



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL
May 12, 2015

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

RE: **Docket No. I-2015-2472242**

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 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 Engineer, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's own	:	
Motion to determine the condition and	:	
Disposition of six (6) existing structures	:	Docket No. I-2015-2472242
Carrying various highways above the grade	:	
Of the Canadian Pacific Railroad in	:	Filed Electronically
Great Bend Township, New Milford Township	:	
Brooklyn Township, Hop Bottom Borough	:	
Lathrop Township, Susquehanna County and	:	
Benton Township, Lackawanna County	:	
(264 293 K) in Nicholson	:	
Borough, Wyoming County	:	

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 entered April 9, 2015, directed that the Department, within sixty (60) days from service of the Commission Order "submit to Canadian Pacific Railroad, Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Benton Township, Lackawanna County, Susquehanna County and this Commission, the most recent NBIS inspection report, including an in-depth load rating analysis of the subject structures." Commission Order ¶4.

2. Simultaneous with the filing of this Petition for Protective Order, the Department has filed a Motion for Extension of Time for the completion of the in-depth load rating analyses ordered by the Commission.

3. 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).

4. 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).

5. 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.*

6. 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. §409.¹

7. Requiring the Department to submit any 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.

8. 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).

9. 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.

¹ 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.

10. The Commission's need for the reports stems from its responsibility to evaluate the status of the bridges and to determine what, if any, work should be performed on the bridges considering the conditions shown.

11. The Commission must limit the use of any submitted bridge inspection report, study, and/or analysis for the sole and express purpose of determining the current condition of the subject structures.

12. The Department requests that the NBIS bridge inspection reports and in-depth load rating analyses for the subject structures be treated as under seal.

13. The Department will disclose the NBIS bridge inspection reports for the subject structures as directed in the April 9, 2015, Order within thirty (30) days from the issuance of the requested Protective Order.

14. The Department requests that the Commission direct any party provided with the NBIS bridge inspection reports and in-depth load rating analyses be required to treat the reports and analyses as confidential and agree to not provide the bridge inspection reports, in-depth analyses or any data contained therein to any third party or to use these reports in any litigation other than this current proceeding.

15. The potential harm to the Department far 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.

16. The Commission must ensure that any protective order issued in this matter be served on any and all parties who will receive a copy of the bridge inspection report, study, or analysis in accordance with the Commission established parties of record.

17. The Commission must provide in said Protective Order 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 the parties, including Commission staff, receiving any bridge inspection report and/or in-depth load rating analysis shall provide access to the inspection report and/or in-depth load rating analysis to any other person except as authorized by further order of the Commission or a presiding officer.
3. That the parties shall use the information in the reports to determine the current condition of the bridges, to plan and/or carry out maintenance activities, and to determine if the condition of any of the bridge warrants repair, rehabilitation, replacement, or removal.
4. That any party who discloses the NBIS bridge inspection report and/or in-depth load rating analysis or any of the information contained therein for any of the subject structures 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 based upon, of the NBIS bridge inspection report and/or in-depth load rating analysis, that is made part of the official record in this matter be placed under seal.

6. That upon completion of this proceeding, including any administrative or judicial review, all copies of the NBIS bridge inspection reports and in-depth load rating analysis for the subject structures shall be returned to the Pennsylvania Department of Transportation. In the alternative, parties may provide an affidavit of counsel stating that the NBIS inspection reports and in-depth load rating analyses have been destroyed.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: May 12, 2015

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Benton Township, Lackawanna County	:	
(264 293 K) in Nicholson	:	
Borough, Wyoming County	:	

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 12th day of May, 2015:

Larry Seamour, Chairman
Benton Township
P.O. Box 29
Fleetville, PA 18420

Tom Bracey
Norfolk Southern Railway Co.
1200 Peachtree Street, NE
Atlanta, GA 30309

Pennsylvania State Police Commissioners
Pennsylvania State Police
3rd Floor Department Headquarters
1800 Elmerton Ave.
Harrisburg PA, 17110

Paul J. Himka
1148 Polovitch Road
Nicholson PA, 18446

Brian O'Conner
153 Halls Road
Great Bend, PA 18821

Alan Hall, Chairman
Susquehanna County
105 Maple Street
Montrose, PA 18801

William Jenkins
Lackawanna County
200 Adams Ave.
Scranton, PA 18501

John Koshinski
350 Greenwood Street
Hop Bottom, PA 18824

Don Shibley
19730 State Route 11
New Milford, PA 18834

Daniel Sabatka
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11306 W. Franklin Ave
Franklin Park, PA 60131

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Norfolk Southern Corporation
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Graham A. Anthony
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Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: May 12, 2015