



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 3, 2014

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

RE: **Docket No. C-2014-2426416**

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Notice to Plead and Preliminary Objections to Reading Blue Mountain and Northern Railroad Company's Complaint* 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 that reads "Gina M. D'Alfonso".

Gina M. D'Alfonso
Assistant Counsel in Charge

Enclosure

220/GMD:aca

cc: Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Joseph Strok, District Grade Crossing Administrator, District 4-0
Thomas A. Walter, Assistant District Traffic and Operations Manager, District 5-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN
AND NORTHERN RAILROAD
COMPANY

Complainant

v.

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION

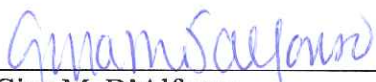
Respondent

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: Complaint Docket
: No: C-2014-2426416
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NOTICE TO PLEAD

This pleading has been filed with the Secretary of the Public Utility Commission. Any responsive pleading to these Preliminary Objections must be filed within ten (10) days of service of this pleading upon you. 52 Pa. Code §§5.61(a)(2), 5.101(b), and 5.101(f)(1).



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DATED: July 3, 2014

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	
AND NORTHERN RAILROAD	:	Complaint Docket
COMPANY	:	No: C-2014-2426416
	:	
Complainant	:	
	:	
v.	:	
	:	Electronically Filed
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION’S PRELIMINARY OBJECTIONS TO READING BLUE
MOUNTAIN AND NORTHERN RAILROAD COMPANY’S COMPLAINT**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, Assistant Counsel in Charge, and Nicholas D. Mertens, Assistant Counsel, and in support of the within Preliminary Objections, sets forth as follows:

Background

1. On or about April 11, 2013, Reading Blue Mountain and Northern Railroad Company (“Reading”) filed a formal Complaint with the Pennsylvania Public Utility Commission (“Commission”).
2. After the Department filed an Answer and New Matter, Preliminary Objections, and corresponding briefs to the same, Reading filed a Petition to withdraw its formal complaint stating that: “[i]t appears that [the Department’s] Preliminary Objections may have merit.” A true and accurate copy of Reading’s Petition to Withdraw Formal Complaint is attached hereto and marked as Exhibit A.

3. The Commission granted Reading's Petition and closed the matter on July 30, 2013. A true and accurate copy of the Commission July 30, 2013 Final Order is attached hereto and marked as Exhibit B.
4. On or about June 13, 2014, Reading filed a second formal Complaint with the Commission alleging similar facts and seeking similar relief contained in its April 11, 2013 Complaint.
5. On or about June 13, 2014, the Complaint was served upon the Department by the Commission.
6. Reading alleges that the Department is a public utility; however, Reading fails to state the public utility service allegedly provided by the Department. Complaint ¶ 3.
7. Reading further alleges that the Department's practice, in permitting vehicles over 80,000 pounds to travel on state highways, is causing damage to an at-grade highway-rail crossing where a single track owned by Reading crosses State Route 940 (Berwick Street) in the Borough of White Haven, Luzerne County. (DOT Number 361 403 J). Complaint ¶ 4.
8. Reading is seeking both damages and injunctive relief.
9. Reading specifically requests that the Commission: allocate future maintenance, repair, and replacement costs upon the Department; issue a prohibitory injunction barring the Department from issuing special hauling permits and directing overweight vehicles on to state routes upon which Reading owns and operates at-grade rail-highway crossings; and issue a mandatory injunction requiring the Department's permittees to post a \$100,000.00 bond for the subject crossing. Complaint ¶ 5.

Count I: The Commission Lacks Subject Matter Jurisdiction

10. Paragraphs One (1) through Nine (9) are incorporated herein as if set forth at length.
11. A party may file Preliminary Objections challenging the Commission's jurisdiction over the proceedings. 52 Pa. Code §5.101(a)(1).
12. "The power of the Commission is statutory, arising either from the express words contained in the enabling statutes or by a strong and necessary implication from those words and the legislative grant of power to act in any particular case must be clear." *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155, 1159-60 (Pa. 2002) (internal citations omitted).
13. The Commission has exclusive jurisdiction over the construction, relocation, alteration, suspension, and abolition of rail-highway crossings. 66 Pa.C.S. §2702.
14. The Commission has exclusive jurisdiction to allocate the "cost of construction, relocation, alteration, protection, or abolition of such crossing," pursuant to 66 Pa.C.S. §2704, of a matter brought before the Commission under 66 Pa.C.S. §2702.
15. In the present matter, Reading is not seeking to construct, relocate, alter, suspend, or abolish any of its crossings. *See generally* Complaint.
16. As such, the Commission does not have jurisdiction to hear the present matter under 66 Pa.C.S §2702 nor does it have the power to allocate cost pursuant to 66 Pa.C.S §2704.
17. Reading is not seeking to allocate costs pursuant to 66 Pa.C.S. §2704.
18. As such, the Commission does not have jurisdiction pursuant to 66 Pa.C.S §2704.
19. The Commission has jurisdiction over the services and facilities of a public utility operating within the Commonwealth, 66 Pa.C.S. §1501.

20. The Department cannot be classified as a “public utility” within the meaning of the Public Utility Code (“Code”) nor does it engage in any activity which may be implied or inferred as providing public utility services. *See Pennsylvania v. Merritt Chapman & Scott Corp.*, 248 A.2d 194 (Pa. 1968) (an agency of the Commonwealth cannot be a “public utility” as defined by the Code).
21. The Commission does not have jurisdiction to hear the present matter pursuant to 66 Pa.C.S. §1501.
22. Reading is merely seeking to have the Commission enjoin the Department from issuing special hauling permits, place additional burdens on the Department’s permittees, and to allocate future costs onto the Department.
23. The Commission does not have jurisdiction over the issuance or the conditions of special hauling permits issued by the Department. The General Assembly has vested that power exclusively to the Department. 75 Pa.C.S. §4961 *et seq.* The Department is also without authority to require its permittee to post a bond, in favor of the Department and/or Reading, when traveling on state routes which do not have a posted weight limit. 67 Pa. Code §189.4.
24. In 2009, at the time of the last replacement of the crossing surface, Reading knew or should have known that vehicles weighing more than 80,000 pounds were or could be permitted to use the subject crossing because the specific legislation to permit loads carrying combustible coal ash loads, up to 95,000 pounds, was enacted in 1998. Act 1998-151 (H.B. 433), P.L. 1126, § 51, approved Dec. 21, 1998 *codified at* 75 Pa.C.S. §4979.2.

25. Additionally, the Commission has already allocated future maintenance responsibilities at the subject crossing to Reading “for a distance of twenty-four (24) inches beyond the outermost rails”. *Application of Aqua Pa., Inc.*, PUC Docket Number A-2011-2264535, ¶ 13 (Secretarial Letter Nov. 22, 2011); *Application of Reading Blue Mountain & N. Ry.*, PUC Docket No. A-2009-2120719 (Secretarial Letter, Aug. 17, 2009).
26. Reading’s complaint does not spell out a single valid cause of action under the Code.
27. As such, the Commission is without jurisdiction to: (1) enjoin the Department from permitting or specifically directing overweight vehicles from traversing state routes that intersect at-grade crossings owned and operated by Reading; or (2) issue a mandatory injunction requiring the Department to condition its special hauling permits upon the posting of a \$100,000.00 bond for the subject crossing (or any highway-rail crossing). No provision in the Code or elsewhere grants the Commission the authority to rule upon or issue injunctive relief relative to the Department’s issuance of special hauling permits.
28. Additionally, the Commission is without jurisdiction to allocate costs upon the Department for the maintenance, replacement, or repair of the subject crossing without the filing of a railway complaint, application, or the Commission initiating an investigation.
29. While the Commission does not have jurisdiction over the instant matter, Reading is not without remedy. 66 Pa.C.S. §103(c). It is well-established precedent that the Commonwealth Court has jurisdiction over Commonwealth agencies and officials to enjoin state action. 42 Pa.C.S. §761.

Count II: Reading's Complaint is Legally Insufficient

a. Reading has failed to state a claim upon which relief can be granted.

30. Paragraphs one (1) through Twenty-Nine (29) are incorporated herein as if set forth at length.
31. A party may file Preliminary Objections challenging the legal insufficiency of a formal Complaint. 52 Pa. Code §5.101(a)(4).
32. Reading filed a formal complaint form alleging that it is a customer of the Department and that the Department, as an alleged public utility, is permitting trucks over 80,000 pounds to travel over a specific Reading owned and maintained crossing. Complaint ¶ 4.
33. Pursuant to 66 Pa.C.S. §701, a Complaint is proper when:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done *by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.* Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

Id. (emphasis added). See 52 Pa. Code §5.21 (related regulation).

34. Pursuant to the Code and Commission's regulations, a Complainant must allege a public utility is in violation of "any law" under the Commission's jurisdiction or a Commission Order. *Id.*

35. In the alternative, a public utility, such as Reading, may file a complaint regarding any regulation or order of the Commission. *Id.*
36. Reading has not demonstrated that the Department is a Public Utility pursuant to the Code.
37. Reading has failed to allege that the Department has violated any provision of the Code, the Commission's Regulations, or an Order issued by the Commission. *See generally* Complaint.
38. Additionally, Reading has not complained of "any regulation or order of the Commission, which the complainant is or has been required by the Commission to observe or carry into effect." 66 Pa.C.S. §701.
39. Reading has not set forth any legal basis, under the Code, for its claims.
40. As such, "even if all of the facts set forth in the Complaint are assumed to be true, the Complainant has failed to set forth grounds upon which relief can be granted" and the Department is entitled to have the instant complaint dismissed. *Linda Piekara v. PECO Energy Co.*, 2012 Pa. PUC LEXIS 1645, *6 (Initial Decision Oct. 25, 2012) *aff'd* Docket No. C-2012-2323880 (Final Order Dec. 19, 2012).
- b. Reading's requested relief in Paragraph 5(2) of the Complaint is not ripe for adjudication.***
41. In the alternative, if the Commission concludes it has jurisdiction over the instant matter and that the complaint is legally sufficient under the Code, the requested relief contained in Paragraph 5(2) of the Complaint is not ripe for adjudication.
42. In determining the question of ripeness, Pennsylvania courts will "generally consider whether the issues are adequately developed and the hardships that the parties will suffer

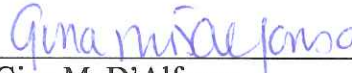
if review is delayed." *Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 932 A.2d 56, 60 (Pa. 2007).

43. In the Complaint, Reading requests that the Commission: "[o]rder PaDOT to reimburse [Reading] for all costs associated with maintenance, replacement and repair of this crossing." Complaint ¶ 5(2).
44. However, Reading has not alleged that the subject crossing is unsafe or in need of repairs or replacement.
45. Reading's requested relief, in regards to the allocation of future costs, is premature.
46. The relief requested by Reading is not ripe, as the costs associated with a *future* replacement is speculative, at best.
47. Additionally, the Commission has ordered Reading to bear the costs of maintenance and repair work for the subject crossing.
48. Reading will not suffer any hardship if it is required to commence a second action with the Commission to construct, relocate, suspend, or abolish the subject crossing once its cause of action has ripened.

WHEREFORE, the Commonwealth of Pennsylvania Department of Transportation respectfully requests that the Pennsylvania Public Utility Commission grant these Preliminary Objections and dismiss the Complaint of Reading Blue Mountain and Northern Railroad Company pursuant to 52 Pa. Code §5.21(d) as the Commission lacks jurisdiction over Reading's claims. Additionally, said claims are legally insufficient.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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Assistant Counsel in Charge
Nicholas Mertens
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Commonwealth of Pennsylvania
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nimertens@pa.gov

DATED: July 3, 2014

Railroad Company respectfully requests the Commission grant it leave to withdraw the
Complaint filed in this matter.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'P. Ober', is written over a horizontal line.

Paul R. Ober, Esquire
Attorney for Complainant
Attorney I.D. 17998
234 N. 6th Street
Reading, PA 19601

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	Complaint Docket:
AND NORTHERN RAILROAD	:	No. C-2013-2357454
COMPANY,	:	
Complainant	:	
	:	
v.	:	
	:	Electronically filed
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION, BERKS COUNTY	:	
PORT CLINTON BOROUGH,	:	
SCHUYLKILL COUNTY, WHITE	:	
HAVEN BOROUGH, LUZERNE	:	
COUNTY	:	
Respondent	:	

CERTIFICATE OF SERVICE


I hereby certify that on June 12, 2013, I have served a true and correct copy of the foregoing Petition for Withdraw of Complaint of Reading Blue Mountain & Northern Railroad upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Harrisburg, PA 17105-8212

Berks County Solicitor
Berks County Services Center
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Reading, PA 19601

Alvin B. Marshall, Esquire
Office of County Solicitor
Schuylkill County
401 North Second Street
Pottsville, PA 17901-2528

Dated: 6/12/13


Charissa M. Chamuras, Legal Assistant
to Paul R. Ober, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	Complaint Docket
AND NORTHERN RAILROAD	:	No: C-2014-2426416
COMPANY	:	
Complainant	:	
	:	
v.	:	
	:	Electronically Filed
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the Department's *Notice to Plead and Preliminary Objections to Reading Blue Mountain and Northern Railroad Company's Complaint* was served upon the parties below by first-class mail; postage prepaid this 3rd day of July 2014:

Matthew A. Johnson, Assistant VP
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Port Clinton, PA 19549

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: July 3, 2014