



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 03, 2011

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

RE: **Docket No. C-2011-2237486**

Dear Secretary Chiavetta:

Enclosed for filing, please find the original and one copy of the *Brief in Support of Order dated May 27, 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, 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., District Bridge Engineer, Engineering District 4-0
Thomas M. Opalka, Assistant Highway Maintenance Manager, District 4-0
Keith D. Williams, P.E. PTOE, District Traffic Engineer, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	
	:	P-2011-2241780
v.	:	
	:	C-2011-2237486
Delaware and Hudson Railway Company, Inc.	:	
d/b/a Canadian Pacific and Pennsylvania	:	Electronically Filed
Department of Transportation	:	

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION
BRIEF IN SUPPORT OF ORDER DATED MAY 27, 2011**

On May 13, 2011, the Complainant, A. Edward Schwartz (“Schwartz”) filed a petition for expedited hearing and interim emergency order. The Commonwealth of Pennsylvania, Department of Transportation (“Department”) filed an answer to the petition on May 20, 2011, alleging *inter alia* that the Schwartz petition was without merit. Administrative Law Judge David A. Salapa (“ALJ”) held a hearing on May 25, 2011. In a May 27, 2011, order ALJ Salapa denied the petition for interim emergency relief because Schwartz failed to demonstrate by a preponderance of the evidence that he was entitled to the relief requested. This brief is being submitted in accordance with 52 Pa. Code §5.305.

The regulations at 52 Pa. Code §§3.6-3.8 state that the presiding officer may issue an interim emergency order, after hearing, upon finding that:

1. The petitioner's right to relief is clear.
2. The need for relief is immediate.
3. The injury would be irreparable if relief is not granted.

4. The relief requested is not injurious to the public interest.

52 Pa. Code §3.6(b). The record in this matter clearly reflects that Schwartz was unable to meet any of the established criteria.

Schwartz has full access to his property by use of the detour established by the Department in accordance with the May 19, 2011, order of the Pennsylvania Public Utility Commission (“Commission”) and in compliance Departmental regulations and policies. 67 Pa. Code § 212.117(f); Pennsylvania Department of Transportation Publication 213, *Temporary Traffic Control Guidelines*.¹ See Department’s Answer to Petition for Issuance of an Emergency Order and Request for Expedited Hearing, paragraph 7. The established detour can “legally, safely, structurally and physically accommodate the weight and size of vehicles and their loads that are being detoured.” 67 Pa. Code § 212.117(f) (2). NT 76. In fact, Department Exhibit 1, a plan of the detour, shows that the detour specifically includes State Route 4009 which fronts the Schwartz property.

The ALJ noted that part of the detour is posted for 10 tons. However, this posting has no bearing on Schwartz’s ability to use the detour as the roads were posted prior to the closing of the bridge and the erection of the detour. Order page 10; NT 35. Furthermore, local traffic which is defined as “vehicles or combinations going to or coming from a residence, commercial establishment, or farm located on a posted highway or which can be reached only via a posted highway”² can use the posted road.³ NT 80-81. Therefore, there is no merit to

¹ <ftp://ftp.dot.state.pa.us/public/PubsForms/Publications/PUB%20213.pdf>

² 67 Pa. Code 189.2

³ 67 Pa. Code 189.3

his testimony regarding the condition of the roadway on the detour as those conditions pre-existed the closure of the bridge.

Schwartz claimed that he could not use the detour for moving his business equipment, specifically his farm equipment. But Schwartz admitted that he was not aware of the Pennsylvania Vehicle Code provisions which allow him to move his farm equipment on SR 4009. NT 61; 75 Pa. C.S. § 1301. The witness for the Department testified that he is familiar with the types of vehicles that Schwartz testified that he operates and that in fact the Department operates similar equipment on the detour, including the dirt road portion State Route 4009. NT 76. Therefore, any testimony regarding Schwartz's inability to move vehicles over 10 tons is without merit.⁴

The Department's witness testified that these roads are maintained and snow removal occurs, although SR 4009 is not necessarily at the top of the transportation priority system. NT 76-77. He also testified that if problems with the road or the drainage occur that he should be notified. Finally, he agreed that since this State Route 4009 is part of a detour that the Department will be even more diligent in its maintenance efforts. NT 78.

⁴ Schwartz's self-serving testimony belies an ulterior motive that was clear in both the petition for an emergency interim relief and the initial complaint: he seeks a private at-grade crossing. Though Schwartz's testimony addressed a public crossing, this change from the relief sought in his complaint and petition which occurred only after the ALJ advised counsel for Schwartz at the Prehearing Conference that the Commission does not have jurisdiction over private crossings NT 14. Indeed, Schwartz has not explained where either a public at grade crossing or the roadway approaches would go, who would maintain the crossing, which entity would accept dedication of the roadway, who would acquire the properties to construct it and, who would pay for it. Schwartz has failed to carry even the most minimal burden to show that a temporary at-grade is feasible, let alone necessary.

Wherefore, the Department of Transportation supports the Administrative Law Judge's Order Denying Interim Emergency Relief and requests that this Honorable Commission affirm his decision.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: June 03, 2011

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CERTIFICATE OF SERVICE

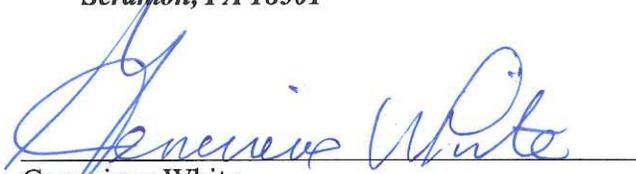
I hereby certify that a true and correct copy of the *Brief* was served upon the parties below by first-class mail; postage prepaid this 3rd day of June 2011:

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