

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Norfolk Southern Railway Company :
to abolish the public rail highway crossing of High : Docket No.: A-2008-2075123
Street above its tracks in the City of Bethlehem and :
the Borough of Hellertown, Northampton County, : Electronically Filed
PA (DOT # 592 787H) :

PETITION FOR PROTECTIVE ORDER

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation ("Department"), by and through its counsel, Jason D. Sharp, and submits the following in support of its Petition for Protective Order, pursuant to 52 Pa. Code § 5.423:

1. At the further pre-hearing conference in the above captioned matter on June 21, 2011, Administrative Law Judge Kandace Melillo ("ALJ") request that the Department provide her Honor and the parties with a copy of a 2010 bridge inspection report for the subject bridge.

2. While the Department does not own or maintain the subject bridge, the Department provides consultant inspection services to counties and municipalities, including the City of Bethlehem, to ensure that bridge inspections are conducted and in compliance with the National Bridge Inspection Program. 23 U.S.C. §§ 116, 144.

3. An August 3, 2010 inspection report was generated subsequent to a June 14, 2010 inspection of the subject bridge.

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, 67.102 , 67.706.

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.

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.

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. In order to properly evaluate and critically assess the status of a bridge structures, engineers performing bridge inspections must 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 subject 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 City of Bethlehem, Norfolk Southern Railway Company, the Commission's Bureau of Transportation and Safety and, if requested, Northampton County.
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 the 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. That the Pennsylvania Department of Transportation's petition for protective order is granted.
2. That the Pennsylvania Department of Transportation is ordered to submit the August 3, 2010 bridge inspection report regarding the subject bridge to the presiding ALJ and City of Bethlehem, Norfolk Southern Railway Company, the Commission's Bureau of Transportation and Safety and, if requested, Northampton County.
3. That neither counsel nor witnesses for the parties receiving the August 3, 2010 bridge inspection report for the subject bridge shall provide access to the inspection report to any other person except as authorized by this order of the Commission or the presiding officer.
4. That the parties shall use the subject bridge inspection report 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 inspection report to any person other than those persons or parties 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 report 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.

Respectfully submitted,


Jason D. Sharp, Assistant Counsel
PENNDOT - Office of Chief Counsel

DATED: June 23, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Petition for Protective Order* was served upon the parties listed below, in accordance with the requirements of §1.54, and in the manner reflected below this 23rd day of June, 2011:

BY FIRST CLASS MAIL:

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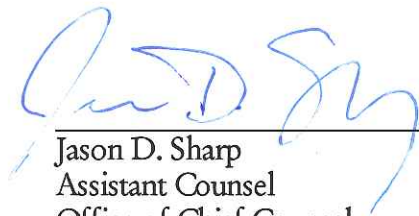
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DATED: June 23, 2011