



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

January 2, 2013

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 please find the Department's *Motion to Preclude Testimony of Reading Blue Mountain and Northern*, in the above-captioned matter

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: Parties of Record  
Mark Chappell, P.E., Chief, Utilities and Right-of-Way Division, 7<sup>th</sup> Floor  
Joseph Strok, Grade Crossing Engineer, District 4-0

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PITTSTON TOWNSHIP**

**v.**

**READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD**

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**Docket Number**

**C-2011-2274074**

**MOTION TO PRECLUDE TESTIMONY OF READING BLUE MOUNTAIN AND  
NORTHERN**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), and submits the following motion pursuant to 66 Pa. C.S. § 332 (f) and 52 Pa. Code §§ 5.103, 5.245:

**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.
4. On or about December 6, 2011, the Department 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. 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 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).
9. On or about June 6, 2012, the Commission's Bureau of Investigation and Enforcement ("BIE") served the testimony of George Steiner on the parties.
10. Reading was served with the Department's and BIE's written direct testimony.
11. Reading failed to appear at the hearing in this case, despite notice and an opportunity to be heard (Hearing Transcript 06/20/2012, N.T. 5).
12. 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 that he, on advice from his client, is not participating is and not defending. Therefore, he is not here." (Hearing Transcript 06/20/2012, N.T.5).

## COUNT I: WAIVER OF PARTICIPATION

13. Paragraphs one (1) through twelve (12) are incorporated herein as if set forth at length.
14. The Commission is “required to provide due process to the parties appearing before them.” *Schneider v. Pa. Public Util. Com.*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). “[D]ue process is satisfied when the parties are afforded notice and the opportunity to appear and be heard.” *Id.*
15. “It is well-established law that once timely notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to be present and participate in the hearing.” *Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Commission Opinion and Order January 24, 2002).
16. The Public Utility Code and the Commission’s regulations provide that a party who fails to appear and defend at a hearing is “deemed to have waived the opportunity to participate in such conference or hearing.” 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245.<sup>1</sup>

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<sup>1</sup> 66 Pa. C.S. § 332 (f): *Actions of parties and counsel.* --Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination. If the actions of a party or counsel in a proceeding shall be determined by the commission, after due notice and opportunity for hearing, to be obstructive to the orderly conduct of the proceeding and inimical to the public interest, the commission may reject or dismiss any rule or order in any manner proposed by the offending party or counsel, and, with respect to counsel, may bar further participation by him in any proceedings before the commission.

67 Pa. Code § 5.245. Failure to appear, proceed or maintain order in proceedings:

- (a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:
- (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
  - (2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.
  - (3) Not be permitted to recall witnesses who were excused for further examination.
- (b) Subsection (a)(1)—(3) does not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. Counsel shall be expected to go forward

17. Reading had notice and ample opportunity to participate in the hearing in this matter, but chose not to do so, relinquishing its right to cross-examine the witnesses who testified about the crossing at the prior hearing (Hearing Transcript 06/20/2012, N.T. 5).
18. None of the exceptions provided for in 66 Pa. C.S. § 332(f) or 52 Pa. Code § 5.245 apply to Reading, where Reading's failure to be appear, be represented and present testimony was not unavoidable but in fact was intentional and deliberate.
19. Additionally, the Commonwealth Court has, in the administrative law context, clearly stated that "a party's own negligence is not sufficient good cause as a matter of law for failing to appear at a . . . hearing." *Eat'N Park Hospitality Group, Inc v. Unemployment Compensation Board of Review*, 970 A.2d 492, 494 (Pa. Cmwlth. 2008).
20. "A party seeking to ensure that truth favoring his position comes out in a hearing bears a responsibility to complete a record at the time of a hearing." *City of Wilkes-Barre v. Wilkes-Barre Fire Fighters Ass'n*, 992 A.2d 246, 254 (Pa. Cmwlth. 2010). Participation by Reading, in any subsequent hearing, essentially grants it "a second bite of the evidentiary apple" – an impermissible second opportunity to present evidence as to the condition of the crossing. *Id.*

**Wherefore**, Reading's further participation in any hearing in this matter is barred by the applicable laws, regulations and the rules of due process and its proposed testimony must be rejected.

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with the examination of witnesses at the hearing under § 5.242 (relating to order of procedure), or as has been otherwise stipulated or has been directed by the presiding officer.

(c) If the Commission or the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, including an intervenor, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint, application, or petition, if the action is that of complainant, applicant, or petitioner.

## COUNT II: READING FAILED TO MEET ITS BURDEN OF PRODUCTION

21. Paragraphs one (1) through twenty (20) are incorporated herein as if set forth at length.
22. As the complainant in this matter, the Township bears the burden of proof. 66 Pa. C.S. § 322(a); 52 Pa. Code § 332(a) (“the proponent of a rule or order has the burden of proof”). See *Torino Inc. v. PECO Energy Co.*, 2010 Pa. PUC Lexis 593 (Commission Opinion and Order February 2, 2010).
23. The burden of proof “is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).
24. A preponderance of the evidence standard is met when “one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party.” *Application of Samir Ouagerrouch*, 2012 Pa. PUC Lexis 1585, \*4 (Commission Opinion and Order September 27, 2012).
25. In *Huiping Xu v. Peoples Natural Gas Co.*, the Commission set forth a comprehensive statement of the required burden of proof:

To establish a sufficient case and satisfy the burden of proof, complainant must show that respondent is responsible or accountable for the problem described in the Complaint. Such a showing must be by a preponderance of the evidence. That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Complainant must initially produce sufficient credible evidence to establish a prima facie case in order that complainant not lose summarily. ***If complainant does so, the burden of going forward with evidence shifts to respondent to produce credible evidence of at least co-equal weight.*** This burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with complainant.

2010 Pa. PUC Lexis 936, \*12-\*13 (Initial Decision June 8, 2010) (Commission adopted Initial Decision on September 9, 2010) (citations omitted).

26. Here, the Township adopted the testimony of the Department and BIE as its case in chief (Hearing Transcript, N.T. 5).<sup>2</sup>
27. The Department and BIE's testimony was aligned with the position of the Township – the crossing had failed, it was dangerous to the public and had to be replaced. (BIE Statement p. 3, lns. 18-21; Department Statement # 3, p. 2, lns. 36-48).
28. Once this evidence was presented, the burden of going forward with evidence shifted to the only respondent not aligned with the Township – Reading. Reading did not present any credible evidence of at least co-equal weight to that adopted by the Township; Reading produced nothing at all. *Huiping Xu, supra*.
29. Reading's testimony now offered as per the Order of October 22, 2012, allows Reading to present evidence that should have been presented in the prior hearing and constitutes an impermissible "a second bite of the evidentiary apple". *Wilkes-Barre Fire Fighters Ass'n, supra*.

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<sup>2</sup> If the Office of Administrative Law Judge determined that there was insufficient evidence adduced to render a decision as a result of the initial hearing, then presumably the Township failed to carry its burden of proof and the matter should be dismissed. *See App. of Armstrong Commc'ns Inc.*, 1998 Pa. PUC Lexis 175, \*20 (September 9, 1998) ("if a party fails to produce any proof on an issue for which it has the burden, we, and the Commission, cannot make findings of fact necessary to support an adjudication."). However, if the ALJ determined that the Township, through adoption of the testimony of the Department and BIE, established that the crossing needs to be replaced, the only issues properly before the ALJ now are the nature of the replacement and the timing of the replacement. Those are the only issues not substantively addressed by the parties in the prior hearing. The need for replacement and suggested cost and maintenance allocations were made at the prior hearing. *See* Testimony of Joseph Strok, Department Statement #3. The use of the "questions and procedures" now invite the parties to relitigate issues presented at the prior hearing. Indeed, Reading's responses to the "questions and procedures" required by the Order of October 22, 2012 essentially allow Reading to reopen and relitigate issues it should have raised in its defense at the prior hearing in this matter. As noted in its testimony, Reading now seeks to present evidence that Reading "believes the crossing is safe" and that "[Reading] has NEVER agreed to replace this crossing absent the Air Products grant funding." Further, Reading's testimony addresses the detour issue, which your Honor has already ruled on and indicated was not open for discussion, (Pre-Hearing Conference of 11/28/2012, N.T. 17, 22; Affidavit of Wayne Michel, appended to Reading and Blue Mountain's Proposed Testimony). Somehow Reading's willful, calculated failure to appear and defend in this matter has essentially earned it a *de novo* hearing in this matter.

*Wherefore*, based upon the foregoing, it is respectfully requested that Reading be barred from further participation in the matter or that the subject hearing be limited only to addressing the specific issues of the scope and timing of the crossing replacement.

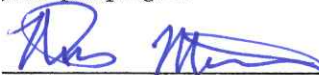
Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: January 2, 2013

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PITTSTON TOWNSHIP**

Complaint Docket

v.

**C-2011-2274074**

**READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Department's *Motion to Preclude Testimony of Reading Blue Mountain and Northern*, was served upon the parties below by first-class mail, postage prepaid this day, January 2, 2013:

Paul Ober, Esquire  
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DATED: January 2, 2013