



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 3, 2013

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

RE: **Docket No. M-2013-2364201**

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Petition for Protective Order*, in the above-captioned matter.

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

Very truly yours,

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

Nicolas Mertens  
Assistant Counsel

Enclosure

220/NDM:aca

cc: Parties of Record  
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section  
Gerard Babinski, District Bridge Engineer, District 4-0  
Joseph Strok, District Grade Crossing Engineer, District 4-0

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|   |   |                              |
|---|---|------------------------------|
| Bridge Structure where State Route 1025,  | : |                              |
| crosses over a single track of Canadian   | : | Docket Number M-2013-2364201 |
| Pacific Railroad (264 293 K) in Nicholson | : |                              |
| Borough, Wyoming County                   | : | <b>Filed Electronically</b>  |

**PETITION FOR PROTECTIVE ORDER**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, and submits the following in support of its Petition for Protective Order, pursuant to 52 Pa. Code §5.423:

1. A Commission Order in this matter dated May 23, 2013, directed that the Department, within thirty (30) days of issuance of the Commission Order “provide any engineering inspections and analysis necessary to determine the existing structural condition of the subject bridge and report its findings to the Commission.” Commission Order ¶5.

2. The Commission Order also required that the Department, within ninety (90) days of the issuance of the Commission Order, “provide any engineering study and analysis to determine the feasibility and any remedial action to reopen the bridge safely to the public and report its findings to the Commission.” Commission Order ¶6.

3. Simultaneous with the filing of this Petition for Protective Order, the Department has filed a Petition for Reconsideration and Amendment of the May 23, 2013 Order (Department’s is seeking reconsideration of allocating initial costs and responsibility onto the Department to perform bridge inspection where prior order places responsibility onto the Railroad).

4. The Department, by requesting a protective order for any bridge inspection reports or alike, is not waiving any legal or factual arguments presented in the Department’s Petition for Reconsideration and Amendment of the May 23, 2013 Order or the Motion for Certification of Interlocutory Order and Stay of Proceedings Pending Appeal filed simultaneously with the present Petition for Protective Order.

5. The Department has conducted the bridge inspections of the subject bridge to insure that the State is in compliance with the National Bridge Inspection Program ("NBIS"). 23 U.S.C. §§116 and 144.

6. The most recent bridge inspection was conducted on November 11, 2012.

7. 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).

8. 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).

9. Public disclosure of the detailed bridge inspection reports, studies, or analyses could pose a danger to the safety or physical security of the structure therefore only redacted bridge inspection reports, studies, and/or analyses are provided pursuant to the "Right-to-Know Law." 65 P.S. §§67.101 *et seq.*

10. The subject report, study, and/or analysis is also protected from discovery and production into evidence in any federal and state court cases, under 23 U.S.C. §409.<sup>1</sup>

11. Requiring the Department to submit a bridge inspection report, study, or analysis into the public record of the Commission is in direct conflict with the Federal and State prohibitions and protections provided under the aforementioned statutes.

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<sup>1</sup> The Department recognizes that the Commission's August 12, 2002, Order in the *West Road* case (M-00021610), determined that 23 U.S.C. §409 was not applicable to PUC proceedings. Without waiving the right to raise the issue in a subsequent proceeding or to seek the appropriate appellate review of that question in the present matter, the Department provides citation to 23 U.S.C. §409 to highlight the strong public policy favoring the non-disclosure in a public forum of this sensitive inspection information.

12. Producing any structure safety inspection report, study, or analysis 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).

13. Engineers performing bridge inspection reports, studies, and analyses to properly evaluate and critically assess the status of a bridge structure should not be concerned with the ramifications their report in a court proceeding.

14. 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.

15. The Commission must limit the use of the submitted bridge inspection report, study, and/or analysis for the sole and express purpose of determining the current condition of the State Route 1025 Bridge structure.

16. The Department requests that the bridge inspection report be treated as under seal.

17. The Department will disclose the bridge inspection report from November 11, 2012 to the Commission, as required in the May 23, 2013 Order, within Thirty (30) days from the issuance of this Protective Order.

18. The Department requests that the Commission require any party provided with the report 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 this report in any litigation other than this current proceeding.

19. 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, studies, and/or analyses are not normally subject to disclosure to any party other than the bridge owner or the party that maintains the bridge.

20. 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, study, or analysis.

21. The Commission must provide that any party who discloses the bridge inspection report, or any reports, surveys, schedules, lists, studies, analyses, 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 hereby **GRANTED**.
2. That neither counsel nor witnesses for the parties, including Commission staff, receiving any bridge inspection report for the State Route 1025 Bridge shall provide access to the inspection report to any other person except as authorized by further order of the Commission or the presiding officer.
3. That the parties shall use the most recent bridge inspection report for the State Route 1025 Bridge 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.

4. That any party who discloses the most recent bridge inspection report for the State Route 1025 Bridge to any person other than those persons set forth in this order will be subject to sanctions by the Commission.
5. That any copy, and testimony thereof, of the bridge inspection report, that is made part of the official record be placed under seal.
6. That upon completion of this proceeding, including any administrative or judicial review, all copies of the most recent bridge inspection report, study, or analysis for the State Route 1025 Bridge 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,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION

*for* 

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DATED: June 3, 2013

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Department's *Petition for Protective Order* was served upon the parties listed below, in accordance with the requirements of §1.54, by First-Class mail, postage prepaid and by electronic mail as indicated this 3<sup>rd</sup> day of June, 2013:

George A. Bernard, Coordinator  
Canadian Pacific Railway  
P.O. Box 8002  
200 Clifton Park Corporate Park  
Clinton Park, NY 12065

Wyoming County  
Board of Commissioners  
Wyoming County Courthouse  
1 Courthouse Square, 2nd Floor  
Tunkhannock, PA 18657

Michael J. Washo, Chairman  
Lackawanna County Commissioners  
200 Adams Avenue  
Scranton, PA 18503

Nicholson Borough  
17 Main Street  
P.O. Box AD  
Nicholson, PA 18446

William Lloyd, Jr.  
Office of Small Business Advocate  
300 North Second Street  
Suite 1102  
Harrisburg, PA 17101

Irwin A. Popowski, Esquire  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor Forum Place  
Harrisburg, PA 17101-1923

Johnnie E. Simms, Esquire  
PA PUC Office of Trial Staff  
PO Box 3265  
Harrisburg, PA 17105-3265

Bohdan Pankiw, Chief Counsel  
Law Bureau  
Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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Assistant Counsel in Charge  
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