



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

July 10, 2013

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

Re: A. Edward Schwartz v. Delaware and Hudson Railway Company,  
Inc. d/b/a Canadian Pacific Railroad; and PennDOT  
Docket Nos. C-2011-2237486, P-2011-2241780

Dear Ms. Chiavetta:

Enclosed for filing is the original copy of the Main Brief of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

Adam D. Young  
Prosecuting Attorney  
Attorney ID No. 91822

Counsel for the Bureau of  
Investigation and Enforcement

Enclosures

cc: As per Certificate of Service

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**A. Edward Schwartz  
Complainant**

**v.**

**Delaware and Hudson Railway  
Company, Inc. d/b/a Canadian  
Pacific Railroad; and PennDOT  
Respondents**

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**Docket No: C-2011-2237486  
P-2011-2241780**

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**MAIN BRIEF OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Prosecutor

Counsel for Pennsylvania Public  
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Dated: July 10, 2013

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## TABLE OF CONTENTS

STATEMENT OF THE QUESTIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	7
A.    What should be the final disposition of the S.R.4009 crossing at issue in This case? .....	7
B.    Which parties should be responsible for the performance of and cost of repairs made, repairs to be made, future construction, if necessary, and future maintenance .....	9
PROPOSED FINDINGS OF FACT .....	11
PROPOSED CONCLUSIONS OF LAW .....	12
PROPOSED ORDERING PARAGRAPHS .....	13
CONCLUSION .....	14

## STATEMENT OF THE QUESTIONS INVOLVED

- A. What should be the final disposition of the S.R.4009 crossing at issue in this case?**
  
- B. Which parties should be responsible for the performance of and cost of repairs made, repairs to be made, future construction, if necessary, and future maintenance?**

## STATEMENT OF THE CASE

On April 15, 2011, the Complainant filed a complaint with the Commission alleging that the bridge carrying S.R. 4009 over the facilities of Delaware and Hudson Railway Company, Inc. ("D&H") d/b/a Canadian Pacific is unsafe. According to the complaint, the bridge is not being properly maintained by the railroad or PennDOT. Complainant alleged that a large hole had opened in the deck of the bridge, and the debris from the bridge is falling onto the railroad tracks. Complainant alleged that the railroad was responsible for maintaining the bridge in accordance with a deed dated May 30, 1917.

According to the complaint, Complainant owns a horse farm along S.R. 4009 and receives deliveries in excess of 30 tons on a regular basis. The bridge at issue, however, allegedly had been posted with 10-ton weight limit signs. Complainant alleged that his vehicle and horse trailers weigh in excess of 10 tons, and further contends that with such a weight restriction, no delivery trucks, bedding trucks, fuel trucks, fire trucks, equipment delivery trucks, or dump trucks can travel across the S.R. 4009 bridge.

On May 5, 2011, the Commission issued a Secretarial Letter stating that a Commission staff engineer conducted an on-site field investigation and conference on April 6, 2011. According to the Secretarial Letter, PennDOT agreed to place a steel plate over the hole in the deck of the bridge, and notified the Commission on April 15, 2011 that this task had been completed on April 8, 2011.

On May 9, 2011, PennDOT filed an answer in response to the complaint, which denied that the bridge is unsafe. The answer further asserted that the bridge was not posted for 10 tons, rather S.R. 4009 was. The answer also asserted that complainant could use S.R. 4009 for local deliveries as well as emergency service pursuant to 67 Pa. Code § 189.3.

On May 13, 2011, Complainant filed a petition for expedited hearing and interim emergency Order alleging that the S.R. 4009 bridge had further deteriorated and that on May 11, 2011, PennDOT closed the bridge. Among other things, the petition alleged that the railroad tracks bifurcate Complainants property, and that the bridge is necessary to access the other half of his property. The only other access to the other half of Complainants property is a dirt road in need of serious repairs, and which allegedly is a much longer route adding time for emergency vehicle response.

On May 17, 2011, the Commission scheduled an emergency hearing for May 25, 2011. On May 19, 2011 an order was issued by the Commission stating that on May 10, 2011, PennDOT notified the Commission that a portion of the bridge had fallen onto the railroad tracks below. The order directed PennDOT to provide for detours during the time that the S.R. 4009 bridge is closed, to maintain any barricades and provide any engineering inspections to determine the feasibility of reopening the bridge.

An emergency hearing was held as scheduled on May 25, 2011. Complainant and his wife provided testimony, as did one witness from PennDOT. LaPlume Township, the Railroad, and the Commission's Bureau of Investigation and Enforcement presented no witnesses. By opinion and Order dated May 27, 2011, Administrative Law Judge David

A. Salapa concluded that the closing of the S.R. 4009 bridge did not justify the construction of an at-grade crossing on an expedited basis, and certifying the material question to the Commission as to whether the emergency relief was properly denied. By Order entered July 5, 2011, the Commission determined that ALJ Salapa properly denied the emergency relief, and remanded the matter to the OALJ for further proceedings.

By hearing notice dated November 10, 2011, the Commission scheduled a *telephonic prehearing conference on December 15, 2011*. At the *prehearing conference*, PennDOT indicated that it was willing to do work necessary to reopen the bridge to traffic. However, PennDOT advised that the bridge would be restricted to a load limit of 13 tons. In addition, the roadway width between the guiderails would be 12 feet (or one lane). This work could be accomplished by spring, 2012.

By hearing notice dated January 31, 2012, the Commission scheduled a hearing for this matter on March 21, 2012. On April 25, 2012, ALJ Salapa issued a recommended decision approving the plans to reopen the S.R. 4009 bridge for single lane travel with a weight restriction of 13 tons. Subsequently, the work was completed by PennDOT at its initial cost and expense, and the matter was scheduled for a final hearing regarding costs, and maintenance responsibilities, and final disposition of the crossing. The final hearing was held on May 23, 2013.

## **SUMMARY OF ARGUMENT**

The bridge at issue is nearly 100 years old, and is in a state of serious disrepair. It is posted to carry legal loads of only 13 tons, and has been relegated to a single lane of travel. Concrete continues to spall and chunks of mortar and concrete continue to fall on the tracks below. In the short term, if no plans are in the works for removing the existing structure and constructing a new one, or in the alternative constructing an at-grade crossing, the cosmetic deficiencies need to be addressed so that no more spalling occurs. In the long term, this bridge will need to be removed, and either replaced, or an at-grade crossing installed. Applying the proverbial “lipstick on a pig” by addressing short-term cosmetic deficiencies should not affect the fact that long term plans for this structure should be started as soon as practicable.

## ARGUMENT

### A. **What should be the final disposition of the S.R.4009 crossing at issue in this case?**

The bridge at issue in this case carrying State Route 4009 over the tracks of Delaware and Hudson Railway Company, Inc. (D&H) d/b/a Canadian Pacific Railroad, was initially constructed in 1914-1915 by Respondent railroad's predecessor in interest, the Delaware, Lackawanna and Western Railroad (DL&W). (N.T. 5/23/13 at 253). In the early 1900's, Emma Slayton, predecessor in interest to Complainant A. Edward Schwartz, owned a farm through which DL&W intended to place its tracks. In 1912, DL&H exercised its power of eminent domain to take the realty. (Compl. St. 4, Line 71-81). After several years of protracted litigation, a deed was executed in 1917 in which DL&H agreed to keep open the crossing as it existed at the time for the benefit of the public as well as Ms. Slayton. (Compl. Ex. 10).

Complainant now owns the land once belonging to Emma Slayton and through which run the tracks of respondent D&H. Complainant operates a horse farm, and for the past 16 years has used the bridge daily to access both sides of his property. (Compl. St. 2, Lines 24-25). Complainant frequently used the bridge to access the other half of his property with vehicles and horse trailers weigh in excess of the load limit now posted, and maintains that with such a weight restriction, no delivery trucks, bedding trucks, fuel trucks, fire trucks, equipment delivery trucks, or dump trucks can travel across the S.R. 4009 bridge. Complainant's business has been significantly impacted. (See generally N.T. 5/25/11 Testimony of A. Edward Schwartz).

Nearly 100 years after its construction, the bridge structure has a rating of 3 out of 10, or “serious condition.” (PennDOT St. No. 6 at pg. 3; Ex. 7). The deck rating and substructure rating are listed as 4 out of 10, or “poor condition.” The bridge exhibits signs of significant spalling, with mortar and aggregate falling onto the tracks below. (PennDOT St. 6 at Pg. 5; Compl. Ex. 5 and 6). While repairs have been made to the bridge to allow it to reopen to single lane traffic with a load capacity of 13 tons, the bridge continues to deteriorate, and in time will need to be closed. (N.T. 5/23/13 at 290-292). At the very least, repairs need to be made to this bridge to stop the concrete from falling onto the tracks below, however, from an engineering standpoint, such repairs are cosmetic in nature only, and will not affect the load capacity of the bridge. (N.T. 5/23/13 at 263). A newly constructed bridge would be designed to carry legal load, which is 80,000lbs or 40 tons. (N.T. 5/23/13 at 253).

Ultimately, this bridge will continue to deteriorate, and in time, will need to be closed. The timeframe for this is unknown, and could be as much as 10-20 years from now. But the final disposition of this bridge is before the Commission now, and I&E is of the opinion that the Commission should look long-term at this bridge, and not allow a permanent solution to languish for many years. In the immediate future, if a new bridge structure or at-grade crossing is not slated for construction, the spalling of concrete must be addressed. There is no doubt that sometimes large chunks of concrete and mortar are falling onto the tracks below. The impact of this on rail operations is debatable, and obviously, depends on the size of the chunks falling, but nevertheless, concrete and mortar ARE falling off the bridge, and this is a safety issue that must be addressed.

**B. Which parties should be responsible for the performance of and cost of repairs made, repairs to be made, future construction, if necessary, and future maintenance?**

Generally, I&E takes no position on cost allocation in rail cases, and suggests only that the applicable law be applied in a well-reasoned and just manner so as to ensure that outcome is just and reasonable for all concerned parties. The railroad did construct the bridge, and PennDOT has maintained the road surface over the years. There appears to be no evidence of maintenance being performed on the bridge substructure or superstructure (except the bituminous surface) since the bridge's construction, nor are there any prior orders of the Commission assigning maintenance responsibilities on this bridge. There are, however, two private agreements, a Cooperation Agreement between PennDOT and D&H (PennDOT Ex. 12), and a land deed between Emma Slayton and DL&W (Compl. Ex. 10) which should be examined and given due weight when determining the party or parties responsible.

Pursuant to Section 2704(a) of the Public Utility Code, 66 Pa.C.S. § 2704(a), the Commission is vested with the authority to determine which concerned parties shall bear the costs associated with the alteration of a railroad crossing and the facilities at or adjacent to such crossing. In exercising this authority, the Commission is not limited to any fixed rate with respect to the allocation of costs, but instead, may take all relevant factors into consideration. *Department of Transportation v. Pa. Public Utility Commission*, 469 A.2d 1149 (Pa. Cmwlth. 1983). The allocation of costs between the concerned parties is within the discretion of the Commission. *Borough of South*

*Greensburg v. Pa. Public Utility Commission*, 544 A.2d 82 (Pa. Cmwlt. 1988). The Commission determines what parties are concerned within the meaning of 66 Pa.C.S. § 2704(a) and § 2702(c). *County of Chester v. Pa. Public Utility Commission*, 408 A.2d 552 (Pa. Cmwlt. 1979); *Consolidated Rail Corp. v. Pa. Public Utility Commission*, 671 A.2d 248 (Pa. Cmwlt. 1995). In apportioning costs in rail highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. *Wheeling and Lake Erie Railway Co. v. Pa. Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlt. 2001), *alloc. denied*, 790 A.2d 1021 (Pa. 2001); *Greene Twp. v. Pa. Public Utility Commission*, 668 A.2d 615 (Pa. Cmwlt. 1995); *AT&T v. Pa. Public Utility Commission*, 737 A.2d 201 (Pa. 1999).

Among the factors that the Commonwealth Court noted in the *Greene Twp.* case, as relevant, are the following: (1) Which party built the crossing; (2) Whether the roadway existed before or after the construction of the crossing; (3) Relative benefit conferred on each party with the construction of the crossing; (4) Whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) The relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors the Commission can consider. *Bell Atlantic-Pa. Inc. v. Pa. Public Utility Commission*, 672 A.2d 352 (Pa. Cmwlt. 1996); *AT&T v. Pa. Public Utility Commission*, 737 A.2d 201 (Pa. 1999); *PECO Energy Co. v. Pa. Public Utility Commission*, 791 A.2d 1155 (Pa. 2002).

## PROPOSED FINDINGS OF FACT

1. The bridge at issue in this case carrying State Route 4009 over the tracks of Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad, was initially constructed in 1914-1915 by Respondent railroad's predecessor in interest, the Delaware, Lackawanna and Western Railroad. (N.T. 5/23/13 at 253).
2. In the early 1900's, Emma Slayton, predecessor in interest to Complainant A. Edward Schwartz, owned a farm through which DL&W intended to place its tracks. In 1912, DL&H exercised its power of eminent domain to take the realty. (Compl. St. 4, Line 71-81).
3. A deed was executed in 1917 in which DL&H agreed to keep open the crossing as it existed at the time for the benefit of the public as well as Ms. Slayton. (Compl. Ex. 10).
4. The acquisition of Ms. Slayton's property divided the property into two halves. (Compl. St. No. 2 Lines 16-19).
5. Complainant now owns the land once belonging to Emma Slayton and through which run the tracks of respondent D&H. Complainant operates a horse farm on this land, and for the past 16 years has used the bridge daily to access both sides of his property. (Compl. St. 2, Lines 16-19, 24-25).
6. Complainant frequently used the bridge to access the other half of his property with vehicles and horse trailers weigh in excess of the load limit now posted. Delivery trucks, bedding trucks, fuel trucks, fire trucks, equipment delivery trucks, or dump trucks cannot travel across the S.R. 4009 bridge with its current posted weight limit. (See generally N.T. 5/25/11 Testimony of A. Edward Schwartz).
7. The bridge structure has a rating of 3 out of 10, or "serious condition." (PennDOT St. No. 6 at pg. 3; Ex. 7).
8. While repairs have been made to the bridge to allow it to reopen to single lane traffic with a load capacity of 13 tons, the bridge continues to deteriorate, and in time will need to be closed. (N.T. 5/23/13 at 290-292).
9. Repairs will need to be made to this bridge to stop the concrete from falling onto the tracks below, however, from an engineering standpoint, such repairs are cosmetic in nature only, and will not affect the load capacity of the bridge. (N.T. 5/23/13 at 263).

10. A newly constructed bridge would be designed to carry legal load, which is 80,000lbs or 40 tons. (N.T. 5/23/13 at 253).

### PROPOSED CONCLUSIONS OF LAW

1. Pursuant to Section 2704(a) of the Public Utility Code, 66 Pa.C.S. § 2704(a), the Commission is vested with the authority to determine which concerned parties shall bear the costs associated with the alteration of a railroad crossing and the facilities at or adjacent to such crossing.
2. In exercising this authority, the Commission is not limited to any fixed rate with respect to the allocation of costs, but instead, may take all relevant factors into consideration. *Department of Transportation v. Pa. Public Utility Commission*, 469 A.2d 1149 (Pa. Cmwlt. 1983).
3. The allocation of costs between the concerned parties is within the discretion of the Commission. *Borough of South Greensburg v. Pa. Public Utility Commission*, 544 A.2d 82 (Pa. Cmwlt. 1988).
4. The Commission determines what parties are concerned within the meaning of 66 Pa.C.S. § 2704(a) and § 2702(c). *County of Chester v. Pa. Public Utility Commission*, 408 A.2d 552 (Pa. Cmwlt. 1979); *Consolidated Rail Corp. v. Pa. Public Utility Commission*, 671 A.2d 248 (Pa. Cmwlt. 1995).
5. In apportioning costs in rail highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration, the only requirement being that its order is just and reasonable. *Wheeling and Lake Erie Railway Co. v. Pa. Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlt. 2001), *alloc. denied*, 790 A.2d 1021 (Pa. 2001); *Greene Twp. v. Pa. Public Utility Commission*, 668 A.2d 615 (Pa. Cmwlt. 1995); *AT&T v. Pa. Public Utility Commission*, 737 A.2d 201 (Pa. 1999).
6. The deck rating and substructure rating are listed as 4 out of 10, or “poor condition.” The bridge exhibits signs of significant spalling, with mortar and aggregate falling onto the tracks below. (PennDOT St. 6 at Pg. 5; Compl. Ex. 5 and 6).

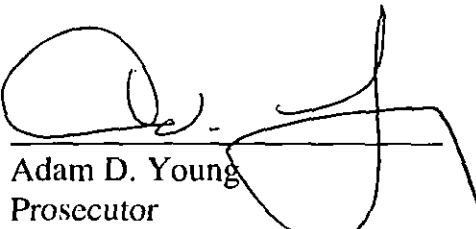
## PROPOSED ORDERING PARAGRAPHS

1. That the bridge carrying S.R.4009 over the tracks of the Delaware and Hudson Railway Company, Inc. be repaired to such a condition as to prevent any further debris from falling onto the tracks below.
2. That upon completion of the repair work, D&H at its sole cost and expense shall maintain the substructure and superstructure, with the exclusion of the bituminous surface, in a safe and satisfactory manner and with its current posted weight limit.
3. That PenDOT maintain the bituminous roadway surface in a smooth and satisfactory manner at its sole cost and expense.
4. That PennDOT conduct bridge inspections pursuant to the National Bridge Inspection Standards program once every twelve (12) months.
5. In the alternative, that the bridge carrying S.R.4009 over the tracks of the Delaware and Hudson Railway Company, Inc. be replaced with a new bridge structure capable of carrying legal load.
6. In the alternative, that the bridge carrying S.R.4009 over the tracks of the Delaware and Hudson Railway Company, Inc. be removed and replaced with an *at-grade crossing with all necessary safety features, including signage, lights and/or gates, if necessary.*

**CONCLUSION**

For the foregoing reasons, I&E requests that appropriate action be taken to alleviate any existing safety concerns at this crossing, and address final disposition and future maintenance of the crossing, or crossings to be constructed, with costs incident thereto.

Respectfully Submitted:



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Attorney ID No. 91822

Counsel for the Pennsylvania  
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Dated: July 10, 2013

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing documents, Main Brief of the Bureau of Investigation and Enforcement, upon the persons listed and in the manner indicated below:

Service by First Class Mail:

Hon. David A. Salapa  
Administrative Law Judge  
Pa Public Utility Commission  
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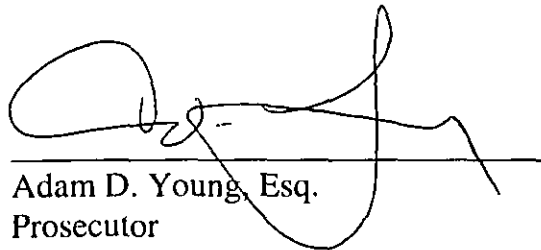
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