



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

March 15, 2016

Joel H. Cheskis, Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: **Docket No. C-20054822**

Dear Judge Cheskis:

Enclosed 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 black ink, appearing to read "N. Mertens".

Nicholas D. Mertens
Assistant Counsel

Enclosure

220/NDM:aca

cc: Rosemary Chiavetta, Secretary, PUC (for filing)
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Rodney Rehnert, District Grade Crossing Engineer, District 5-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|------------------------------|---|-----------------------|
| Whitehall Township | : | Docket No. C-20054822 |
| | : | |
| v. | : | |
| | : | |
| R.J. Corman Railroad Company | : | |

PETITION FOR PROTECTIVE ORDER

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Nicholas D. Mertens, and submits the following in support of its Petition for Protective Order, pursuant to 52 Pa. Code § 5.365:

1. On March 1, 2016, Counsel for Whitehall Township submitted its Interrogatories and a Request for the Production of Documents to the Department.

2. In order to comply with the aforementioned discovery requests and to further determine the current condition of the Lehigh Street retaining wall, subject to the present litigation, the Department anticipates having to disclose inspection reports, studies, and/or load rating analyses.

3. As such, the Department requests a Protective Order pursuant to Pennsylvania Public Utility Commission’s (“Commission”) Rules and Regulations. 52 Pa. Code § 5.365.

4. The Commission issues a Protective Order “only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party 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 § 5.365(a).

5. 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 § 5.365(a)(5).

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

7. 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

8. The submission of any structure inspection report, study, or analysis to the general public or into the public record is in direct conflict with the Federal and State prohibitions and protections provided under the aforementioned statutes.

9. 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 highway structures 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).

10. Engineers performing structure inspection reports, studies, and analyses to properly evaluate and critically assess the status of a 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.

11. The Commission must limit the use of any structure inspection report, study, and/or analysis for the sole and express purpose of determining the current condition of the subject retaining wall, settlement discussions, and/or a hearing in the present matter.

12. The Department requests that any and all inspection reports, studies, and/or load rating analyses for the subject retaining wall be treated as under seal.

13. The Department requests that the Commission direct any party provided with the inspection reports, studies, and/or load rating analyses be required to treat such as confidential and agree to not provide the structure inspection reports, studies, and/or load rating analyses or any data contained therein to any third party or to use these reports in any litigation other than the current proceeding.

14. 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 structure inspection reports, studies, and/or analyses are not normally subject to disclosure to any party other than the structure owner or the party that maintains the structure.

15. 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 structure inspection report, study, or analysis in accordance with the Commission established parties of record.

16. The Commission must provide in said Protective Order that any party who discloses the structure inspection report, or any reports, surveys, schedules, lists, studies, analyses, or data contained in such report, to a third party or uses said 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.

17. The Department has reached out to Counsel for the Whitehall Township, Lehigh County, and the Commission and received no objections to the issuance of a Protective Order in the subject matter.

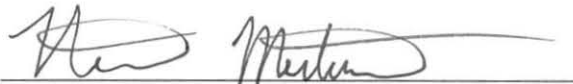
WHEREFORE, based upon the foregoing, the Department respectfully requests that the Commission grant the relief sought herein and enter the following Protective Order:

1. 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 structure inspection report, study, and/or load rating analysis shall provide access to the inspection report, study and/or load rating analysis to any other person except as authorized by further order of the Commission or a presiding officer.
3. The parties shall use the information in the reports to determine the current condition of the subject retaining wall, to plan and/or carry out maintenance activities and for settlement discussions and/or preparation for a hearing in these proceedings.
4. Any party who discloses the structure inspection report, study, and/or 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. Any copy, and testimony based upon, of the structure inspection report, study, and/or load rating analysis or any of the information contained therein 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 structure inspection report, study, and/or load rating analysis for the subject retaining wall shall be returned to the Pennsylvania Department of Transportation. In the alternative, parties may provide an affidavit of counsel stating that the structure inspection report, study, and/or load rating analysis have been destroyed.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Nicholas D. Mertens
Assistant Counsel
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128
Fax Number (717) 772-2741
Pennsylvania Attorney I.D. Number 313998
nimertens@pa.gov

DATED: March 15, 2016

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| Whitehall Township | : | Docket No. C-20054822 |
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| v. | : | |
| | : | Electronically Filed |
| R.J. Corman Railroad Company | : | |

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, this 15th day of March, 2016:

Charles Fonzone, Esq.
Gross Mcginley, LLP
P.O. Box 4060
33 South Seventh Street
Allentown, PA 18105

Rhonda L. Daviston, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
400 North Street
Harrisburg, PA 17120

Thomas M. Caffrey, Esq.
Norris McLaughlin & Marcus
515 West Hamilton Street, Suite 502
Allentown, PA 18101

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Alicia Adair, Legal Assistant to
Nicholas D. Mertens
Assistant Counsel
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128

DATED: March 15, 2016