

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

White Haven Borough

v.

Reading Blue Mountain & Northern  
Railroad Company

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C-00004204

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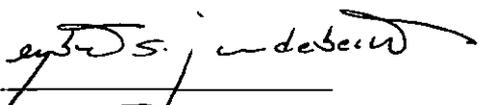
CLARIFICATION  
Of Interim Order Dismissing Party

On November 17, 2006, I issued an Interim Order dismissing PennDOT from the above captioned action. The Ordering Paragraph stated:

“Pennsylvania Department of Transportation’s motion to be dismissed from the current proceedings in the above captioned matter is granted. PennDOT is not dismissed from the Docket, as there have been prior issues and actions in which PennDOT was involved.”

As that paragraph states, PennDOT cannot be dismissed from the docket, however, as PennDOT has no interest or authority over the remaining issues, they have asked to be “dismissed.” That word appears to cause confusion. Therefore, to clarify, my intention is to allow PennDOT not to participate any further, as is their wish. PennDOT will remain an “inactive party” for the balance of this proceeding and will remain on the Party List.

Dated: November 21, 2006

  
\_\_\_\_\_  
Ember S. Jandebaur  
Administrative Law Judge

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

IN REPLY PLEASE  
REFER TO OUR FILE

November 30, 2006

ORIGINAL

VIA HAND DELIVERY

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

DOCUMENT  
FOLDER

**RE: Brief of Law Bureau Prosecutory Staff; White Haven Borough v.  
Reading, Blue Mountain, and Northern Railroad Company,  
Docket No. C-00004204**

Dear Secretary McNulty:

Enclosed for filing with the Commission are the original and nine (9) copies of the Brief of Law Bureau Prosecutory Staff in the above captioned matter. As indicated by the attached Certificate of Service, all parties to this proceeding have been served with two copies of this Brief. Also, a copy has been provided both electronically and in hard copy to the presiding Administrative Law Judge, Ember S. Jandebaur.

If you have any questions regarding this submission, please do not hesitate to contact me.

Sincerely yours,

KJR

Wayne T. Scott  
Law Bureau Prosecutory Staff

Enclosures

cc: Presiding ALJ, The Honorable Ember S. Jandebaur  
Per Certificate of Service

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## I. BACKGROUND

This proceeding commenced when the Borough of White Haven ("Borough") filed a complaint on September 18, 2000. The Borough complained about two specific areas along the tracks of the Reading, Blue Mountain, and Northern Railroad Company ("Railroad or Company") in its Borough. The first area involved a collapsed retaining wall near the Berwick Street at-grade crossing. The second area involved the railroad trestle bridge at Susquehanna Street and the associated stone wing walls and retaining walls.

Answers to the complaint were filed by the Railroad and the Pennsylvania Department of Transportation ("PennDOT") on October 10, 2000. Subsequent hearings were held on March 1, 2001 before Administrative Law Judge Lovenwirth in the Scranton Office Building. A Recommended Decision was issued by ALJ Lovenwirth on October 10, 2001.

By Opinion and Order entered February 8, 2002, the Pennsylvania Public Utility Commission ("Commission") dismissed the complaint involving the railway crossing at Berwick Street because the necessary repairs had been completed. The Commission sustained the complaint as related to the Susquehanna Street below grade crossing and the associated stone retaining walls.

In summary, the Commission's Order required the Company to conduct an in-depth inspection of the wall and surrounding structures and to submit a report to the Commission and each party of record. The Company was also to make the necessary repairs to the retaining wall to prevent future problems and safety hazards.

The Company employed the services of Timothy S. Benner, P.E. to inspect the retaining wall and to make recommendations as to how to maintain the integrity of the wall during its remaining service life ("Benner report"). Mr. Benner issued his report to the Company and, pursuant to Commission Order, the Company supplied a copy of the report to the other parties.

The parties met on several occasions in an attempt to resolve this matter. However, as of this date, the Company has failed to comply with the recommendations in the report and, in Prosecutory Staff's view, has failed to make the necessary repairs to the retaining wall to insure its structural integrity.

By letter dated June 14, 2006, Prosecutory Staff contacted Administrative Law Judge Ember S. Jandebaur to request a full hearing be scheduled in this matter since no resolution could be reached between the parties. Pursuant to this letter, ALJ Jandebaur held hearings on this matter on October 18, 2006. The parties represented at the hearing were the Law Bureau Prosecutory Staff, PennDOT, the Borough of White Haven, and Reading, Blue Mountain, and Northern Railroad Company.

At the commencement of the hearing, ALJ Jandebaur asked that each party succinctly recite their positions as it relates to this case. At that time, all of the parties agreed that the retaining wall is the only issue remaining in this matter. In addition, both the Borough and Prosecutory Staff stated that it was their positions that the recommendations in the Benner Report have not been implemented in regard to the retaining wall and that these recommendations should be immediately undertaken by the Railroad. On the other hand, it was the Railroad's position that the wall is sufficient as it

stands and that continued monitoring is all that is required. At that point, the hearing proceeded and witnesses were called.

## **II. PROPOSED FINDINGS OF FACT**

A. Pursuant to the Commission's Opinion and Order entered February 7, 2002, the Railroad employed the services of outside consultant and engineer, Timothy S. Benner, P.E., to perform an in-depth inspection and evaluation of the stone retaining walls along tracks leading from Susquehanna Street Railroad Bridge and to prepare a report on his findings including recommendations. This report was submitted to the Commission and each party of record.

B. It is the position of Prosecutory Staff and the Borough that the recommendations found in the report have not been implemented by the Company. N.T. 6-7.

C. It is the Company's position that the wall in question is sufficient as it stands and requires nothing other than continued monitoring. N.T. 9.

D. The parties have had numerous discussions in an effort to resolve this matter but, unfortunately, these efforts have not been fruitful. N.T. 7.

E. Dominic Yannuzzi, a professional engineer and the Borough's witness carefully reviewed the aforementioned Benner report. N.T. 17.

F. According to Mr. Yannuzzi's testimony, which was based on both his observations and discussions with Mr. Benner, all the vegetation which was supposed to have been removed from behind the wall in question has not been removed. N.T. 18-19.

G. Measurements taken by Mr. Yannuzzi also reveals that the wall has shifted approximately 6 inches over the last two years. N.T. 20.

H. The wall's vibrating when the train passes by is a "concern" to Mr. Yannuzzi because forces from the train on the soil are being transmitted down through the soil against the wall and it is the wall that is preventing the tracks from collapsing. This could cause the wall to fail or the train to derail. N.T. 20-21.

I. If the wall fails and the train derails, it would go into the G&A Hardware Store building and cause an additional serious public safety hazard. N.T. 25-29.

J. The distance between the retaining wall and the G&A Hardware building is eight feet. N.T. 39.

K. There has been mortar placed between some of the bricks in the retaining wall. However, this has not aided the structural integrity of the wall. N.T. 39, 64.

L. Steel cribbing was placed where the wall previously collapsed and is holding back the embankment underneath the railroad. However, this repair occurred approximately 10 feet from the present problem area. N.T. 39-40.

M. There is a large crack in the retaining wall and the evidence shows that there is a large separation in the retaining wall. N.T. 40.

N. Steel cribbing was placed at the wall to hold back the embankment and in between the cribbing is just timbers and the timbre that is actually being held by the steel bracing is in a deteriorated condition. N.T. 40-41.

O. Mr. Yannuzzi recommended that the trees above the wall be cut and that the wall be stabilized immediately. According to Mr. Yannuzzi, the wall must be

replaced or stabilized or the wall will fail. In fact, Mr. Yannuzzi stated that should the likelihood of the wall failing is imminent and that such a failure would have an impact on life and property. NT. 43-44.

P. The Prosecutory Staff's witness, Mr. Ronald Hull, concurred with the testimony of Mr. Yannuzzi. N.T. 60.

Q. Mr. Hull testified that the wall should either be replaced, repaired with steel supports or rock anchors. N.T. 61.

R. Mr. Hull also suggested that an alternative to repairing or replacing the wall is to move the track westerly to take live loads off the wall. Mr. Hull stated that the tracks would have to be shifted approximately 11 or 12 feet so that the load is off the wall. N.T. 61-62.

S. The Company agreed that there is sufficient space to move the track in the manner that Mr. Hull suggested and, although they are not willing to do so, it is possible that this could be done. N.T. 63.

T. Mr. Hull also stated that he observed that the two white patches appearing on the wall was mortar repaired onto the wall supporting the joints and that, in his opinion, this had little or no effect on wall safety and, in fact, since the patches were bulging, it is probable that a deterioration of the structural integrity of the wall was continuing. Mr. Hull also stated that he observed cracks in that portion of the wall. N.T. 65.

U. The Company's witness, Mr. Alvin J. Roman stated that he was a civil engineer, not a structural engineer. Mr. Roman stated that his testimony was based upon

his observations but that he had not even reviewed the report submitted by Mr. Benner.  
N.T. 73-74.

V. Mr. Roman admitted that there were cracks in the wall and cracks in the mortar and that when a train passes over the wall, vibrations are transmitted. However, according to Mr. Roman, the cracks were not significant and vibrations were "normal."  
N.T. 77.

W. Mr. Roman also testified that when he observed a train passing over the bridge, there were little pieces of stones in between crevices in the rock and that the stones did not move. He opined that if a wall was in danger of failure, mortar would not stick to the rock. N.T. 79.

X. According to Mr. Roman, over approximately a 6 year period of time, he has observed the wall 24 times and has not observed any movement in the wall. N.T. 85.

Y. Upon cross examination, Mr. Roman stated that he took some pictures of the wall but only two of the three areas in question. N.T. 89.

Z. Mr. Roman stated that his pictures were taken at eye level but that the wall extended upward approximately 15 to 20 feet higher and that bigger stones may have cracked above eye level that would not be indicated by movement of smaller stones below. N.T. 94.

AA. Mr. Roman also admitted that during the course of his inspections, he did not take any measurements whatsoever, but simply made a physical observation of the wall. N.T. 90.

BB. Mr. Roman also stated on cross examination that old structural walls such as the one in question have been existence for 100 years and they remain there forever and sometimes not forever, but they could suddenly fail. N.T. 91.

### **III. DISCUSSION**

A review of the record and the exhibits clearly shows that there is a problem with the wall in back of the G&A Hardware Store building. There are bulges, cracks, and vegetation. In fact, one wonders what other indicators there are to indicate a problem - other than the wall actually collapsing.

Prosecutory Staff submits that the weight of the evidence clearly supports the position that this wall must be repaired, replaced, or the tracks must be moved. Moreover, if repaired, this repair must be specifically planned and scrutinized by the Commission.

When one reviews the testimony of both Mr. Yannuzzi and Mr. Hull, there can be little doubt that this wall is not safe. Moreover, as stipulated by the Company, the possible collapse of the wall and/or derailment of the train poses a serious public safety hazard. According to the testimony of both of these witnesses, the cracks are indicative of a wall that is ready to fail. Their testimonies were based both on personal observations and measurements, as well as the report filed by Mr. Benner who was hired and paid by the Railroad. All of these experts agree that this wall is not safe and must be repaired or replaced.

On the other hand, the Company's only witness was Mr. Roman who had not even read the Benner Report. The only testimony that this civil engineer could give was based on pictures taken at eye level of only a portion of the wall and his occasional observations. Mr. Roman conducted no measurements, read no reports, nor talked to any other experts. Moreover, on cross examination, he admitted that this wall could possibly fail at any time. He could offer no empirical insight as to the condition of the wall above eye level.

Clearly, when comparing the testimony of Mr. Yannuzzi and Mr. Hull to that of Mr. Roman, the weight of evidence is clearly on the side of Borough and Prosecutory Staff's positions. Therefore, Prosecutory Staff submits, there is substantial evidence that the Company is jeopardizing public health and safety by failing to repair or replace the retaining wall or by failing to relocate the tracks.

It is Prosecutory Staff's position that this wall should either be replaced or moved, or that the tracks be relocated. These methods are the only way that the public's health, safety and welfare can be guaranteed. The Company has already attempted to make "bandaid" repairs to the wall and has failed to make the wall safe. After all this time, the wall is still not safe. Public safety has been at risk long enough.

Prosecutory Staff contends that for the Company to repair the wall, without specifics as to how this is to be done, has the potential of lengthening this proceeding indefinitely. Therefore, replacement of the wall or movement of the tracks within no more than 90 days is the most expeditious, justifiable, and efficient way to deal with this matter. It is the only way to ensure public safety.

#### IV. PROPOSED CONCLUSIONS OF LAW

A. The Commission has jurisdiction over the parties to and the subject matter of this proceeding. 66 Pa.C.S.A. § 2702, 2704.

B. The Commission has exclusive jurisdiction over the rail-highway crossings in the Commonwealth and the approaches thereto. 66 Pa.C.S.A. § 2702; *Department of Transportation v. Pa. PUC*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springettsbury v. Pa. PUC*, 289 A.2d 762 (Pa. Cmwlth. 1972).

C. The Commission has the exclusive authority to order the construction, reconstruction, alteration, repair, protection or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties should perform such work at the crossings and which parties shall maintain the crossings in the future, all to effectuate the prevention of accidents and to promote the safety of the public. 66 Pa.C.S.A. § 2702, 2704.

D. The Commission is empowered to order the alteration and reconstruction of rail-highway crossings upon such reasonable terms and conditions, including the assignment of future maintenance of any portion of the crossing remaining in place, as it shall prescribe. 66 Pa.C.S.A. § 2704(a).

E. The Commission has the exclusive authority to assess the costs of the work ordered performed upon the parties to this proceeding in such proper proportions as it may determine. 66 Pa.C.S.A. § 2704(a).

F. In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes into consideration all relevant facts, the only

requirement being that its Order must be just and reasonable. *Greene Twp. V. Pa. PUC*, 668 A.2d 615 (Pa. Cmwlth. 1995); *Bell Atlantic-Pa., Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1996).

G. The Commission is empowered to order every public utility to furnish and maintain adequate, efficient, safe, and reasonable services and facilities.

66 Pa.C.S.A. § 1501.

V. CONCLUSION

Wherefore the reasons stated above, Law Bureau Prosecutory Staff respectfully requests that this Honorable Commission order Reading, Blue Mountain, and Northern Railroad Company to replace the retaining wall referred to herein or, in the alternative, relocate the tracks as recommended.

Respectfully submitted,



Wayne T. Scott  
Prosecutory Staff  
Attorney ID No. 29133

P.O. Box 3265  
Harrisburg PA 17105-3265  
(717) 787-5000

Dated: November 30, 2006

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document, upon the following persons listed and in the manner indicated below:

Service by First Class Mail and/or Electronic Mail:

Reading Blue Mountain &  
Northern Railroad  
PO Box 218  
Port Clinton, PA 19549

Wesley Westerhoefer  
Reading Blue Mtn & Northern RR Co  
PO Box 218  
Port Clinton, PA 19544

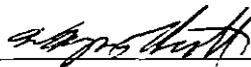
Donald G. Karpowich,  
Esquire  
White Haven Borough  
85 Drasher Road  
Drums, PA 18222

Gregory F. Lepore, Esquire  
Holl & Associates  
1860 Geryville Pike  
Pennsburg, PA 18073

Joseph Strok  
Penndot District 4-0  
PO Box 111  
Scranton, PA 18501

Jason D. Sharp, Esquire  
Pa. Dept. of Transportation  
9<sup>th</sup> Floor Keystone Building  
PO Box 8212  
Harrisburg, PA 17105-8212

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SECRETARY'S BUREAU

  
\_\_\_\_\_  
Wayne T. Scott  
Assistant Counsel  
Attorney ID No. 29133

Pennsylvania Public Utility Commission

P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

DATED: November 30, 2006

**DONALD G. KARPOWICH**  
ATTORNEY-AT-LAW, P.C.

85 Drasher Road • Drums, PA 18222 • (570) 788-6647 • Fax (570) 788-0654

December 8, 2006

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

ORIGINAL

**RE: White Haven Borough v. Reading, Blue Mountain,  
and Northern Railroad Company,  
Docket No. C-00004204**

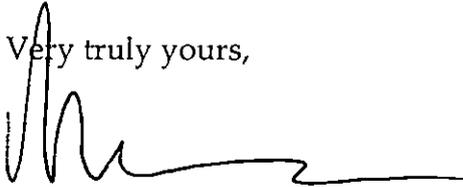
Dear Secretary McNulty:

Enclosed for filing with the Commission, please find an original and (9) copies of the Brief of the Main Brief Of White Haven Borough, in regard to the above referenced matter. Also enclosed is the accompanying Certificate of Service. All parties to this proceeding have been served with two copies of this Brief. An original has also been sent to the Administrative Law Judge, Ember S. Jandebaur.

Should you have any questions, please do not hesitate to contact me.

Thank you.

Very truly yours,



Donald G. Karpowich  
DGK/rc  
Enc.

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SECRETARY'S BUREAU

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DONALD G. KARPOWICH, ATTORNEY-AT-LAW, P.C.  
DONALD G. KARPOWICH, ESQUIRE  
I.D. #78176  
85 DRASHER ROAD  
DRUMS, PA 18222  
(570) 788-6647

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SECRETARY'S BUREAU

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

White Haven Borough, :  
:   
Complainant :  
:   
vs. : Docket No. 00004204  
:   
Reading Blue Mountain & Northern :  
Railroad Company, :  
:   
Respondent :

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MAIN BRIEF OF WHITE HAVEN BOROUGH

I. HISTORY OF THE PROCEEDINGS:

1. On September 18, 2000, White Haven Borough (hereinafter the "Borough") filed a Complaint to the above-captioned docket with the Public Utility Commission against the Reading Blue Mountain & Northern Railroad Company (hereinafter the "Railroad").

2. In its Complaint, the Borough complained about two specific areas along the tracks of the Railroad in the Borough. The first area involved a collapsed retaining wall near the Berwick Street at-grade crossing. The second area involved the railroad trestle (bridge) over Susquehanna Street, as well as the associated stone wing walls and retaining wall.

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3. Answers to the Complaint were filed by the Railroad on October 2, 2000, Luzerne County and the Pennsylvania Department of Transportation (hereinafter "Penn Dot") on October 10, 2000.

4. A hearing on the Complaint was scheduled for March 8, 2001, by and before the Administrative Law Judge Richard M. Lovenwirth.

5. At the Hearing of March 8<sup>th</sup>, the following parties were represented: the Borough, the Railroad, Penn Dot, the P.U.C. Bureau of Transportation and Safety, Rail Safety Division (hereinafter "BTS"), Luzerne County, and Dennison Township.

6. The hearing produced 148 pages of transcript from four (4) witnesses and seven (7) exhibits from different parties.

7. On October 10, 2001, the Recommended Decision of the ALJ Lovenwirth was issued.

8. On November 1, 2001, late exceptions were filed by the Railroad.

9. On December 10, 2001, the Railroad filed a Petition for Leave to File Exceptions *Nunc Pro Tunc*, and the Commission found the Petition to be meritorious.

10. On February 7, 2002, entered February 8, 2002, the Commission rendered their Opinion and Order, which required the Railroad to perform certain work and prepare certain reports, all of which would be the subject of a *further hearing*.

13. Thereafter, a pre-hearing conference was held, and the parties met at the site on several occasions to attempt to resolve the outstanding issues as they relate to the retaining wall.

14. The Railroad being unwilling to perform any work and implement the recommendations of its report as they relate to the Susquehanna Street retaining wall, BTS requested that the matter be referred to the Office of the Administrative Law Judge for a further hearing.

15. Pursuant to the request, on October 18, 2006, a hearing was conducted before Administrative Law Judge Ember S. Jandebaur.

16. At the Hearing of October 18<sup>th</sup>, the following parties were represented: the Borough, the Railroad, Penn Dot, and BTS.

17. The hearing produced 110 pages of transcript from three (3) witnesses and thirteen (13) exhibits from different parties.

18. At the hearing of October 18<sup>th</sup>, Penn Dot renewed a request to be dismissed from the action (remaining only as an inactive party), which ALJ Jandebaur granted.

19. At the conclusion of the hearing, a briefing schedule was established, and this Brief is being submitted pursuant that schedule.

## II. PROPOSED FINDINGS OF FACT:

1. The only issue remaining for purposes of the hearing is the retaining wall (N.T. 6-7, 9).

2. The portion of the retaining wall in question is located near the intersection of Susquehanna Street and Towanda Street within White Haven Borough, Luzerne County, Pennsylvania (N.T. 16).

3. The relevant portions of the Commission's Opinion and Order relating to the retaining wall are as follows:

(a) That Reading, Blue Mountain and Northern Railroad Company, having agreed to do so, at its sole cost and expense, within nine (9) months of entry of this Opinion and Order, furnish all material and do all work necessary to cut and remove all trees growing around the Susquehanna Street Bridge and between its tracks and the retaining walls along the tracks approaching the bridge (Page 8, Paragraph No. 5 of the Commission's February 2002 Opinion and Order).

(b) That Reading, Blue Mountain and Northern Railroad Company, at its sole cost and expense, with services of an outside consultant engineer, within twelve (12) months from service of the instant Opinion and Order: (1) perform an in-depth inspection and evaluation of the stone retaining wall along its tracks leading from the Susquehanna Street railroad bridge; and (2) prepare and submit to this Commission and each party of record a written report of its in-depth inspection and evaluation of the retaining walls including an evaluation of the stability of the stone walls, locations of failures or potential failures, reasons for failures or bulges in the walls, recommendations for prevention of future problems and recommendations for any necessary repairs including cost estimates for said work (Pages 9-10, Paragraph No. 9 of the Commission's February 2002 Opinion and Order).

(c) That upon completion of the work herein ordered, Reading, Blue Mountain and Northern Railroad Company, report to this Commission the date of actual completion of the work (Page 11, Paragraph No. 16 of the Commission's February 2002 Opinion and Order).

(d) That upon the submission of the In-Depth Inspection and Load Rate Analysis Report of the bridge and the In-Depth Inspection and Evaluation Report of the retaining walls, a further hearing be held to consider the reports and their recommendations and any other issues involved (Pages 11-12, Paragraph No. 19 of the Commission's February 2002 Opinion and Order).

4. Pursuant to the Opinion and Order of the Commission, the Railroad retained Timothy S. Benner, P.E., to prepare an Inspection Report to address among other things the retaining wall along the G&A Hardware Property (Borough Exhibit C-2, N.T. 18).

5. The report of Timothy S. Benner, P.E., was prepared on June 21, 2004 based upon an inspection date of April 24, 2003 (Cover Page, Borough Exhibit C-2).

6. Mr. Benner found that the face of the wall parallels the G & A Hardware building a distance of approximately 9'-6" (Page 5, Borough Exhibit C-2).

7. Based upon his inspection and an in-depth analysis of the retaining wall, Mr. Benner concluded that "the [retaining] wall is in overall poor condition (Page 5, Borough Exhibit C-2).

8. Mr. Benner recommended that in order to maintain the structural integrity of the wall during its remaining service life the following occur:

(a) In the short term, all vegetation be removed from the area behind the wall, and

(b) In the long term, the wall be replaced (Page 6, Borough Exhibit C-2).

9. The Borough's main concern is that the retaining wall near Susquehanna Street is in immediate danger of collapse, which could cause a train to derail, thereby having an adverse impact upon the health, safety and welfare of the traveling public, people and their property.

10. Dominic J. Yanuzzi, an Engineer with the firm of Alfred Benesch, testified on behalf of the Borough. Mr. Yanuzzi was qualified as an expert in the fields of civil and structural engineering in the areas of walls, structures and roadways, including design, construction, repair and maintenance of the same (N.T. 14, Borough Exhibit C-1).

11. Mr. Yanuzzi conducted an investigation of the retaining wall, which consisted of reviewing PUC documents and the Benner report, visiting the site, taking photographs, reviewing Luzerne County aerial photographs, causing a site survey to be performed, and taking measurements and calculations of the retaining wall (N.T. 15-17, Borough Exhibits C-3-C-9).

12. Mr. Yanuzzi testified that in his opinion the retaining wall was shifting or moving (N.T. 20). This opinion was based upon Mr. Benner's finding in April of 2003 that the wall was bulging at an average of eighteen (18") inches, and when Mr. Yanuzzi re-measured the bulge two weeks prior to the October 18<sup>th</sup> hearing it measured twenty-four (24") inches (N.T. 19-20; Page 5, Borough Exhibit C-2 ). Mr. Yanuzzi also testified that he took measurements in 2005 and again in 2006 and based upon those measurements the wall has shifted and moved (N.T. 53).

13. Mr. Yanuzzi testified that he observed the train passing on the tracks, and concluded that the wall vibrates when the train passes (N.T. 20). Mr. Yanuzzi determined that the retaining wall is holding up the tracks, and this could cause the wall to fail and a train to derail (N.T. 21).

14. Mr. Yanuzzi prepared a plan view of the area showing the impacts on the area when the retaining wall collapses (N.T. 23-26, Borough Exhibit C-3). The different impacts of concern include not only damage to the G & A Hardware building, which is located approximately eight (8') feet from the wall, but a derailment, which would have a more expansive impact on the area (N.T. 23, 25).

15. Mr. Yanuzzi produced an aerial photograph of the area in question depicting the tracks and a train on those tracks measuring a distance of approximately fifteen hundred (1500') feet (N.T. 27).

16. Mr. Yanuzzi in being familiar with the area testified that in his opinion a train derailment (depending upon its cargo) would have an impact on the Lehigh River, the hardware store, residences, the municipal building, community building, fire station, and other business including a bulk fuel storage business (N.T. 28-29, Borough Exhibits C-4 and C-5).

17. The Railroad conceded to the effects of a train derailment as testified by Mr. Yanuzzi, and stipulated on the record that if a train derailed in this area that it would be a public safety hazard (N.T. 29).

18. Mr. Yanuzzi testified that he took several pictures of the area, which show that the wall is bulging, and there are still trees and vegetation growing on top of the wall (N.T. 31, 38, Borough Exhibit C-6).

19. There was an area of the wall that appeared to contain mortar between the cracked bricks or stones (N.T. 38-39, 41). Mr. Yanuzzi testified that the attempted mortar repair by the Railroad has no affect on the structural integrity of the wall, and in any event the areas where the mortar was placed has fallen out of the cracks (N.T. 39, 51, 55-56).

20. Mr. Yanuzzi showed photographs that he had taken near the bulging retaining wall depicting steel cribbing that was placed at one time by the Railroad in an area of the wall that had previously collapsed, and is actually holding back the embankment underneath the railroad (N.T. 39-40, Borough Exhibits C-8 and C-9). Mr. Yanuzzi stated this area also concerns him in that there is timber in between the steel braces and the deteriorating condition (N.T. 41, Borough Exhibit C-8). Based upon these conditions, Mr. Yanuzzi opined that more double repair is necessary in that area (N.T. 41).

21. In October of 2005, Mr. Yanuzzi prepared an expert report, wherein he concluded that the trees need to be cut above the wall and the wall be immediately stabilized, repaired, or replaced (N.T. 43-44). Mr. Yanuzzi held this same opinion at the time of the hearing (N.T. 43-45).

22. Mr. Yanuzzi concluded his testimony by stating that:

- (a) If repairs are not made to the retaining wall, the wall will fail;
- (b) Failure is imminent; and
- (c) If the wall were to fail, it would have an impact on life and property (N.T. 44).

23. On cross-examination, Mr. Yanuzzi stated with hesitation that the expected failure of the wall is due to among other things vegetation and structural integrity (N.T. 45).

24. BTS called as its witness, Mr. Ronald Hull, an employed civil engineer with the Pennsylvania Public Utility Commission, Rail Safety Division. Mr. Hull testified that he agrees with the professional opinions of Mr. Benner and Mr. Yanuzzi (N.T. 60-61).

25. Mr. Hull concluded that the Railroad has three options: (a) Repair the wall; (b) Replace the wall; or (c) relocate or shift the track to remove the live loads off the wall (N.T. 61).

26. The Railroad called Mr. Al Roman, a civil engineer, as its expert witness (N.T. 70, 79). Mr. Roman admitted that he never saw the report of Mr. Benner in preparation for the hearing, and he did not perform any measurements or take any tests on the wall (N.T. 74, 90). Mr. Roman also testified that his familiarity with the railroad track is based upon the contract his company has with Air Products for use of the railroad line (N.T. 87) Nevertheless, Mr. Roman testified that the wall could fail suddenly and not over a gradual period of time (N.T. 91).

### **III. QUESTIONS PRESENTED:**

**A. WHETHER THE RAILROAD IS IN VIOLATION OF THE FEBRUARY 2002 ORDER AND OPINION OF THE COMMISSION IN THAT IT FAILED WITHIN NINE (9) MONTHS OF THE ENTRY OF THE OPINION AND ORDER TO CUT AND REMOVE ALL TREES GROWING AROUND THE RETAINING WALLS ALONG THE TRACK APPROACHING THE SUSQUEHANNA STREET BRIDGE AND TO REPORT TO THE COMMISSION UPON THE COMPLETION OF THE WORK?**

**SUGGESTED ANSWER: YES.**

**B. WHETHER THE RAILROAD IS FAILING TO MAINTAIN SAFE AND ADEQUATE FACILITIES THEREBY REQUIRING IT TO REPAIR OR REPLACE THE RETAINING WALL NEAR SUSQUEHANNA STREET AT ITS OWN COST AND EXPENSE AND THEN MAINTAIN IT ONCE IT HAS BEEN REPAIRED OR REPLACED?**

**SUGGESTED ANSWER: YES**

IV. ARGUMENT:

A. THE RAILROAD IS IN VIOLATION OF THE FEBRUARY 2002 ORDER AND OPINION OF THE COMMISSION IN THAT IT FAILED WITHIN NINE (9) MONTHS OF THE ENTRY OF THE OPINION AND ORDER TO CUT AND REMOVE ALL TREES GROWING AROUND THE SUSQUEHANNA STREET BRIDGE AND BETWEEN ITS TRACKS AND THE RETAINING WALLS ALONG THE TRACK APPROACHING THE BRIDGE AND TO REPORT TO THE COMMISSION UPON THE COMPLETION OF THE WORK.

The Commission's February 2002 Opinion and Order as it relates to the retaining wall near Susquehanna Street provides that all material and do all work necessary to cut and remove all trees growing around the retaining walls along the track approaching the bridge and report to the Commission upon completion of the work (Page 8, Paragraph No. 5, and Page 11, Paragraph No. 16 of the Commission's February 2002 Opinion and Order).

The Commission Opinion and Order also required the Railroad, at its sole cost and expense, with services of an outside consultant engineer, within twelve (12) months, to: (1) perform an in-depth inspection and evaluation of the stone retaining walls along its tracks leading from the Susquehanna Street railroad bridge; and (2) prepare and submit to this Commission and each party of record a written report of its in-depth inspection and evaluation of the retaining walls including an evaluation of the stability of the stone walls, locations of failures or potential failures, reasons for failures or bulges in the walls, recommendations for prevention of future problems and recommendations for any necessary repairs including cost estimates for said work (Pages 9-10, Paragraph No. 9 of the Commission's February 2002 Opinion and Order).

Pursuant to the Commission's Opinion and Order, the Railroad retained Timothy S. Benner, P.E., to prepare an Inspection Report to address among other things the retaining wall concerns of the Borough (Borough Exhibit C-2, N.T. 18). Mr. Benner prepared a report on June 21, 2004 based upon an inspection date of April 24, 2003 (Cover Page, Borough Exhibit C-2). Mr. Benner concluded that "the [retaining] wall is in overall poor condition (Page 5, Borough Exhibit C-2), and recommended: (a) in the short term, all vegetation be removed from the area behind the wall, and (b) in the long term, the wall be replaced (Page 6, Borough Exhibit C-2).

Dominic J. Yanuzzi, an Engineer with the firm of Alfred Benesch, testified on behalf of the Borough. Mr. Yanuzzi was qualified as an expert in the fields of civil and structural engineering in the areas of walls, structures and roadways, including design, construction, repair and maintenance of the same (N.T. 14, Borough Exhibit C-1). Mr. Dominic Yanuzzi testified that he took several pictures of the area, which show that the wall is bulging, and there are still trees and vegetation growing on top of the wall (N.T. 31, 38, Borough Exhibit C-6). Furthermore, the record does not contain any evidence that the concerned parties or the Commission were notified that work as ordered was completed on the retaining wall. Therefore, the Railroad is not in compliance with the Commission's Opinion and Order.

*It should also be noted that the Railroad has not complied with nor implemented any of the recommendations of the expert engineer it retained to perform the In-Depth analysis of the retaining wall. The short term goal was removal of trees and vegetation and the long term goal was replacement of the wall, none of which occurred since the Benner report was prepared some three years ago.*

**B. THE RAILROAD IS FAILING TO MAINTAIN SAFE AND ADEQUATE FACILITIES THEREBY REQUIRING IT TO REPAIR OR REPLACE THE RETAINING WALL NEAR SUSQUEHANNA STREET AT ITS OWN COST AND EXPENSE AND THEN MAINTAINING IT ONCE IT HAS BEEN REPAIRED OR REPLACED.**

Pursuant to *Section 66 Pa.C.S.A. Section 1501* the Commission may direct a public utility to repair its facilities if it finds: (1) there is a public utility; (2) that the retaining wall is a public utility facility; and (3) that the retaining wall is unsafe and requires repairs for the safety of the public.

It has already been established in ALJ Lovenwirth's Recommended Decision dated September 13, 2001 incorporated into the Commission's February 2002 Opinion and Order that the Railroad is a public utility and that the retaining wall is a public facility. As such, this portion of the Main Brief will only address the issue as to whether the retaining wall is unsafe and requires repairs for the public safety.

The Railroad retained Timothy S. Benner, P.E., to prepare an Inspection Report to address among other things the retaining wall near the Susquehanna Street Crossing (Borough Exhibit C-2, N.T. 18). Based upon his inspection and an in-depth analysis of the retaining wall, Mr. Benner concluded that "the [retaining] wall is in overall poor condition (Page 5, Borough Exhibit C-2). Mr. Benner recommended that in order to maintain the structural integrity of the wall during its remaining service life the following occur: (a) in the short term, all vegetation be removed from the area behind the wall, and (b) in the long term, the wall be replaced (Page 6, Borough Exhibit C-2).

Dominic J. Yanuzzi, an Engineer with the firm of Alfred Benesch, testified on behalf of the Borough. Mr. Yanuzzi was qualified as an expert in the fields of civil and structural engineering in the areas of walls, structures and roadways, including design, construction, repair and maintenance of the same (N.T. 14, Borough Exhibit C-1). Mr. Yanuzzi conducted an investigation of the retaining wall, which consisted of reviewing PUC documents and the Benner report, visiting the site, taking photographs, reviewing Luzerne County aerial photographs, causing a site survey to be performed, and taking measurements and calculations of the retaining wall (N.T. 15-17, Borough Exhibits C-3-C-9).

Mr. Yanuzzi testified that in his opinion the retaining wall was shifting or moving (N.T. 20). Mr. Yanuzzi in being familiar with the area testified that a train derailment (depending upon its cargo) would have a profound impact on the Lehigh River, the hardware store, residences, the municipal building, community building, fire station, and other business including a bulk fuel storage business (N.T. 28-29, Borough Exhibits C-4 and C-5). The Railroad conceded to the effects of a train derailment as testified by Mr. Yanuzzi, and stipulated on the record that if a train derailed in this area that it would be a *public safety hazard* (N.T. 29).

In October of 2005, Mr. Yannuzi prepared an expert report, wherein he concluded that the trees need to be cut above the wall and the wall need to be immediately stabilized, repaired, or replaced (N.T. 43-44). Mr. Yanuzzi held this same opinion at the time of the hearing when he concluded his testimony by stating that: (a) if repairs are not made to the retaining wall, the wall will fail; (b) failure is imminent; and (c) if the wall were to fail, it would have an impact on life and property (N.T. 43-45).

BTS called as its witness, Mr. Ronald Hull, an employed civil engineer with the Pennsylvania Public Utility Commission, Rail Safety Division. Mr. Hull testified that he agrees with the professional opinions of Mr. Benner and Mr. Yanuzzi (N.T. 60-61). However, Mr. Hull concluded his testimony by providing the Railroad with three options: (a) Repair the wall; (b) Replace the wall; or (c) relocate or shift the track to remove the live loads off the wall (N.T. 61).

In any case, based upon the professional opinions given by three credible experts in this case it is obvious that the Railroad is not maintaining a safe and adequate facility. The retaining wall near Susquehanna Street is shifting, moving and in imminent danger of collapse. As such, the recommendations of the experts must be implemented requiring the removal of all trees and vegetation *on top of the tracks and between the retaining wall; and repair or removal of those portions of the retaining wall identified during these proceedings.* It is only immediate implementation of these recommendations that could prevent catastrophic injury to the public.

#### IV. PROPOSED CONCLUSIONS OF LAW:

1. Jurisdiction and authority has already been established in this matter and specifically as it relates to the retaining wall at Susquehanna Street when ALJ Lovenwirth recommended and the Commission decided the following:

(a) The commission has jurisdiction over railroad crossings such as the one located at Susquehanna Street pursuant to *66 Pa.C.S. Section 2702.*

(b) The retaining wall is part of the crossing. The stone retaining walls start at the corner of the bridge abutment and run parallel to the tracks approaching the bridge. The stone retaining walls support the railroad embankment and tracks as they approach the bridge. As such, the retaining wall is to be included with the crossing because it allows the tracks to be elevated to cross over the highway (Page 11, ALJ Recommended Decision dated September 13, 2001 incorporated into the Commission's February 2002 Opinion and Order, page 2-3).

(c) The guiding principle for the Commission in railroad crossing cases such as this one is to promote and protect the health, safety and welfare of traveling public. Accordingly, the Commission has exclusive authority, under 66 Pa.C.S. Section 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossing. The Commission also has exclusive authority to determine and order which parties shall perform such work at the crossings and maintain the crossings in the future (Page 5, Commission's February 2002 Opinion and Order).

(d) Furthermore, the Commission is empowered, *under 66 Pa.C.S. Section 2702(b)*, to determine and prescribe the manner in which such crossings may be constructed, reconstructed, altered, repaired, protected, suspended or abolished. The Commission is also empowered, pursuant to *66 Pa.C.S. Section 2702(c)*, to order the work performed upon such reasonable terms and conditions as it prescribes. *Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa.Cmwlth. 1994) (Page 5, Commission's February 2002 Opinion and Order).

(e) The Commission also has exclusive authority, pursuant to 66 Pa. C.S. Section 2704(a), to assess the costs of any work it orders upon the concerned parties in the proceeding in such proportions as the Commission may deem appropriate (Page 5-6, Commission's February 2002 Opinion and Order).

(f) The Commission also has jurisdiction over the retaining wall to regulate the facilities of public utilities pursuant to 66 Pa. C.S.A. Section 1501 (Page 11, ALJ Recommended Decision dated September 13, 2001 incorporated into the Commission's February 2002 Opinion and Order, page 2-3). This section provide in pertinent part that:

"Every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvement in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patroness, employees and the public."

(g) The definition of "facilities" as provided under 66 Pa.C.S.A. Section 102 includes the following:

"All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility."

(h) Section 66 Pa.C.S.A. Section 1501 provides that the Commission may direct a public utility to repair its facilities if it finds: (1) there is a public utility; (2) that the retaining wall is a public utility facility; and (3) that the retaining wall is unsafe and requires repairs for the safety of the public.

(i) The Railroad is a public utility since the definition of a public utility under 66 Pa.C.S.A. Section 102 includes a person or corporation transporting passengers or property as a common carrier.

(j) The retaining wall is a public facility since it is owned by the Railroad. The appellate courts of the Commonwealth have construed railroad facilities under 66 Pa. C.S.A. Section 102 to include privately owned and constructed sidewalks connected to railroad-owned property used in the public service. *Lehigh Navigation and Coal Company v. Pa. P.U.C.*, 1 A.2d 540 (Pa. Super. 1938). In the past, appellate courts of Pennsylvania have stated that 66 Pa.C.S.A. Section 1501 allows the Commission to regulate railroad operating practices, *Erie and Lackawanna Railroad Company v. Pa. P.U.C.*, 205 Pa. 291, 208 A.2d 908 (1965); railroad equipment, *Monongahela Connecting Railroad Company v. Pa. P.U.C.*, 206 Pa. Super. 17, 211 A.2d 113 (1965); and track clearances, *Reading Company v. Pa. P.U.C.*, 188 Pa. Super. 146, 146 A.2d 746 (1958).

(k) Accordingly, the Commission has subject matter jurisdiction over all of the concerns in the Borough's Complaint, which complaint includes the retaining wall (Page 13, ALJ Recommended Decision dated September 13, 2001 incorporated into the Commission's February 2002 Opinion and Order, page 2-3).

2. The Railroad has violated the Commission's February 2002 Opinion and Order by failing within nine (9) months from the date of the entry of the Opinion and Order to cut and remove all trees growing around the Susquehanna Street Bridge and between its tracks and the retaining walls along the track approaching the bridge, and by failing to report to the Commission upon completion of the work.

3. The Railroad has failed to maintain safe and adequate facilities in that the retaining wall near the Susquehanna Street crossing is in need of repair or replacement as it is in imminent danger of collapse.

**V. CONCLUSION/RELIEF REQUESTED:**

Based upon the foregoing, the Borough respectfully requests:

(a) That the Railroad, at its sole cost and expense, within ten (10) days of service of the Order, furnish all material and do all work necessary to cut and remove all trees and vegetation at, on, near or between the tracks and the retaining walls along the tracks approaching the Susquehanna Street Bridge, including those areas identified during these proceedings.

(b) That the Railroad, at its sole cost and expense, furnish all material and do all work necessary to repair or replace those portions of the retaining walls failing near the tracks approaching the Susquehanna Street Bridge, and as identified during these proceedings in the report of Dominic J. Yanuzzi, P.E. and Timothy S. Benner, P.E. Work must be commenced within ten (10) days of service of the Order, and the work must then be completed within thirty (30) days thereafter.

(c) All concerned parties agree to cooperate with the Railroad while it performs the work under the Order.

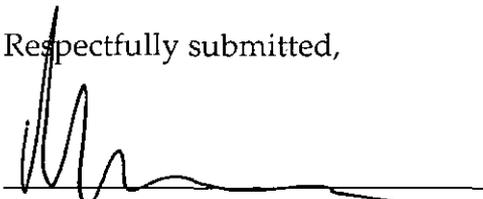
(d) That upon completion of the work, the Railroad notify all concerned parties and report to the Commission the date of actual completion of the work.

(e) The Railroad, at its own cost and expense, within thirty (30) days of the completion of work, shall retain the services of Timothy S. Benner, P.E. to file a written report with the Commission and copy all concerned parties regarding his findings on the adequacy of the work performed, and any party has the right to request a further hearing regarding non-compliance with the Order.

(f) That upon satisfactory completion of the work, the Railroad, at its sole cost and expense, shall furnish all material and do all work necessary thereafter to maintain the retaining walls.

DATE: 11-29-06

Respectfully submitted,



Donald G. Karpowich, Esquire  
Attorney for Complainant-White  
Haven Borough

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**IN THE COURT OF COMMON PLEAS  
OF LUZERNE COUNTY, PENNSYLVANIA**

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White Haven Borough	:	
	:	
Complainant,	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
Reading Blue Mountain and	:	
Northern Railroad Company, et al.	:	
	:	
	:	No. C-00004204
Respondents.	:	
	:	
	:	

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**CERTIFICATE OF SERVICE**

I, Donald G. Karpowich, Esquire, do hereby certify that I have served a copy of the **Borough Of White Haven's Main Brief** was served upon the following parties listed below by first class mail, postage, by U.S. Mail, First Class, postage prepaid, on the date indicated below to the following:

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Jason D. Sharp, Esquire  
Commonwealth of Pennsylvania  
Department of Transportation  
P.O. Box 8212  
Harrisburg, PA 17105-8212

Wayne Scott, Esquire  
Pennsylvania Public Utility Commission  
Bureau of Transportation and Safety-Legal Division  
P.O. Box 3265  
Harrisburg, PA 17105-3265

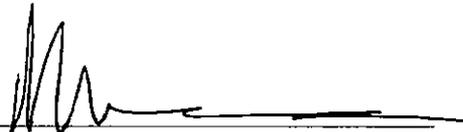
Reading, Blue Mtn and Northern RR  
P.O. Box 218  
Port Clinton, PA 19549

James P. Blum Esquire, County Solicitor  
Luzerne County Courthouse  
200 North River Street  
Wilkes-Barre, PA 18711

Gregory F. Lepore, Esquire  
Holl & Associates  
920 South Broad Street  
P.O. Box 807  
Lansdale, PA 19446

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P. J. ...  
SECRETARY'S BUREAU

DATED: 12-9-06

BY:   
Donald G. Karpowich, Esquire  
Attorney for Complainant  
85 Drasher Road  
Drums, PA 18222  
(570) 788-6647  
ID # 78176



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

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October 26, 2007

James J. McNulty, Jr., Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**ORIGINAL**

Re: White Haven Borough v. Reading, Blue Mountain & Northern  
Railroad  
No. C-00004204

Dear Mr. McNulty:

Enclosed for filing is the Praecipe for Withdrawal and Entry of Appearance of the Pennsylvania Public Utility Commission, Bureau of Transportation and Safety, in the above-referenced matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

**DOCUMENT  
FOLDER**

Sincerely,

Terrence J. Buda  
Assistant Counsel  
Attorney ID No. 33477

TJB/rgb

Enclosure

cc: As per certificate of service

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

White Haven Borough

v.

Reading, Blue Mountain & Northern  
Railroad

Docket No. C-00004204

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PRAECIPE FOR WITHDRAWAL AND ENTRY OF APPEARANCE

---

Please withdraw the appearance of Wane T. Scott, Assistant Counsel, on behalf of the Pennsylvania Public Utility Commission, Bureau of Transportation & Safety, in the above-captioned matter.

Please enter my appearance on behalf of the Pennsylvania Public Utility Commission, Bureau of Transportation & Safety in the above-captioned matter.

**DOCKETED**  
OCT 31 2007



Terrence J. Buda  
Assistant Counsel  
Attorney ID #33477

P.O. Box 3265  
Harrisburg, PA 17105-3265  
717-787-5000

Dated: October 26, 2007

SECRETARY'S BUREAU

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**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the foregoing document, Praecipe for Appearance, upon the persons listed and in the manner indicated below:

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**Service by First Class Mail:**

Reading Blue Mountain & Northern  
Railroad  
PO Box 218  
Port Clinton, PA 19549

Elizabeth J. Altero, Secretary  
White Haven Borough  
312 Main Street  
White Haven, PA 18661

Donald G. Karpowich, Esquire  
White Haven Borough  
85 Drasher Road  
Drums, PA 18222

James P. Blaum, Esquire  
Luzerne County  
Luzerne County Courthouse  
200 N. River Street  
Wilkes Barre, PA 18711

Thomas P. Pizano, Chairman  
Luzerne County  
Luzerne County Courthouse  
200 N. River Street  
Wilkes Barre, PA 18711

Gino Andreuzzi, Esquire  
Dennison Township  
76 Walnut Street  
White Haven, PA 18661

Sam Macurak, Jr., Chairman  
Dennison Township  
20 Macorak Lane  
White Haven, PA 18661

Jason D. Sharp, Esquire  
Pa. Dept. of Transportation  
9<sup>th</sup> Floor Keystone Building  
PO Box 8212  
Harrisburg, PA 17105-8212

Gary C. Fawver, Chief  
Pa. DOT Right of Way & Utilities  
7<sup>th</sup> Floor Keystone Building  
PO Box 3362  
Harrisburg, PA 17105-3362

Gregory F. Lepore, Esquire  
Holl & Associates  
920 S. Broad Street  
PO Box 807  
Lansdale, PA 19446

Joseph Strok  
Penndot District 4-0  
PO Box 111  
Scranton, PA 18501

Wesley Westerhoefer  
Reading Blue Mtn & Northern RR Co.  
PO Box 218  
Port Clinton, PA 19544

Samuel T. Guesto, Jr., Chief Clerk  
Luzerne County Court House  
200 N. River Street  
Wilkes Barre, PA 18711

Kathleen Stortz, Secretary  
Dennison Township  
67 Coallagher Lane  
White Haven, PA 18661

Ron Sturgeon  
Pennoni Associates  
100 N. Wilkes Barre Blvd.  
Wilkes Barre, PA 18701



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Terrence J. Buda  
Assistant Counsel  
Attorney ID No. 33477  
Pennsylvania Public Utility Commission

P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

Dated: October 26, 2005