910.

Street and JFK Boulevard, Mellon Bank Center, located at 1735 Market Street. See Center City District/Central Philadelphia Development Corp. website at www.centercityphila.org.

31. There are also numerous restaurants, retail shops, museums and other establishments located in close proximity to the 15th Street Station. Id.

D. 15th Street Market-Frankford Line Entrance

32. The 15th Street Entrance is a street level open-air entrance to the Market-Frankford Line 15th Street Station located at the northwest corner of 15th and Market Streets, directly across the street from City Hall and Dilworth Plaza. See photographs of the 15th Street Entrance taken by Plaintiff's counsel attached (Exhibit 15); see also SEPTA photograph of directional signage within the 15th Street Entrance escalator headhouse (Exhibit 16).

33. The 15th Street Entrance is located on land owned by the City and leased to SEPTA. See statement by Andres Perez of June 15, 2000 (Exhibit 17); see also Deposition of Christopher Zearfoss, Senior Transportation Project Manager, City of Philadelphia Office of Strategic Planning (Exhibit 18) at pg. 63, line 13 – pg. 64, line 12.

34. The City of Philadelphia, shortly after the 15th Street Entrance's construction in the 1960's, depicted the entrance as an entrance to the 15th Street Station of the Market-Street Subway and the Subway-Surface Lines. See City of Philadelphia 1963 Capital Program photograph and description of 15th Street Entrance (Exhibit 19).

35. Christopher Zearfoss, Senior Transportation Project Manager, City of Philadelphia Office of Strategic Planning, testified that you can directly access the 15th Street Station from the 15th Street Entrance as follows: "if you're proceeding west, having come down the stairway, you take a left, you come to a flight of steps that lead up to the cashier facility that

leads to the 15th Street Station of the Market-Frankford Line.” Exhibit 18 at pg. 81, line 6 – pg. 82, line 8.

36. Mr. Zearfoss further testified that the platform and tracks for the Market-Frankford Line are located directly under the stairs leading to the cashier facility for the 15th Street Station. Id.

37. SEPTA clearly recognizes and acknowledges the 15th Street Entrance as an entrance to the 15th Street Market-Frankford Line Station. See Exhibit 6.

38. SEPTA’s own directional signage affixed to the renovated escalator headhouse at the 15th Street Entrance, which is viewed by SEPTA patrons as they descend the escalator, identifies it as an entrance to the Market-Frankford Line 15th Street Station as well as providing access to the Subway-Surface Trolley Lines, the Broad Street Subway, and to the Suburban Regional Rail System. Exhibits 15 and 16 supra.

39. Gerald Maier, SEPTA’s Director of Real Estate, testified that pedestrians can reach the 15th Street Station from utilizing the 15th Street Entrance. See Deposition of Gerald Maier (Exhibit 20) at pg. 65, line 23 – pg. 67, line 20.

40. Various maps and diagrams depict the close proximity of the 15th Street Entrance to the Market-Frankford Line 15th Street Station, and demonstrate that the 15th Street Entrance is closer to the Market-Frankford Line than it is to the high speed Subway-Surface Trolley line, the Broad Street Subway, and to the Suburban Regional Rail System. See Exhibit 7; see also portion of City of Philadelphia Center City Concourse System map, dated November 3, 1978 (Exhibit 21).

41. The 15th Street Entrance is highly visible to the public, it is advertised by SEPTA as an entrance to the Market-Frankford Line, and pedestrians use it to enter the Market-Frankford Line 15th Street Station. Exhibits 15-21 supra.

E. 15th Street Market-Frankford Line Entrance Alterations and Renovations

42. Prior to 2001, the 15th Street Entrance consisted of a set of stairs, which descended into the center of a courtyard, and two escalators enclosed within a headhouse. See SEPTA pre-renovation photographs of 15th Street Entrance (Exhibit 22).

43. In February 2001, SEPTA began an alteration and renovation of the 15th Street Entrance. See SEPTA Capital Project Progress Report from February 2001 (Exhibit 23).

44. As part of the renovation work, SEPTA completely demolished the centrally located existing stairs and constructed new stairs along the southeastern wall of the entrance. Exhibit 20 at pg. 60, line 25 – pg. 61, line 22, and Deposition of Terry Heiser, SEPTA Senior Project Manager for the Suburban Station and City Hall Station Renovation projects (Exhibit 24) at pg. 14, line 22 – pg. 15, line 25.

45. Gerald Maier stated that “the original stairs came from the western part of the courtyard about in the middle and kind of plunked themselves down into the middle of the courtyard” and that “the plan was to remove those stairs and to replace them with a stair entrance right at the corner of 15th and Market, which is what was done.” Exhibit 20 at pg. 60, line 25 – pg. 61, line 22

46. Terry Heiser also verified the demolition of the stairs and construction of new stairs as part of the renovation to the 15th Street Entrance. Exhibit 24 at pg. 14, line 22 – pg. 15, line 25.

47. Roderick Wolfson, Project Architect with Bower Lewis Thrower hired by SEPTA for the Suburban Station and City Hall Station Rehabilitation Projects, testified that the 15th Street Entrance stair was demolished as it was BLT's conclusion that the stair was beyond repair due to deterioration of the concrete. See Deposition of Roderick Wolfson (Exhibit 25) at pg.13, line 12 - line 22.

48. SEPTA's building permit submitted to the City of Philadelphia identified the project as follows:

Demolition incorporates head house, stair, railings, limited wall, veneer, pavement and lighting systems. Also to be removed are planters, fountain and ceilings. Construction scope consists of glass head house, stair, (2) retail spaces, railings, storefront system, planters, lighting and paving installed, as well as new ceiling.

(Exhibit 26).

49. Photographs produced by SEPTA explicitly depict the demolition of the centrally located existing stairs, and the construction of the new stairs along the southeastern edge of the 15th Street Entrance. See SEPTA 15th Street Entrance construction photographs (Exhibit 27).

50. The alteration and renovation project was completed, and the new stairs were reopened to the public on August 8, 2002. See SEPTA Capital Project Summary Report, August 2002 (Exhibit 28).

51. SEPTA did not install an elevator at the 15th Street Entrance as part of the project, and thus, the newly renovated entrance cannot be used by individuals who use wheelchairs. Exhibits 23-28 supra.

52. It is technically feasible to install an elevator at the 15th Street Entrance from street level to the concourse level. Exhibit 24 at pg. 54, line 11 – pg. 55, line 5.

F. City Hall Broad Street Subway Station

53. City Hall Station was constructed in 1928 as part of the original Broad Street Subway which extended underground below Broad Street from Olney Avenue to City Hall. See SEPTA Broad Street Subway History (Exhibit 29); and City Hall Renovations document (Exhibit 30).

54. City Hall Station served as the southern terminus of the Broad Street Subway line until April, 1930, when the line was extended to South Street. Id. The subway now extends as far north as Fern Rock Station and as far south as Pattison Avenue Station. Id.

55. The Broad Street Subway and the City Hall Station are located under the Market-Frankford Line and Subway Surface Lines underneath City Hall's western foundations. See City Hall Station Renovations –Request for Proposal (Exhibit 31).

56. The address for the City Hall Broad Street Subway Station is Broad and Market Streets. See SEPTA City Hall Station address (Exhibit 32).

57. The City Hall Station has several direct entrances including a stair entrance from Dilworth Plaza at street level to the lower north concourse, a stair entrance from street level at the City Hall Courtyard to the lower south concourse, and an escalator serving as an exit from the lower south concourse to the southeast City Hall Courtyard. Exhibit 29; see also Heiser Deposition Exhibits 5B, 6A, & 6B (Exhibit 33); and City Hall Station Renovations Existing Concourse Level Plan (Exhibit 34).

58. The Broad Street Subway's lower concourses run north and south of the Market-Frankford Line. Exhibits 30, 33 and 34 supra.

59. From the lower south concourse under the City Hall Courtyard pedestrians can travel east through the concourse, without using any stairs, to reach the eastbound platforms of

the 13th Street Market-Frankford Station and the 11th Street Market-Frankford Station. Id.; see also deposition transcript of Skip Brooke, Director of Engineering in SEPTA's Bridges and Buildings Department (Exhibit 35) at pg. 22, line 21 – pg. 26, line 13.

60. From that same location in the lower south concourse under City Hall Courtyard, a pedestrian can travel east and then south, without using stairs, to reach the South Broad Street concourse, the Walnut-Locust Broad Street Subway Station,² and can actually continue in the South Broad Street concourse to the PATCO Line under 15th and Locust Streets (there is a PATCO elevator which can be used to reach the street at this location). Exhibit 35 at pg. 40, line 6 – pg. 41, line 7; Exhibit 24 at pg. 74, line 11 – pg. 77, line 10; Exhibit 18 at pg. 144, line 21 – pg. 147, line 3; see also Exhibit 33.

61. According to SEPTA, City Hall Station is the heaviest patronized station on the Broad Street Subway Line, serving 57,000 passengers on a daily basis. Exhibit 3 at pg. 33.

62. The station serves as a major interchange between the Broad Street Line, Market-Frankford Line, Subway-Surface Lines and Regional Rail Lines. Id.; see also Exhibit 8.

63. City Hall is the center of Philadelphia municipal government, housing the Mayor's office, City Council Chambers, the City Commissioners, and a variety of local governmental departments. See City of Philadelphia website at www.phila.gov.

64. City Hall also serves as the base of operations for the Philadelphia Court of Common Pleas, including housing numerous courtrooms for civil proceedings, the Complex Litigation Center, Orphan's Court Administration, and Office of the Prothonotary. See First Judicial District of Pennsylvania website at www.courts.phila.gov.

² There are now elevators operational from the lower South Broad Street concourse to the platforms at Walnut-Locust Station. However, there are still no elevators from the street level to the Walnut-Locust Station.

65. Maxine Griffith, the former Executive Director of the City of Philadelphia Planning Commission, testified to the importance of City Hall Station due to its location to the heart of City government. See Deposition of Maxine Griffith (Exhibit 36) at pg. 122, line 5 – pg. 123, line 6; & pg. 140, line 21 – pg. 141, line 6.

66. Denise Goren, then Deputy Mayor for Transportation, in a letter to Elizabeth Nuding, Secretary to the Board of SEPTA, dated May 20, 1999, in discussing the need for more money for City Hall Station Rehabilitation, described City Hall Station and its connections to the Market-Frankford Line and subway-surface trolley lines as “the busiest nexus on the SEPTA system.” See Letter from Goren to Nuding. at pg. 2 (Exhibit 37).

67. In a May 22, 2000 letter to Ms. Nuding, Christopher Zearfoss, then Acting Deputy Mayor for Transportation, wrote, regarding the need for City Hall Station Rehabilitation, that “this busy station complex must receive funding befitting its keystone location and the tens of thousands of daily riders who will benefit.” See Letter from Zearfoss to Nuding at pg. 2 (Exhibit 38).

68. City Hall Station records the most passenger activity of any other station on the Broad Street Subway line. See SEPTA Broad Street Line, Ridership Census 1993-1994; 1998; and 2002 (Exhibits 39, 40, and 41).

69. The 1993-1994 ridership census for both northbound and southbound travel reveals that 26,126 people boarded the subway at City Hall Station and 30,289 people disembarked from the subway at City Hall Station in one day, for a total passenger activity of 56,415. Exhibit 39 at SEPTA Bates Stamp Nos. 8739-8740.

70. All of the other stations on the Broad Street Line, with the exception of Olney Station, paled in comparison to the passenger activity at City Hall Station. Id. For example, in

the census of 1993-1994, Walnut-Locust Station only recorded 6,152 total boardings and 6,596 leavings for a passenger activity total of 12,748; Race-Vine only recorded 2,612 total boardings and 3,433 leavings for a passenger activity total of 6,045; and Spring Garden only 5,269 boardings and 5,507 leavings for a passenger activity total of 10,776. Id.

71. In 1993-1994, the passenger boardings of 26,126 at City Hall Station exceeded average station passenger boardings on the entire Broad Street Subway Line by more than **350 %**.³ Id.

72. Current data is consistent with the 1993-1994 data; City Hall Station is still the busiest station on the Broad Street Subway. In 2002 ridership data revealed total boardings for City Hall Station at 26,950 and total leavings at 29,650 for a total passenger activity both northbound and southbound of 56,600. Exhibit 41 at pg. 3.

73. Again, all of the other Broad Street Subway stations continue to pale in comparison to the passenger activity of City Hall Station. Id. In 2002, Walnut-Locust Station only recorded 5,229 boardings and 5,519 leavings for a total of 10,748, Race-Vine Station only recorded 2,142 boardings and 2,914 leavings for a total of 5,056; and Spring Garden Station only recorded 5,562 boardings and 6,123 leavings for a total of 11,685. Id.

74. In 2002, the passenger boardings of 26,950 at City Hall Station exceeded average station passenger boardings on the entire Broad Street Subway Line, calculated to be an average of 5,228 boardings (115,034/ 22), by more than **400 %**. Id.

75. City Hall has been and remains the busiest station on SEPTA's Broad Street Subway. Exhibits 39, 40, and 41.

³ There was a total observation of 126,590 boardings at all Broad Street Subway stations. Since there are 22 stations, the average number of station boardings is 5,754 (i.e. 126,590÷ 22). Id. Accordingly, the total boardings of 26,126 at City Hall Station is greater than three times - 350 % - the average of 5,754.

76. SEPTA, in its own documents, identified City Hall Station as meeting nearly all of the federal regulatory criteria for key stations. Exhibit 14 supra.

G. City Hall Broad Street Subway Station Southeast Escalator Replacement

77. In August 2003, SEPTA completed the replacement of an escalator in the southeast corner of the central City Hall Courtyard, which serves as an exit for patrons disembarking from the Broad Street Subway City Hall Station and pedestrians traversing the concourse. See City Hall Station Renovations BLT Meeting Minutes at Item 20-03 and FY 2003 Capital Budget, Escalator/Elevator Program report (Exhibit 42); see also Brooke Affidavit at ¶ 19 (Exhibit 43); and Exhibits 33 & 34.

78. The escalator was inoperable prior to the replacement. Exhibit 43 at ¶ 15.

79. The southeast City Hall Courtyard escalator was one of six escalators replaced as part of Phase II of SEPTA's Escalator Replacement Program, a program under which numerous inoperable or deteriorated escalators have been replaced throughout SEPTA's transit system.⁴ Exhibit 43 at ¶¶ 4-7 & Exhibit 35 at pg. 13, line 16 – pg. 19, line 20.

80. Skip Brooke, Director of Engineering in the Bridges and Buildings Department at SEPTA, testified that the existing southeast City Hall Courtyard escalator was removed from the wellway in order to facilitate installation of the new escalator. Exhibit 35 at pg. 49, line 3 – 11.

81. Mr. Brooke testified that the prior escalator had inadequate vertical clearance for the new escalator. Exhibit 35 at pg. 55, line 2 – line 10; pg. 57, line 21 – pg. 58, line 2; pg. 69, line 21 – pg. 70, line 4; and pg. 73, line 4 – line 18.

82. Mr. Brooke testified that installation of the new escalator required SEPTA to physically relocate the truss in the wellway (the truss is the structural piece that physically

⁴ SEPTA's Escalator Replacement Program was initiated in 1999, Exhibit 35 at pg. 13, line 23 – pg. 15, line 25, and is now in Phase VI, with several future phases planned. Id. at pg. 19, line 7-line 20. The future phases will include the replacement of the northwest City Hall Courtyard escalator. Id.

supports the escalator along its length) to accomplish the required seven foot vertical clearance.
Id.

83. Mr. Brooke also explained in detail the construction photographs taken of the southeast City Hall Courtyard escalator replacement project. Exhibit 35 at pg. 58, line 8 – pg. 77, line 14; see also photographs of escalator before, during and after construction (Exhibit 44). SEPTA's Fiscal Year 2005 Capital Budget also contains two photographs depicting the new escalator and headhouse in the southeast City Hall courtyard, and identifies plans to replace the escalator in the Northwest courtyard. See 2005 Fiscal Year Capital Budget at pgs. 42-43 (Exhibit 45).

84. SEPTA provided no elevator access for individuals who use wheelchairs as part of this renovation project to the City Hall Station southeast City Hall Courtyard. Exhibits 42 – 45 supra.

85. It is technically feasible to install an elevator in the City Hall Courtyard to provide access from the street level to the lower concourse level. Exhibit 35 at pg. 95, lines 9-16; and Exhibit 43 at ¶ 36.

86. Counsel for EPVA testified that in the EPVA v. SEPTA lawsuit that the stations chosen for the EPVA Settlement were based on costs. See excerpts of deposition transcript of James Weissman (Exhibit 46). That is, SEPTA put a certain amount of money on the table and told EPVA they had to choose stations within the cost parameters. Id. EPVA decided on numerosity – not the ADA key station criteria. Id. City Hall Station and 15th Street Station were not included in that list due to cost concerns not because they were unimportant stations.
Id.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c). See also Pittston Co. Ultramar America v. Allianz Ins., 124 F.3d 508, 515 (3d Cir. 1997). If there is no genuine dispute concerning any facts material to its claims, summary judgment must be entered in favor of Plaintiff.

B. Plaintiff Has Standing To Pursue These Claims

Plaintiff Disabled in Action of Pennsylvania has sustained injury in its own right as a result of SEPTA's failure to make the 15th Street Entrance to the Market-Frankford Line 15th Street Station and the southeast City Hall Courtyard Broad Street Subway exit accessible to persons with disabilities, including those who use wheelchairs. See Statement of Undisputed Facts (SUF) Nos. 1-7. Plaintiff has expended its own time, money and resources in a variety of ways due to the inaccessibility of the identified transportation facilities. Id. DIA has paid for alternative transportation services for individuals unable to access SEPTA's transportation facilities at the identified entrances. Id. DIA's work has been interrupted as a result of the inaccessibility of the entrances. Id. Accordingly, DIA has standing to sue as an organization. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Alexander v. Riga, 208 F.3d 419, 427 n.4 (3d Cir. 2000); Robinson v. Block, 869 F.2d 202, 207, 210 n.9 (3d Cir. 1989); ADAPT v. Philadelphia Housing Authority, No. 98-4609, 2000 WL 433976 at *2-*3, *5-*6 (E.D. Pa. Apr. 14, 2000); Liberty Resources, Inc. v. SEPTA, 155 F.Supp. 2d 242, 242-52 (E.D.Pa. 2001), vacated as moot, 54 Fed. Appx. 769 (3d Cir. 2002).

DIA also has standing to pursue this lawsuit on behalf of its members. DIA's members are individuals with disabilities who utilize SEPTA's transportation services and these individuals have been unable to access SEPTA's facilities at the identified entrances. SUF Nos. 1-7. DIA's members are qualified individuals with disabilities as defined by the ADA and the Rehabilitation Act of 1973. *Id.* DIA may pursue this case on behalf of its members because (1) those members have been harmed by SEPTA's failure to make the identified entrances wheelchair accessible and (2) the interests DIA seeks to protect are germane to its organizational purposes to eradicate transportation barriers that inhibit the ability of individuals with disabilities to live independently in their communities. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Doe v. Stincer*, 175 F.3d 879, 882-83, 885-86 (11th Cir. 1999).

C. SEPTA Violated the ADA By Altering the 15th Street Market-Frankford Station Entrance and The City Hall Broad Street Subway Station Exit Without Making Them Accessible To Individuals With Disabilities

1. Plaintiff Represents Individuals With Disabilities Protected By The ADA and Section 504 and SEPTA Is Subject To The Requirements Of Those Statutes

There is no dispute that all of DIA's members are eligible under the ADA to use SEPTA's fixed route transportation system. SUF Nos. 1-7. Therefore, they are qualified persons with disabilities under the ADA and Section 504. 42 U.S.C. §§ 12102(2), 12131(2); 29 U.S.C. §§ 705(9)(B), 705(20). It is also undisputed that SEPTA is a public entity subject to Title II of the ADA, including the provisions governing public transportation. 42 U.S.C. § 12131(1)(B); 74 Pa. Cons. Stat. Ann. § 1711, and SUF Nos. 8-11. As the recipient of federal funds, SEPTA is also subject to Section 504 of the Rehabilitation Act. 29 U.S.C. § 794; *Id.* Since SEPTA is a federally-funded, public entity that operates a fixed route transportation system, it is required to

comply with the new construction and alterations provisions of the ADA, 42 U.S.C. § 12147, and Rehabilitation Act, 29 U.S.C. § 794.

2. Under the ADA, Congress Intended That Alterations To Transportation Facilities Would Trigger Equal Access

In enacting the ADA, Congress found that isolation, segregation, and discrimination against individuals with disabilities persists in the “critical area[] of . . . transportation.” 42 U.S.C. §12101(a)(3). Accordingly, the ADA bars discrimination in public transportation. 42 U.S.C. §12147(a); see also S. REP. NO. 101-116, at 13 (1989) (“Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society.”); H.R. REP. NO. 101-485, pt. 3, at 63 (1990) (“The ADA is geared to the future-the goal being that, over time, access will be the rule, rather than the exception”)(emphasis added).

In recent cases, the United States Supreme Court and Courts of Appeals have construed Title II of the ADA broadly to be “faithful to the Act’s demand . . . to secure access and avoid exclusion.” Tennessee v. Lane, 124 S. Ct. 1978, 1996 (2004) (Ginsburg, J., concurring); (“Including individuals with disabilities among people who count in composing ‘We the People’, Congress understood in shaping the ADA would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation”); see also Olmstead v. L.C., 527 U.S. 581, 598 (1999) (finding that Congress had a comprehensive view of the concept of discrimination advanced in the ADA “that included disparate treatment among members of the same protected class”); Hason v. Med. Bd., 279 F.3d 1167, 1172 (9th Cir. 2002) (quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998)) (finding that the ADA must be construed “broadly in order to effectively implement the ADA's fundamental purpose of ‘providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’”).

Congress and the federal agencies understood that equal access would be achieved over time primarily as both new construction and alterations occurred. Whenever a public entity, including a transit authority such as SEPTA, newly constructs or alters a facility or part of a facility, the new construction or alteration triggers the ADA's mandate of equal access. Thus, the federal regulations are substantially more stringent concerning alterations and new construction undertaken by public entities than they are concerning the retrofitting of existing, non-altered facilities. Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993), cert. denied 511 U.S. 1033 (1994); see also Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988) (holding that the alteration of the Columbia Avenue Subway Station entrance without making it accessible violated Section 504 of the Rehabilitation Act and its federal regulations, the relevant portions of which were identical to 49 C.F.R. § 37.43(a)(1)).

The distinction between new construction and alterations, on one hand, and existing facilities, which the public entity does not alter, on the other hand, is one of the bedrocks of both the ADA and Section 504. If a public entity could make alterations to existing facilities and not make them accessible, then the future goal of achieving full access would never be obtained. Under that scenario, existing facilities, even if altered, would not trigger accessibility, so that all facilities that existed in 1990 would have never become accessible. To ensure that result would not happen, both the ADA and Section 504 require public entities, if and only when they decide to make an alteration, that the alteration trigger an accessibility mandate. As a consequence, when the public entity decides to make an alteration (or newly construct), that decision carries with it the duty to ensure that the alteration is accessible.

The distinction between new construction and alterations, on one hand, and existing facilities which the public entity does not alter, on the other hand, also “reflects Congress’ recognition that mandating changes to existing facilities could impose extraordinary costs. **New construction and alterations**, however, present an immediate opportunity to provide **full** accessibility.” Kinney, 9 F.3d at 1074 (emphasis added). Further, it is “discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.” Id. at 1073. While “the obligation of accessibility for alterations does not allow for non-compliance based upon undue burden,” Id. at 1071, if a transit authority did have to prioritize accessibility, **“an accessible entrance would generally be the most important . . . since without it the facility will be totally unusable by many persons with disabilities.”** H.R. REP. NO. 101-485, pt. 3, at 65 (1990)(emphasis added).

In keeping with the intent of Congress, and to facilitate accessibility of public transportation systems, the ADA, as did Section 504, see Sykes, supra, mandates that transit authorities, when making an alteration to an existing station or part thereof, make the altered portion accessible to individuals with disabilities:

With respect to alterations of an existing facility **or part thereof** used in the provision of designated transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of Sec. 12132 of this title and Sec. 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), for a public entity to fail to make such alterations in such a manner that, to the maximum extent feasible, the **altered portions** of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

42 U.S.C. § 12147(a) (emphasis added). The U.S. Department of Transportation (DOT) regulations promulgated under this part of the ADA reiterates transit authorities’ responsibilities:

When a public entity alters an existing facility or **a part of** an existing facility used in providing designated public transportation services in a

way that affects or could affect the usability of the facility or part of the facility, the entity shall make the alterations . . . in such a manner, to the maximum extent feasible, that the **altered portions** of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

49 C.F.R. § 37.43(a)(1)(emphasis added); see also 28 C.F.R. § 35.151(b)(regulation promulgated by the Department of Justice under the ADA with almost identical language and the regulation that the Third Circuit construed in Sykes). Thus, the statute and regulations make clear that (1) if the existing facility in question is a facility used in providing designated public transportation services, or is part of a facility used in providing designated public transportation services, and (2) if the public entity decides to alter that existing facility, or part thereof, then the public entity is mandated to make that altered facility or the altered portions of the facility readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, to the maximum extent feasible.

3. The 15th Street Courtyard And Southeast City Hall Escalator Are Part of Existing Stations/Facilities Covered By The ADA Alterations Provisions

a. The 15th Street Entrance Is An Entrance To The Market-Frankford Line 15th Street Station

The Market-Frankford Line 15th Street Station is located underground at 15th and Market Streets. SUF Nos. 15-16. The 15th Street Entrance is a street level open-air entrance to the Market-Frankford Line 15th Street Station that is located at the northwest corner of 15th and Market Streets, across the street from City Hall and Dilworth Plaza. SUF No. 32. Various maps and diagrams of the concourse depict the close proximity of the 15th Street Entrance to the Market-Frankford Line 15th Street Station, in fact, they demonstrate that it is situated directly adjacent to the 15th Street Station platforms. SUF No. 40. The City, which owns the property of the 15th Street Entrance, recognizes the 15th Street Entrance as an entrance to the 15th Street

Market-Frankford Station. SUF Nos. 33-36. Even SEPTA itself recognizes the reality that the 15th Street Entrance is an entrance to the 15th Street Market-Frankford Station. SUF Nos. 37-39.

According to the DOT regulations, a facility is defined as “all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, structure, or equipment is located.” 49 C.F.R. §37.3. This definition is very broad and supports Plaintiff’s claim that the 15th Street Entrance is unequivocally part of the Market-Frankford Line 15th Street Station. To access the 15th Street Station from the 15th Street Entrance, a pedestrian would descend either the stairs or escalator, then turn left into the 15th Street concourse corridor, ascend a flight of stairs and then proceed through the turnstiles, and then descend another set of stairs to the train platforms. SUF Nos. 35 & 39. The evidence, and the reality, make it readily apparent that the 15th Street Entrance provides a direct connection to the 15th Street Station through the 15th Street Corridor, that pedestrians use it to get to the 15th Street Station, and thus, that it is an entrance and part of the 15th Street Station.

b. The Southeast City Hall Escalator Is Part Of The Broad Street Subway City Hall Station

The undisputed documentary evidence identifies the southeast City Hall Courtyard Escalator as part of the City Hall Broad Street Subway Station. SUF Nos. 77-83. The construction photographs produced by SEPTA explicitly depict the Southeast City Hall Escalator as part of the City Hall Broad Street Subway Station. SUF No. 83. The escalator at this location is clearly marked on the side of the headhouse as an exit for SEPTA patrons disembarking from the Broad Street Subway at City Hall Station. SUF No. 83. Construction documents related to the replacement of the southeast City Hall Courtyard escalator continuously refer to the escalator as being part of the City Hall Station. SUF Nos. 77-83.

There is absolutely no question that the southeast City Hall Courtyard escalator is part of the Broad Street Subway City Hall Station.⁵

4. The 15th Street Courtyard and City Hall Southeast Escalator Renovations Unequivocally Qualify As Alterations Triggering the ADA Mandate of Accessibility

Neither the 15th Street Entrance nor the Market-Frankford Line 15th Street Station is currently accessible to individuals who use wheelchairs. SUF No. 51. There are no other accessible entrances to either the 15th Street Station or the City Hall Station. SUF Nos. 42, 51 and 84. Both the 15th Street Entrance and City Hall escalator construction projects unequivocally qualify as alterations for the purposes of the ADA, as it cannot be disputed that the alterations were substantial in nature and affected the usability of the respective facilities that they are part of. 42 U.S.C. § 12147(a). As such, the ADA and Section 504 required that SEPTA make these entrances readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

The Americans with Disabilities Act Accessibility Guidelines, which apply equally to alterations under Title II and Title III of the ADA, includes in its definition of alterations the statutory focus on usability. It defines alteration as “a change to a building or facility ... that affects or could affect the usability of the building or facility or part thereof. 28 C.F.R. § 36, Appendix. A. It continues by stating “normal maintenance ... is not an alteration unless it affects the usability of the building or facility.” *Id.* The federal regulations define an alteration as “a change to an existing facility, including, but not limited to remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.” 49

⁵ SEPTA’s documents show that it plans to construct or reconstruct another escalator in the Northwest City Hall Courtyard which will again provide access to the Broad Street Subway. Because construction has not yet occurred, it is legally premature to request an elevator at that location at this time.

C.F.R. § 37.3. “Minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability do not trigger the requirement that the altered areas must be made accessible.” H.R. Rep. No. 101-485, pt. 3, at 64 (1990); see also 49 C.F.R. § 37.3.

The Third Circuit has interpreted the alterations provision of the ADA broadly to effectuate accessibility. In Kinney v. Yerusalem, 9 F.3d 1067, 1069 (3d Cir. 1993), cert. denied 511 U.S. 1033 (1994), the court squarely faced the question of what constitutes an alteration under the ADA, specifically in the context of whether street resurfacing constituted an alteration triggering an ADA requirement to install curb ramps and provide accessibility pursuant to the resurfacing. The court focused with precision on the concept of usability that is expressed in the statutory language for alterations. Kinney at 1072-1074. The court held that street resurfacing constitutes an alteration because it unequivocally affected usability by making the street more usable by pedestrians. Id. at 1073-1074. It accepted the district court’s opinion that:

Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people and generally promotes convenience and travel. The surface of a street is the part of the street that is “used” by both pedestrian and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way.

Id., (quoting Kinney, 812 F.Supp. 547, 551 (E.D. Pa. 1993)). The court made clear that, “if a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities.” Id. at 1073. The court reasoned that its reading “helps to implement the legislative vision, for Congress felt that it was discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.” Id. The court also held that resurfacing constituted an alteration under the ADA because it involved more than minor repairs or maintenance. Id.; see also Molloy v. Metropolitan Transp. Auth., 94 F.3d 808, 811-12 (2d Cir. 1996) (holding that installation of

movable ticket machines is an alteration, and requiring ticket machines to be readily accessible); Civic Association of the Deaf v. Giuliani, 970 F. Supp. 352, 359 (S.D. NY 1997)(finding that replacement of two-button emergency boxes with one-button boxes constitutes an alteration under the ADA because it was a “change to the physical and functional structure of the equipment,” and requiring that defendants restore the two-button boxes since the one-button boxes did not provide adequate access for the deaf citizens of the city).

It is undisputed that SEPTA demolished the existing centrally located stairs at the 15th Street Entrance and constructed an entirely new set of stairs along the southern edge of the entrance. SUF Nos. 42-49. These renovations were substantial in nature and affected a change in the physical and functional structure of the entrance because it involved demolition of the existing stairs, including their foundation, and construction of new foundations for the new stairs. Id. The construction work undertaken at the 15th Street Entrance involved substantially more than mere maintenance. Further, it is beyond dispute that the renovations affected the usability of the 15th Street Entrance since it involved the demolition of existing stairs and construction of new stairs. This is directly analogous to Kinney in that the changes made to the stairs promoted convenience and travel, and made the stairs safer to use. SEPTA admitted that the old stairs were entirely demolished because they were in such disrepair that they could not be fixed. SUF No. 47. Since the old stairs were in such disrepair, clearly the new stairs are much safer for pedestrians to use than the old stairs. It simply cannot be argued in good faith that the installation of new stairs at the 15th Street Entrance to the Market-Frankford 15th Street Station did not affect the usability of that entrance. Thus, the alterations qualify as alterations under the ADA, and SEPTA was legally required to make the 15th Street Entrance accessible to persons who use wheelchairs by installing an elevator.

Likewise, the renovation to the southeast City Hall Courtyard exit from the Broad Street Subway was substantial in nature as it included the demolition of the existing escalator and truss and installation of an entirely new escalator and truss. SUF Nos. 78-84. The photographs produced by SEPTA demonstrate the extensive nature of the replacement of the escalator, including the difficulty that arose that required the truss to be relocated to accommodate the new escalator. Id. Based upon the evidence, it simply cannot be disputed that the replacement work was substantial in nature and constituted more than just minor maintenance. Further, there is no question that the renovations affected the usability of the Broad Street Subway City Hall Station because the escalator was inoperable prior to the renovations. Prior to the renovations, pedestrians could not use the escalator to exit the lower south concourse to the City Hall Courtyard after disembarking from the City Hall Station. SUF No. 79. Now, with the installation of the new escalator, pedestrians can *use* that escalator as another means to exit the lower south concourse after disembarking from the Broad Street Subway at City Hall Station. Thus, installing a new, escalator increased the usability of the Station by adding another means of egress from the station. Unequivocally, the alterations qualify as alterations under the ADA, and thus, SEPTA was legally required to make the altered southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station accessible to persons who use wheelchairs.

Further, not only did the alterations at the 15th Street Entrance and City Hall Courtyard affect the usability of transportation facilities, it is also clear that the alterations were more than just “mere maintenance,” and qualify as ADA alterations for that reason as well. There cannot be a real dispute that SEPTA’s construction of a new stairway from the street to the concourse level at 15th and Market was an “alteration,” as USDOT defines it. Under the federal regulation, an “alteration means any change to an existing facility, including, but not limited to, remodeling,

renovation, rehabilitation, reconstruction, ... changes or rearrangement in structural parts or elements...” 49 C.F.R. 37.3. That there had been a stairway prior to the construction of the new stairway does not undercut the fact that the new stairway was an alteration – the new stairway changed the entrance by renovating or reconstructing a stairway, i.e. rearranging the structure of the stairway. The new stairway does not fit into the only exception to the federal regulations’ alteration mandate under “normal maintenance,” since the photographs of the new stairway show that it was far from “reproofing, painting or wallpapering.” Construction of a new stairway is far from “normal maintenance.” Similarly, the photographs of the new escalator installation at the southeast City Hall Station cannot be considered “normal maintenance.” SEPTA had to reconfigure and remodel the structural elements and it then replaced the truss, and finally installed a completely new escalator. Again, this is not “normal maintenance” as the ADA and Section 504 contemplated.

SEPTA claims it had no legal obligation to install an elevator at 15th Street because the alterations were included within its “Suburban Station Rehabilitation project” wherein it also constructed two street level elevators at 16th and JFK Blvd and 17th and JFK Blvd, providing access to the Suburban Station pursuant to its obligation under its 1988 settlement agreement in the EPVA v. SEPTA case. The problem with SEPTA’s argument is that it ignores the undisputed evidence that Suburban Station is not an entrance to the 15th Street Market-Frankford Line Station so that elevators installed to access Suburban Station cannot be deemed to provide access to a wholly separate transportation facility, such as the 15th Street Market-Frankford Line Station. SUF Nos. 32-41. The “existing facility used in providing designated public transportation,” for the purposes of 42 U.S.C. § 12147(a) and 49 C.F.R. § 37.43(a)(1), which the 15th Street Entrance is a part of, is the Market-Frankford Line 15th Street Station. The 15th Street

Station is a completely different station than Suburban Station located on a completely separate and distinct rail line. SUF No. 18.

The alterations to the 15th Street Entrance and the southeast City Hall escalator are virtually the same in DIA v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988), which involved alterations to the Columbia Avenue Broad Street Subway Station. There SEPTA demolished the existing stairway and constructed a new stair in the same location (unlike the 15th Street stairway where SEPTA relocated the stair) and installed an escalator. While decided before the ADA, the Court upheld the lower court's application of the Rehabilitation Act alteration provision, 49 C.F.R. § 27.67(b), which is nearly identical to the ADA alteration provision, 42 U.S.C. § 12147(a), to SEPTA's reconstruction of stairs, and construction of new stairs and an escalator, leading to the Subway. In that case, the Court dealt with alterations identical to those at 15th Street and City Hall Courtyard and it mandated that SEPTA provide elevator access to people with disabilities. The Sykes decision is binding for purposes of the 15th Street Entrance and the southeast City Hall Courtyard exit. Thus, unequivocally SEPTA should also be required to provide elevator access to people with disabilities at both the 15th Street Entrance and the southeast City Hall Courtyard.

5. SEPTA Violated The ADA By Not Making The Altered Entrances Accessible To The Maximum Extent Feasible

The ADA provides that it shall be considered discrimination for a public entity to “fail to make ... alterations in such a manner that, to the maximum extent feasible, the **altered portions** of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.” 42 U.S.C. § 12147(a) (emphasis added). The regulations specify that to the maximum extent feasible means that all changes that are possible must be made. 49 C.F.R. Part 37, App. D. A transit authority will only

be excused in the “occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration.” 49 C.F.R. § 37.43(b). SEPTA does not claim, nor can it claim, that it is impossible to make the 15th Street Entrance itself accessible to individuals with disabilities by installing an ADA-compliant elevator.

SEPTA may claim that it cannot provide direct access to 15th Street Station by installing one elevator at the 15th Street Entrance and that providing an elevator thus, would serve no useful purpose. However, this argument is irrelevant and misses the point. The ADA mandates that the **altered portions** of the station are readily accessible to and usable by individuals with disabilities.” 42 U.S.C. § 12147(a)(emphasis added). In reference to the 15th Street Entrance, the installation of an elevator, which would provide access to persons in wheelchairs from street level to concourse level, is itself unequivocally feasible. SUF No. 52. The street level entrance is the part of the facility, i.e. the 15th Street Station, that the ADA requires that SEPTA make accessible, not necessarily the entire facility. This follows Congress’ goal that “over time, access will be the rule, rather than the exception.” H.R. REP. NO. 101-485, pt. 3, at 63 (1990). This is the purpose Congress had in mind when developing the alterations provisions of the ADA. Because there is no dispute that it was feasible to install an elevator at the 15th Street Entrance, the ADA mandated that SEPTA provide access to persons who use wheelchairs. SEPTA failed to do so.

Likewise, the ADA mandated that SEPTA provide access to persons who use wheelchairs when it altered the southeast City Hall Courtyard escalator, which is part of the City Hall Broad Street Subway Station, to the maximum extent feasible. It is feasible for SEPTA to install an elevator in the City Hall Courtyard near the renovated escalator. SUF No. 86. Again,

because there is no barrier to installing an elevator near the renovated southeast City Hall Courtyard escalator providing access to the lower south concourse, the ADA mandated that SEPTA install such an elevator to provide access to persons who use wheelchairs.

It is undisputed that SEPTA made alterations to the 15th Street Market-Frankford Line Entrance and the southeast City Hall Courtyard Broad Street Subway Station exit. It is further undisputed that SEPTA did not install an elevator at the 15th Street Entrance or City Hall Courtyard southeast exit as part of the renovations, and thus, the entrances themselves cannot be used by individuals who use wheelchairs. These alterations unequivocally affected the usability of parts of existing stations/facilities and SEPTA failed to make the altered parts of those stations/facilities readily accessible to individuals with mobility disabilities, including those who use wheelchairs, in violation of the ADA and the Rehabilitation Act. SEPTA continues to discriminate against individuals with disabilities every day that the entrances are not made accessible. This illegal discrimination will only end when SEPTA makes the 15th Street Entrance and the southeast City Hall Courtyard Broad Street Subway exit readily accessible to and usable by individuals with mobility disabilities, including those in wheelchairs, to the maximum extent feasible.

D. Alternatively, SEPTA Violated the ADA By Failing To Make Its “Key Stations” of 15th Street Market-Frankford Line Station and City Hall Broad Street Subway Station Accessible To Individuals Who Use Wheelchairs

Title II of the ADA set forth a special rule for public entities regarding existing rapid rail and light rail key stations. In enacting the ADA in 1990, Congress mandated that public entities make “key stations” in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs by July 26, 1993, providing for extensions for stations requiring extraordinarily expensive structural changes. 42

U.S.C. § 12147(b). Underlying this requirement is Congress' recognition that, to achieve meaningful equal and civil rights for persons with disabilities, it is necessary to affirmatively mandate that public transportation providers must make their most important transportation stations accessible. Otherwise, persons with disabilities would always be second class citizens because they could not access the most important stations in the public transportation system.

The ADA explicitly provides that "key stations" should be determined according to "criteria established by the Secretary by regulation." 42 U.S.C. § 12147(b). The DOT implementing regulation for the key station requirement provides that a public entity must identify key stations by taking into consideration the following criteria:

- (1) Stations where passenger boardings exceed average station passenger boardings on a rail system by at least fifteen percent;
- (2) Transfer stations on a rail line or between rail lines;
- (3) Major interchange points with other transportation modes, including stations connecting with major parking facilities, bus terminals, intercity or commuter rail stations, passenger vessel terminals, or airports;
- (4) End stations;
- (5) Stations serving major activity centers, such as employment or government centers, institutions of higher education, hospitals or other major healthcare facilities, or other facilities that are major trip generators for individuals with disabilities.

49 C.F.R. § 37.47(b)(1)-(5).

The 15th Street Market-Frankford Line Station and the City Hall Broad Street Subway Station are unequivocally **the most used stations** on their respective high speed rail lines as evidenced by SEPTA's ridership census. SUF Nos. 20-28; 62; 69-76. According to ridership data, the 15th Street Station exceeds average station passenger boardings on the Market-Frankford Line by between **400 and 500 %**, SUF Nos. 25 & 28, and City Hall Station exceeds

average station ridership on the Broad Street Subway Line by between **350 and 400 %**. SUF Nos. 72 & 75. These stations are located in the heart of Center City close to major government and business centers, healthcare facilities and entertainment venues. SUF Nos. 30-31. City Hall Station and 15th Street Stations are located directly adjacent to City Hall, the hub of Philadelphia government. SUF Nos. 15 & 55. City Hall is the center of Philadelphia municipal government, housing the Mayor's office, City Council Chambers, the City Commissioners, and a variety of local governmental departments. SUF No. 64. City Hall also serves as the base of operations for the Philadelphia Court of Common Pleas, including housing numerous courtrooms for civil proceedings, the Complex Litigation Center, Orphan's Court Administration, and Office of the Prothonotary. SUF No. 65. The 15th Street Station and City Hall Station are both major interchanges between both the Market-Frankford Line and the Broad Street Subway, as well as for the regional rail system, the high speed trolleys, and numerous bus routes.

The 15th Street Station and City Hall Station fit more of the regulatory criteria that SEPTA was mandated to consider in designating its key stations than any other stations in the entire SEPTA system. SEPTA's own documents identified 15th Street Station and City Hall Station as meeting nearly all of the regulatory criteria. SUF Nos. 29 & 77. This is not a case where the stations fit only one of the criteria and it could still be arguable that the stations were not key stations for purposes of the ADA. Instead, these stations exceed average station ridership of their respective lines by substantially more than fifteen percent. These stations essentially serve as end stations as they are the main stations that residents from outlying areas of the city including West Philadelphia, North Philadelphia, Northeast Philadelphia, and South Philadelphia use to access Center City. Under the ADA federal regulatory criteria, the 15th Street Station and City Hall Station are unequivocally key stations and must be made accessible.

The only argument SEPTA has proffered is that 15th Street Station and City Hall Station are not key stations because they were not included in the EPVA settlement agreement that was entered in 1989 – prior to enactment of the ADA and the key station mandate, and that a DOT regulation deemed that settlement agreement as complying with the ADA. 49 C.F.R. § 37.53. SEPTA’s argument fails for several reasons, including that the opposing party and counsel in the EPVA lawsuit testified that the stations chosen for the EPVA Settlement were based on costs. SUF No. 87. That is, SEPTA put a certain amount of money on the table and told EPVA they had to choose stations within the cost parameters. Id. EPVA decided on numerosity – not the ADA key station criteria. Id. City Hall Station and 15th Street Station were not included in that list due to cost concerns not because they were unimportant stations. Id. Similarly, SEPTA refuses to acknowledge that under the ADA key station criteria, both the City Hall Station and the 15th Street Station, as well as those stations listed in the settlement agreement, could be key stations. The federal regulation on which SEPTA relies merely acknowledges that those stations listed in the settlement agreement are “deemed” to comply, meaning that they are deemed to be “key stations.” Therefore, those stations had to be made accessible. The regulation does not mean, however, that other stations that were not put in the settlement agreement – because SEPTA in 1989 claimed that it had only a specific sum of money for the settlement agreement – but which unequivocally fit the ADA regulatory criteria for “key stations,” are not required to be identified as key stations pursuant to the federal regulatory criteria. Again, the 15th Street Station and City Hall Station fit nearly all of the regulatory criteria, are unequivocally key stations and must be made accessible.

III. CONCLUSION

For all the reasons set forth above, Plaintiff respectfully requests that the Court enter summary judgment in favor of Plaintiff and against SEPTA, declare that SEPTA violated the ADA and Section 504, and order SEPTA to install elevators to make the 15th Street Market-Frankford Station Entrance and southeast City Hall Broad Street Subway Courtyard exit accessible or install elevators to make the entire 15th Street Station and City Hall Broad Street Subway Station accessible.

Respectfully submitted,

//s// Rocco J. Iacullo

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DATED: April 5, 2006

CERTIFICATE OF SERVICE

I, Rocco J. Iacullo, Esquire, hereby certify that Plaintiff's Motion for Summary Judgment, including Statement of Undisputed Facts, Memorandum of Law in support of that Motion, and proposed Order have been filed electronically with the Court, and are available for viewing and downloading from the ECF system by the below counsel, who has consented to electronic service, and certified that true and correct copies of Plaintiff's Exhibits to its Motion were served by first class mail, this 5th day of April, 2006, upon the below counsel:

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//s// Rocco J. Iacullo

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