



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

Bp8# 81156151

September 21, 2010

**VIA HAND DELIVERY**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: White Haven Borough v. Reading Blue Mountain & Northern  
Railroad; Docket No. C-00004204

Dear Ms. Chiavetta:

Enclosed for filing with the Commission are the original and nine (9) copies of the Answer of the Law Bureau Prosecutory Staff to the Petition for Reconsideration, Reargument, and/or Stay of Order filed on behalf of White Haven Borough. As indicated by the attached Certificate of Service, all parties of record to this proceeding have been served with copies.

If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely,

Terrence J. Buda  
Law Bureau Prosecutory Staff

Enclosure

cc: As per certificate of service

TJB/fcp

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|----------------------------------------------|---|-----------------------|
| White Haven Borough                          | : |                       |
|                                              | : |                       |
| v.                                           | : | Docket No. C-00004204 |
|                                              | : |                       |
| Reading Blue Mountain & Northern<br>Railroad | : |                       |
|                                              | : |                       |

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**ANSWER OF LAW BUREAU PROSECUTORY STAFF  
TO THE PETITION FOR RECONSIDERATION, REARGUMENT,  
AND/OR STAY OF ORDER**

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Now comes, the Law Bureau Prosecutory Staff (LBPS), by and through its counsel, Terrence J. Buda, Esquire, pursuant to 52 Pa. Code. § 5.572(e), files this Answer in the above-captioned matter, and in support thereof states the following:

1. On September 9, 2010, the White Haven Borough (Borough) filed a Petition for Reconsideration, Reargument and/or Stay of Order (Petition). The Petition seeks relief from the Commission's September 3, 2010 Opinion and Order (Order) that approved the Plan for Repair/Replacement of the White Haven Wall and denied the Objection to the Plan filed by the Borough.
2. As detailed in the Order's History of Proceeding (pages 2 to 5), this proceeding began September 18, 2000 and has labored on for ten years from its inception. By cover letter dated June 8, 2010, Reading Blue Mountain &

Northern Railroad (Railroad) filed its Plan for Repair/Replacement of White Haven Wall (Plan).<sup>1</sup> The filing of the Plan was in response to an original jurisdiction action initiated by the Commission's Law Bureau on behalf of the Commission. The Commission filed a Petition to Enforce its Orders entered February 19, 2008 and January 14, 2010, requiring the Railroad to, *inter alia*, complete work on the replacement of a 171 foot retaining wall approaching the Susquehanna Street Bridge in White Haven Borough. The Railroad and the Commission participated in a Commonwealth Court hearing on June 1, 2010, where the Railroad represented that it would file the Plan with the Commission.<sup>2</sup>

3. On June 28, 2010, the White Haven Borough's Objections to Plan Submitted by Reading Blue Mountain & Northern Railroad for Repair/Replacement of the White Haven Wall was filed. The Commission's Order recognized that the current crux of this case, framed by the Objections filed by the Borough, is whether the plan submitted by the

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<sup>1</sup> Due to an error in the Railroad's identification of the Docket No., the Plan was not officially received by the Secretary's Bureau until July 15, 2010.

<sup>2</sup> As indicated in the September 3, 2010 Opinion and Order, the Railroad had filed an appeal before the Commonwealth Court, at Docket No. 2168 CD 2009, on the issue of whether it was an abuse of discretion for the Commission to deny the Railroad's Petition for Reconsideration of the February 19, 2008 Order. By Memorandum Opinion filed on July 23, 2010, the Court held that the Commission did not abuse its discretion in this matter. The Railroad did not seek allowance of appeal effectively finalizing the issue of the Railroad replacing the retaining wall.

Railroad qualifies as a plan for repair or a plan for replacement of the retaining wall.

4. Without any analysis in its Objections, the Borough summarily concluded that the Plan should be denied and rejected based on the fact that it is not a plan for replacement of the wall, which is what was required by the Commission's February 19, 2008 Order. In its Petition, the Borough contends that at that time, it did not have the opinion of their engineer. However, the opinion of the engineer, attached to the Petition, is dated June 24, 2010. Therefore, it appears that the Borough, in fact, did have the opinion of its engineer when it filed its Objections.
5. To summarize the opinion of the Borough's engineer, the Plan is actually a sketch and is lacking in construction detail and specifications provided for performance of the work. Moreover, the Borough submits that placing a layer of concrete over the top of the existing wall does not constitute a replacement.
6. The Commission specifically addressed this issue in the Order (pages 6-7) finding that "the wall resulting from the plan should be structurally independent of the existing Wall, thus constituting a new structure in the place of the existing wall." The Commission also noted that the plan had been endorsed by a licensed engineer. Even more importantly, the Commission directed the Railroad to complete the project within sixty (60)

days, ordered that the Railroad will be responsible for future maintenance, and emphasized that the “plan in no way transfers the responsibility for the proper design and construction of the wall to the Commission. . . [t]hat liability remains with the Railroad and its agents and contractors.”

7. LBPS submits that the Borough had the opportunity to bring its concerns to the Commission before the Plan was approved. Other than criticizing the Plan because it was labeled a repair/replacement, the Borough did not address any details of the Plan that concerned the Borough. Moreover, the Borough did not submit the opinion of its engineer that apparently, being dated June 24, 2010, was available. In addition, the Borough opines that the Plan is deficient in a number of areas. In the interest of public safety, Borough requests that the Commission reconsider the decision as the Borough believes the Plan to be inadequate.
8. To the extent the Borough seeks rehearing, the LBPS submits that it does not allege nor could the Borough allege newly discovered evidence warranting rehearing. *Pennsylvania Public Utility Commission v. Reading Company*, 345 A.2d 311 (Pa. Cmwlth. 1975). The Borough clearly had the opportunity to raise these arguments and present its engineer’s opinion in its Objections - the Borough declined to do so. Moreover, the Commission’s grant of reconsideration is discretionary and mere disagreement with a Commission decision is insufficient reason to grant a petition for

reconsideration. In making its determination, the Commission may also consider whether the petition for reconsideration addresses new and novel arguments or issues previously overlooked. *Philip Duick, et al. v.*

*Pennsylvania Gas & Water Company*, C-R0597001, 51 PUR 4<sup>th</sup> 284 (1983).

Again, the Borough is not able to establish any new or novel arguments as grounds for reconsideration.

9. However, the Commission's Order does reflect concern for public safety. The condition of the retaining wall was raised as a concern by the Borough ten years ago. The Commission's Order requires the work to be completed within sixty (60) days. If this matter was continued further to conduct additional hearings, the work on replacing the retaining wall would likely not be completed until next spring or later. The Plan proposed by the Railroad is signed and stamped by a licensed engineer. The Commission's Order (page 7) requires the Railroad to properly maintain the newly constructed wall in a safe condition. If the replacement of the wall is defective because of design or construction, the defective condition should at some point be noticeable and the Railroad will have to correct the defect. Therefore, we believe that the public interest is best served by having this retaining wall constructed and completed in an expeditious manner.

In conclusion, LBPS requests that this Commission deny White Haven Borough's  
Petition for Reconsideration, Reargument, and/or Stay of Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terrence J. Buda", written over a horizontal line.

Terrence J. Buda  
Assistant Counsel  
Law Bureau Prosecutory Staff  
Attorney ID #33477

P.O. Box 3265  
Harrisburg, PA 17105-3265  
717-787-5000

Dated: September 21, 2010

**VERIFICATION**

I, Ronald J. Hull, hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: 9-21-10

  
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Ronald J. Hull  
Rail Safety Division  
Bureau of Transportation & Safety

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons listed and in the manner indicated below:

### Service by First Class Mail:

Honorable Ember S. Jandebour  
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A handwritten signature in black ink, reading "Terrence J. Buda", written over a horizontal line.

Terrence J. Buda  
Assistant Counsel  
Attorney ID No. 33477  
Pennsylvania Public Utility Commission

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Dated: September 21, 2010