



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 18, 2011

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

RE: **Docket Nos. C-2011-2237486**
P-2011-2241780

Dear Secretary Chiavetta:

Enclosed for filing, please find the original and one copy of the *Petition for Protective Order and Modification of the Secretarial Letter Dated 5, 2011* of the Department of Transportation.

A copy of this attached has been served upon the parties in the Certificate of Service attached to the application.

Very truly yours,

Gina M. D'Alfonso
Assistant Counsel in Charge

Enclosures

220/GMD:gw

cc: Parties of Record
Judge David A. Salapa, Commonwealth of Pennsylvania, Public Utility Commission
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Joseph Strok, Grade Crossing Administrator, Engineering District 4-0
David Elmer, P.E. Bridge Engineer, Engineering District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ	:	Complaint Docket
Complainant	:	Nos: C-2011-2237486
	:	P-2011-2241780
	:	
v.	:	
	:	Electronically Filed
CANADIAN PACIFIC RAILROAD	:	
LACKAWANNA COUNTY,	:	
La PLUME TOWNSHIP,	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF TRANSPORTATION	:	
Respondents	:	

**PETITION FOR PROTECTIVE ORDER AND MODIFICATION OF THE
SECRETARIAL LETTER DATED MAY 5, 2011**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, and submits the following in support of its Petition for Protective Order, pursuant to 52 Pa. Code § 5.423 and modification of the Secretarial Letter dated May 5, 2011 pursuant to 52 Pa. Code §5.103¹:

1. A Secretarial Letter in this matter dated May 5, 2011, directed that the Department, within thirty (30) days from service of the Secretarial Letter provide the most recent in-depth bridge inspection report, including a load rating analysis of the subject bridge.

2. The Department has neither an in-depth bridge inspection report nor a load rating analysis of the subject bridge. The Department has conducted bridge inspections at the bridge carrying State Route 4009 over Delaware and Hudson Railway Company, Inc. dba Canadian Pacific to insure that the Commonwealth of Pennsylvania is in compliance with the National Bridge Inspection Standard (NBIS) program. 23 U.S.C §§ 116, 144. The date of the most recent NBIS report is August 9, 2010 which predates the current condition of the bridge given the loss

¹ To the extent that the Commission requires the Department to appeal the staff action to effectuate this request for a protective order, then the Department also requests the this Motion be considered filed as under 52 Pa. Code § 5.44.

of parapet on or about May 9 or 10, 2011. This inspection report may not reflect the current status of the bridge.

3. The Department has conducted the bridge inspections at the State Route 4009 Bridge to insure that the State is in compliance with the National Bridge Inspection Program (NBIS). 23 U.S.C. §§ 116, 144.

4. The Commission issues a Protective Order "when a participant demonstrates that the potential harm to the participant of providing the information would be substantial and that harm to the participant if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process." 52 Pa. Code § 5.423(a).

5. One of the factors that the Commission weighs in determining whether to grant or to deny a protective order includes consideration of other statutes or regulations dealing specifically with disclosure of the information. 52 Pa. Code § 5.423 (a) (5).

6. Public disclosure of the detailed bridge inspection report could pose a danger to the safety or physical security of the structure therefore only redacted bridge inspection reports are provided pursuant to the "Right-to-Know Law". 65 P.S. §§67.101 *et seq.*

7. The subject report is also protected from discovery and production into evidence in any Federal and State court cases, under 23 U.S.C. § 409.²

8. Requiring the Department to submit a bridge inspection report into the public record of the Commission is in direct conflict with the Federal and State prohibitions and protections provided under the aforementioned statutes.

² The Department recognizes that the Commission's August 12, 2002, Order in the *West Road* case (M-00021610), determined that Section 409 was not applicable to PUC proceedings. Without waiving the right to raise the issue in a subsequent proceeding or to seek the appropriate appellate review of that question in the present matter, the Department provides citation to Section 409 to highlight the strong public policy favoring the non-disclosure in a public forum of this sensitive inspection information.

9. Producing any structure safety inspection report for general public review, scrutiny and use undercuts the main reason that these reports are treated as confidential – confidentiality promotes independent and critical analysis of bridges by engineering professionals without concern for the potential liability concerns the results of such reports might raise. *See Harrison v. Burlington Northern R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992).

10. Engineers performing bridge inspections to properly evaluate and critically assess the status of a bridge structure should not be concerned with the ramifications their report in a court proceeding.

11. The Commission's need for the report stems from its responsibility to evaluate the status of the bridge and to determine what, if any work should be performed on the bridge, considering the conditions shown.

12. The Commission must limit the use of the submitted bridge inspection report for the sole and express purpose of determining the current condition of the State Route 4009 Bridge structure.

13. The Department requests that the bridge inspection report be treated as under seal.

14. The Department will disclose the bridge inspection report to the parties identified in the May 5, 2011, Secretarial Letter.

15. The Department requests that the Commission require any party provided with the report as outlined in preceding paragraph be required to treat the report as confidential and agree to not provide the bridge inspection report or any data contained therein to any third party or to use this report in any litigation other than this current proceeding.

16. The potential harm to the Department outweighs the public's interest in free and open access to the administrative hearing process, insofar as the bridge inspection reports are not normally subject to disclosure to any party other than the bridge owner or the party that maintains the bridge.

17. The Commission must provide that any protective order issued be served on any and all parties who receive a copy of the bridge inspection report.

18. The Commission must provide that any party who discloses the bridge inspection report, or any reports, surveys, schedules, lists or data contained in such report, to a third party or uses said bridge inspection report, or any reports, surveys, schedules, lists or data contained in such report in other litigation matters be subject to appropriate sanctions from the Commission.

Wherefore, based upon the foregoing, the Department respectfully requests that the Commission enter the following Protective Order:

1. The Pennsylvania Department of Transportation is ordered to submit the NBIS inspection report in its possession instead of an in-depth report and load rating analysis of the bridge in recognition of the fact that those documents do not exist.
2. That the Pennsylvania Department of Transportation's petition for protective order is granted.
3. That neither counsel nor witnesses for the parties receiving the most recent NBIS bridge inspection report for the State Route 4009 Bridge shall provide access to the inspection report to any other person except as authorized by further order of the Commission or the presiding officer.

4. That the parties shall use the most recent bridge inspection report for the State Route 4009 Bridge to determine the current condition of the bridge, to plan or carry out maintenance activities and to determine if the condition of the bridge warrants repair, rehabilitation, replacement or abolishment.

5. That any party who discloses the most recent bridge inspection report for the State Route 4009 Bridge to any person other than those persons set forth in this order will be subject to sanctions by the Commission.

6. That any copy of the inspection report that is made part of the official record be placed under seal.

7. That upon completion of this proceeding, including any administrative or judicial review, all copies of the most recent inspection report for the State Route 4009 Bridge shall be returned to the Pennsylvania Department of Transportation. In the alternative, parties may provide an affidavit of counsel stating that the inspection report has been destroyed.

By way of further order, the Department is ordered to submit the NBIS inspection report in its possession instead of an in-depth report and load rating analysis of the bridge in recognition of the fact that those documents do not exist. Ordering Paragraph 3 of the Secretarial Letter dated May 5, 2011 is modified as follows:

3. Pennsylvania Department of Transportation, within thirty (30) days from the service of this order, submit to Canadian Pacific Railroad, LaPlume Township, Lackawanna County and this Commission, the most recent NBIS bridge inspection report.

Respectfully Submitted,



Gina M. D'Alfonso
Assistant Counsel in Charge
PA Attorney Id# 46767
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
9th Floor - Keystone Building
P.O. BOX 8212
Harrisburg, PA 17105-8212
(717) 787-3128

DATED: May 18, 2011

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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OF TRANSPORTATION	:	
Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's *Petition for Protective Order and Modification of the Secretarial Letter Dated 5, 2011* was served upon the parties listed below, in accordance with the requirements of §1.54, by First-Class mail, postage prepaid this 18th day of May, 2011:

George Berard
CP Rail
PO Box 8002
200 Clifton Corporate Park
Clifton Park, NY 12065

William Jankins
County Engineer
County of Lackawanna
200 Adams Ave
Scranton, PA 18501

Shirley Lewis
LaPlume Township
2080 Hickory Ridge Road
Factoryville, PA 18419

William Lloyd Jr
Office Small Business Advocate
300 North Second Street
Suite 1102
Harrisburg, PA 17101

Honorable Sid Michaels Kavulich
1038 Montdale Road
Scott Township, PA 18447

Joe Stec
Connomwealth Telephone Co.
100 CTE Drive
Dallas, PA 18612

Kim Flowers
PPL Electric Utilities Corp
2 North Ninth Street
Allentown, PA 18106

Erin Brennan, Esquire
1212 South Abington Road
PO Box 240
Clarks Summit, PA 18411

John O'Brien, Esquire
Lackawanna County Solicitor
200 Adams Avenue
Scranton PA 18503-1607

Johnnie E. Simms, Esquire
PA PUC Office of Trial Staff
PO Box 3265
Harrisburg PA 17105-3265

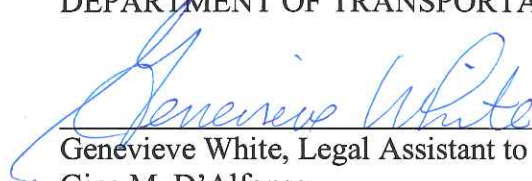
Karl Hansen, Esquire
150 South Fifth Street
Suite 2300
Minneapolis, MN 55402

Jill M. Spott, Esquire
Sheils Law Associates PC
108 North Abington Road
Clarks Summit PA 18411
Representing A. Edward Schwartz

Robert Browning, Esquire
LaPlume Township Solicitor
Oliver Price and Rhodes Attorneys at Law
1212 South Abington Road
PO Box 240
Clark Summit, PA 18411

Irwin A. Popowski, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Flr Forum Place
Harrisburg, AP 17101-1923 □

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Genevieve White, Legal Assistant to
Gina M. D'Alfonso
Assistant Counsel in Charge
Office of Chief Counsel
Commonwealth Keystone Building – 9th Floor
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128

Dated: May 18, 2011