



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

April 11, 2013

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

Re: Docket Number C-2012-2319319

Dear Secretary Chiavetta:

Enclosed for filing please find a copy of the Department of Transportation's *Motion in Limine to Preclude the Written Direct Testimony of Reading Blue Mountain and Northern Railroad* in the above-captioned matter.

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

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Nicholas D. Mertens".

Nicholas D. Mertens
Assistant Counsel

Enclosure
220/NDM:aca

cc: Ember Jandebour, Administrative Law Judge
Parties of Record
Mark Chappell, P.E., Chief, Utilities/Right-of-Way Section
Steve Betts, District Grade Crossing Engineer, District 3-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Carl Lute	:	
	:	
v.	:	C-2012-2319319
	:	
Reading Blue Mountain & Northern Railroad, Conyngham Township, Columbia County, Commonwealth of Pennsylvania Department of Transportation	:	Electronically Filed

**MOTION IN LIMINE TO PRECLUDE THE WRITTEN DIRECT TESTIMONY
OF READING BLUE MOUNTAIN AND NORTHERN RAILROAD**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by its counsel, Nicholas D. Mertens, Assistant Counsel, and submits the following Motion in Limine to Preclude the Written Direct Testimony of Reading filed on April 9, 2013 and pursuant to 52 Pa. Code § 5.103 states the following:

**Count I: Reading’s Testimony should be excluded as untimely
under Your Honor’s Scheduling Order of February 12, 2013.**

1. On February 12, 2013, Your Honor issued a Scheduling Order which set the litigation schedule for the present matter and ordered, *inter alia*, that all “Written Testimony responsive to the attached Questions and Procedures is due March 11, 2013.” Scheduling Order ¶ 2.
2. Additionally, the Scheduling Order stated that all “Written Rebuttal Testimony is due March 25, 2013.” Scheduling Order ¶ 3.

3. On or about March 13, 2013, the Department received the “Pre-Filed Direct Testimony of Wesley Westenhoefer, Vice President, Maintenance of Way Reading Blue Mountain and Northern Railroad” (“Reading Statement Number One (1)”).
4. On or about March 14, 2013, the Department received Reading’s “Praeceptum to Attach,” as it did not attach “Exhibit A” to the prior “Pre-Filed Direct Testimony.”
5. On or about April 9, 2013, Reading again served Pre-Filed Written Direct Testimony containing additional direct testimony from Wesley Westenhoefer. (“Reading Statement Number Two (2)”).
6. As such, Reading Statement Number Two (2) is untimely as it was filed nearly one (1) month late and served less than two (2) weeks prior to the initial hearing in the present matter, pursuant to Your Honor’s Scheduling Order issued on February 12, 2012.
7. An attempt to argue that Reading Statement Number Two (2) is rebuttal testimony even though it is labeled “Direct Testimony,” would not render the Statement admissible as such evidence contained therein would be properly excluded as rebuttal evidence pursuant to 52 Pa. Code § 5.243(e)(2) (“A party will not be permitted to introduce evidence during a rebuttal phase which . . . [s]hould have been included in the party’s case-in-chief”). Further, even if considered to be rebuttal testimony, the document is untimely served pursuant to the Order dated February 12, 2013.

Count II: Allowing Reading to move its Statement Number Two into evidence would prejudice the substantive rights of the Department.

8. Paragraphs one (1) through seven (7) are incorporated herein as if set forth at length.

9. As a general rule, the “[c]ross-examination of the witness presenting written testimony shall proceed at the hearing at which testimony is authenticated if service of the written testimony is made upon each party of record at least 20 days prior to the hearing, unless the presiding officer for good cause otherwise directs.” 52 Pa. Code § 5.412(d).
10. Reading Statement Number Two (2) was served upon the Department less than two (2) weeks prior to the initial hearing.
11. Additionally, Reading Statement Number Two (2) references Exhibits 1-26, which have yet to have been received by the Department as of April 11, 2013.
12. Reading has failed to provide a compelling justification or good cause reason for failing to comply with Your Honor’s Scheduling Order.
13. Given the close proximity to the initial hearing date in this matter Reading’s untimely Pre-Filed Written Direct Testimony is prejudicial and impacts the substantive rights of the parties hereto, including, but not limited to the Department, to secure a “just, speedy and inexpensive determination of every action.” *AT&T Commc’n of Pa. v. Pa. Pub. Util. Comm’n*, 568 A.2d 1362, 1364 (Pa. Commw. Ct. 1990).
14. As the period for the submission of rebuttal testimony has passed, the Department is no longer afforded the opportunity, given to all the parties hereto, to timely submit Pre-Filed Written Rebuttal Testimony in response to Reading’s Statement Number Two (2).
15. Additionally, the parties hereto, including, but not limited to the Department, are no longer afforded sufficient time to adequately prepare for cross examination of Reading’s sole witness.
16. The Pennsylvania Code provides that a “presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the

substantive rights of the parties.” 52 Pa. Code § 1.2(a). *See Springfield Twp. v. Pa. Pub. Util. Comm’n*, 676 A.2d 304 (Pa. Commw. Ct. 1996) (a presiding officer may accept a party’s initial brief even when filed in violation of the briefing order); *AT&T Commc’n of Pa.*, 568 A.2d at 1364 (the Commission can properly rule on a party’s exceptions to an initial decision filed a day late absent prejudice to another party).

17. However, in both *Springfield Township* and *AT&T Communication*, the failure to comply with the Commission’s Rules and Regulation and the presiding officer’s orders were not prejudicial to the opposing parties.
18. Reading’s dilatory tactics in serving Reading Statement Number Two (2) without sufficient justification or good cause less than two (2) weeks prior to the initial hearing date is prejudicial to the Department.
19. The Commission’s Rules and Regulations grant the authority upon Your Honor to exclude inadmissible evidence. 52 Pa. Code §§ 5.403(a)(1) and 5.483(a).
20. Given the close proximity of this Motion to the initial hearing date in this matter, the Department requests that Your Honor waive the twenty (20) day time period for the filing of responsive pleadings and amend such time frame to ten (10) days. 52 Pa. Code §§ 1.91 (a party may request a waiver or, or exception to, any provision of Chapter 5 of the Commission’s Rules and Regulations) and 5.103(c) (“A party has 20 days from the date of service within which to answer or object to a motion, unless the period of time is otherwise fixed by the Commission of the presiding officer”).

WHEREFORE, based upon the foregoing, the Department respectfully requests that Your Honor grant the Department’s Motion in Limine to Preclude the Written Direct Testimony of

Reading Blue Mountain and Northern Railroad served upon the Department and the Commission
on April 9, 2013.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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**BEFORE THE
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Carl Lute	:	
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v.	:	C-2012-2319319
	:	
Reading Blue Mountain & Northern	:	
Railroad, Conyngham Township,	:	
Columbia County, Commonwealth of	:	
Pennsylvania Department of Transportation	:	

NOTICE TO PLEAD

This pleading has been filed with the Secretary of the Public Utility Commission. Any responsive pleading to this Motion must be filed within twenty (20) days of service of this Motion upon you. 52 Pa. Code § 5.103 (b) & (c) unless modified by the Administrative Law Judge.



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DATED: April 11, 2013

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Reading Blue Mountain & Northern	:	
Railroad, Conyngham Township,	:	Electronically Filed
Columbia County, Commonwealth of	:	
Pennsylvania Department of Transportation	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's *Motion in Limine to Exclude the Written Direct Testimony of Reading Blue Mountain and Northern Railroad* was served upon the parties below by first-class mail postage prepaid this 11th day of April, 2013:

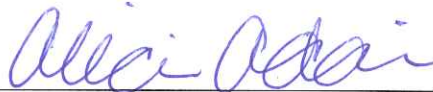
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