



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

November 21, 2012

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

RE: *Pittston Township v. RBMN Co.*
C-2011-2274074

Dear Secretary Chiavetta:

Enclosed for filing please find the *Objection to Notice of Deposition* of the Commonwealth of Pennsylvania, Department of Transportation.

I hereby certify that a copy has been sent to all parties of record as indicated on the Certificate of Service.

Very truly yours,

Jason D. Sharp
Executive Deputy Chief Counsel

Enclosures

220/JDS/aca

cc: Administrative Law Judge Ember S. Jandebour
Parties of Record
Mark Chappell, P.E., Chief, Utilities and Right-of-Way Division, 7th Floor
Lawrence M. Cernansky, P.E., Grade Crossing Engineer, District 10-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PITTSTON TOWNSHIP

v.

**READING BLUE MOUNTAIN AND
NORTHERN RAILROAD**

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Docket Number

C-2011-2274074

OBJECTION TO NOTICE OF DEPOSITION

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Jason D. Sharp, and submits the following objection pursuant to 52 Pa. Code §§ 5.344; 5.347; 5.361:

BACKGROUND

1. Pittston Township (“Township”) initiated the present matter by filing an informal complaint regarding the crossing where SR 2019 (Oak Street) crosses, at grade, the tracks of the Reading Blue Mountain and Northern Railroad Company (“Reading”).
2. The Commission’s Bureau of Technical Utility Services (“TUS”) held a field conference at the crossing on November 3, 2011.
3. On or about November 11, 2011, the Township filed a formal complaint in this matter, alleging, *inter alia*, unsafe conditions at the crossing. Reading’s instant request for depositions, filed November 16, 2012, comes more than one (1) year after the filing of the complaint in this matter.
4. On or about December 6, 2011, PennDOT filed an answer and new matter.

5. On or about December 8, 2011, Reading filed a "response" to the Complaint.
6. TUS held a further field conference on November 17, 2011.
7. A telephonic pre-hearing conference was held in this matter on April 4, 2012.
8. During the telephonic prehearing conference, Reading raised the detour issue (N.T. 5, 8) with counsel for Reading stating, "historically, PennDOT has provided detour services for rail projects such as this. This represents a new departure, as they would say" (N.T.14).
9. On or about June 11, 2012 Reading filed a Petition for Declaratory Order pursuant to 66 Pa. C.S. § 331 (f), alleging, *inter alia*, that the Department was required, under the State Highway Law, 36 P.S. § 670-423, to provide a detour for any crossing repair or replacement.
10. On or about June 13, 2012, the Department filed an answer to Reading's Petition, explaining that it is within the Commission's exclusive power to order the work of construction or alteration of a crossing "to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth". 66 Pa. C.S. § 2702 (c), and that the Commission is not bound by the State Highway law. *Millcreek Twp. v. Pennsylvania PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000). Where the State Highway Law conflicts with the Public Utility Law, "the latter, giving the Commission exclusive jurisdiction over highway-rail crossing proceedings, must prevail." *Philadelphia v. Pennsylvania Public Utility Com.*, 496 A.2d 924, 926 (Pa. Cmwlth. 1985) (citations omitted).

11. Prior to the hearing in this matter, Administrative Law Judge Ember Jandebour (“ALJ”) issue an order on June 14, 2012, denying Reading’s request for declaratory relief.
12. On or about June 6, 2012, the Department filed and served on all parties, including Reading, the written direct testimony of Joseph Strok, District 4-0 Grade Crossing Engineer, Sara Gulick, Director of PennDOT’s Bureau of Rail Freight Ports and Waterways, and Douglas Yacuboski, Assistant Counsel Maintenance Manager for Luzerne County. These individuals were authorized to testify on behalf of the Department (Yacuboski Statement # 1, p.2, ln. 2-4; Gulick Statement # 2, p.1, ln. 45-47; Strok Statement #3, p.2, ln. 13-15).
13. Both Mr. Strok and Ms. Gulick addressed the detour issue in their written direct testimony. Mr. Strok explained the District’s position on the detour issue, the difference between Federally funded Section 130 projects and the present project funding which is state rail funding, and the history of using funding for detours.¹ Additionally, Sara

¹ DEPARTMENT STATEMENT # 3, STATEMENT OF JOSEPH STROK (questions in italics, responses in bold):

It is your understanding that PennDOT rail freight is funding a replacement of the crossing? **Yes.**

Does the crossing replacement as contemplated as part of the rail freight grant satisfy PennDOT’s concerns over a crossing replacement at the subject location? **Yes.**

Assuming there was no funding in place for a crossing replacement, who does PennDOT believe should bear the cost of replacing the crossing? **Reading Blue Mountain and Northern Railroad.**

Does that include detour costs? **Yes.**

Why is PennDOT generally not agreeable to provide a detour for a crossing replacement project? **The detour is part of the entire crossing project and is a project cost.**

Does this constitute a change in the District’s position? **No.**

Why not? **Detour costs were previously covered as part of a project under the Section 130 program if a surface was being replaced. However, [the Federal Highway Administration] will no longer fund a crossing replacement as a standalone project. Therefore, surface replacements requiring a detour under the Section 130 program will only be paid for if the project involves the replacement of lights or gates as well.**

So if this were a Section 130 project that involved the installation of both lights and gates and the installation of a new surface, then there could be funding available in the project to cover the detour costs? **Yes.**

Is this a Section 130 project? **No.**

Gulick explained that the rail freight grant that included the subject crossing did not include funding for detours.²

OBJECTION TO DISCOVERY REQUEST

14. Paragraphs one (1) through thirteen (13) are incorporated herein as if set forth at length.
15. "A party shall initiate discovery as early in the proceedings as reasonably possible. In a proceeding, the right to discovery commences when a complaint, protest or other adverse pleading is filed or when the Commission institutes an investigation or on the record proceeding, whichever is earlier." 52 Pa. Code § 5.331 (b).

Strok testimony, p. 3, ln. 48; p.4, ln. 1-43.

² DEPARTMENT STATEMENT # 2, STATEMENT OF SARA GULICK (questions in italics, responses in bold):

What is the grant assistance program? **The Rail Transportation Assistance Program ("RTAP") is a competitive grant program that provides up to 70% of the total cost for a rail project. The money is authorized through the signing of a Capital Budget bond. To be eligible to receive an RTAP grant, the applicant must have an open line item in an active Capital Budget bill and meet the other requirements as set forth in our grant policy. The money is provided on a reimbursement basis as invoices are submitted to the Bureau for a project.**

What does that funding program have to do with this complaint? **A shipper along this line received a grant for rehabilitation work that included the grade crossing involved in this complaint.**

So there is a pending grant to a shipper on this line that affects the subject crossing? **Yes.**

Who is the shipper? **Air Products and Chemicals ("Air Products"), a manufacturer of heat exchangers.**

In general terms, why were they awarded a grant? **Air Products can only transport their product by rail. According to their application, they will be producing larger heat exchangers and will need the rail line to be upgraded and maintained in order to accommodate these larger exchangers.**

What does the grant fund? **The grant provides funds for the rehabilitation of track and three grade crossings.**

What does the grant provide for the subject crossing at Oak Street? **The grant can be used for materials, construction and paving of the railroad crossing bed within the railroad's right of way.**

How much of the crossing replacement will the grant pay for? **Air Products may use up to 15% of the grant, or \$270,117.**

Does the grant cover detours? **No.**

Gulick testimony, p. 2, ln.13-47; p.3, ln.1-10

16. Reading's request for discovery has been initiated as late as possible in the proceeding, coming more than a year after the filing of the complaint, and after completion of the initial hearing in which Reading did not participate.
17. The Commonwealth Court has affirmed the Commission's refusal to allow dilatory discovery. *Diamond Energy v. Pennsylvania Pub. Util. Com'n*, 653 A.2d 1360, 1369 (Pa. Cmwlth. 1995) (rejecting request to compel discovery where complaint was filed on September 16, 1993 and request to compel discovery was filed on January 4, 1993, less than a four month lapse in a proceeding that required a six month conclusion).
18. The Commission has denied discovery requests where the requester has sought to initiate discovery after the initial hearing in a matter. *Mark Mazza v. PECO Energy Company*; C-2009-2118230; C-2009-2120401; 2010 Pa. PUC LEXIS 2031, 3-4 (Pa. PUC 2010) (ALJ did not abuse her discretion to deny discovery motion where Mazza had filed a formal complaint on July 6, 2009, the initial hearing was held on April 3, 2010, and Mazza did not send PECO a discovery request until April 29, 2010, after a continuance of the initial hearing and after the initial hearing itself.) *aff'd on other grounds Mazza v. PUC*, 2012 Pa. Cmwlth. Unpub. LEXIS 10, 8-9 n.6 (Pa. Cmwlth. 2012) (with Commonwealth Court noting that even if were to address the merits of Mazza's claim that the ALJ abused her discretion in denying discovery, "the result would be no different.")
19. In the *Mazza* case, it is noted that discovery was denied where the initial hearing had taken place but a further hearing was scheduled.
20. Reading has been on notice of the subject complaint for more than a year.
21. Reading was on notice and knew of the detour issues as it raised the issue at the pre-hearing conference and in its Petition for Declaratory Order.

22. Reading had ample opportunity to serve interrogatories or request depositions at any time up to the hearing in this case.
23. Reading failed to request discovery prior to the hearing in this case.
24. Reading was served with the Department's written direct testimony that addressed the exact detour issue that Reading now seeks information on in discovery.
25. Reading failed to appear at the hearing in this case.
26. In fact, the ALJ, presumably to afford Reading due process, contacted Reading's counsel by phone during the hearing. The ALJ stated: "I placed a call to counsel for the railroad and he has been told, on advice from his client, is not participating and not defending. Therefore, he is not here." (N.T.5).
27. Reading had notice and opportunity to participate in the hearing in this matter, but chose not to do so, relinquishing its right to cross-examine the Department's witnesses who testified about the Department position on the detour issue.
28. Reading now seeks to depose two individuals who are executive level employees of the Department.
29. Under 52 Pa. Code § 5.361, Reading's request for discovery will cause unreasonable annoyance, oppression, burden and expense to the Department where the request for deposition seeks to take the testimony of high ranking officials, R. Scott Christie, P.E, Deputy Secretary, and George Roberts, P.E., District Executive, where Reading has not demonstrated that these persons have any unique knowledge of the facts of this particular case. *See e.g. Reif v. CNA*, 248 F.R.D. 448, 454 (E.D. Pa. 2008) (plaintiffs had to show that CEO possessed special or personal unique knowledge of plaintiff's termination claims before a deposition would be warranted); *Federal Practice and Procedure*, §

2037 (2d. 2009) (internal citations omitted) (“A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge, but a different result is sometimes reached when the proposed deponent is a *busy government official*, or a very high corporate officer unlikely to have personal familiarity with the facts of the case”) (emphasis added).

30. Under 52 Pa. Code §, 5.361 (c), the Commission must deny this request for discovery where “information requested has been previously provided” and the Department has demonstrated that the information sought in discovery regarding the detour was provided in the testimony of Strok and Gulick.
31. Reading should not now be given the opportunity to deposing the requested individuals, where Reading failed to appear at the hearing and cross examine the Department’s witnesses, especially where, via the written direct testimony process, Reading had advance knowledge of the scope and nature of the Strok and Gulick testimony.
32. Any deposition of Mr. Christie or Mr. Roberts, *assuming arguendo* that they have any knowledge of the matter, will be redundant given the prior testimony at the hearing in this case.
33. Further, allowing discovery at this time, when they may not be an additional hearing in this matter, is a waste of parties’ time and resources.³

³ It is noted that there is a prehearing conference slated for November 28, 2012. PennDOT reserves the right to object to any further hearing in this matter.

WHEREFORE, based upon the foregoing objection, the Department of Transportation respectfully requests that the Commission quash the notice of deposition.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: November 21, 2012

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PITTSTON TOWNSHIP

v.

READING BLUE MOUNTAIN &
NORTHERN CROSSING

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C-2011-2274074

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the Department's ***OBJECTION TO NOTICE OF DEPOSITION***, was served upon the parties below by first-class mail, postage prepaid this day, November 21, 2012:

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DATED: November 21, 2012