



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 24, 2017

RECEIVED

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg , PA 17120

JUL 24 2017

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

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

Dear Secretary Chiavetta:

Enclosed for filing please find the ***Joint Proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs*** in the above-captioned matter. I have enclosed one (1) original and one (1) copy. Please time stamp and kindly return the copy to my attention. I have included a self-addressed stamped envelope for your convenience.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

Nicholas D. Mertens  
Assistant Counsel

Enclosure

cc: Joel H. Cheskis, Administrative Law Judge  
Parties of Record  
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section  
Rodney Rehnert, District Grade Crossing Engineer, District 5-0  
Kamlesh A. Ashar, P.E., District Bridge Engineer, District 5-0

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**JOINT PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDERING PARAGRAPHS**

**AND NOW**, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Nicholas D. Mertens, Assistant Counsel, Whitehall Township (“Township”), by and through its counsel, Charles Fonzone, Lehigh County (“County”), by and through its counsel, Thomas M. Caffrey, and the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (“BIE”), by and through its counsel, Rhonda L. Daviston, (collectively referred to as the “Parties”), and hereby submits the following jointly proposed findings of fact, conclusions of law, and ordering paragraphs in the above captioned matter:

**I. PROPOSED FINDINGS OF FACT**

1. On May 31, 2005, the Township filed a formal complaint with the Commission against the R.J. Corman Railroad Company (“Railroad”) alleging that the Railroad failed to comply with a prior Commission Order, entered July 2, 1956, at Docket Number 16444.
2. The Township’s complaint alleged that the Railroad had failed to safely maintain a Retaining Wall which supports South Lehigh Avenue (“Retaining Wall”) adjacent to the Race Street Bridge where the Railroad’s tracks (DOT # 932 568 K) crosses beneath the grade of Race Street in Whitehall Township, Lehigh County, Pennsylvania.
3. Race Street is a part of the State Highway System (SR 1004).

4. The original Retaining Wall was constructed by the Lehigh Valley Railroad Company in accordance with an agreement dated November 10, 1910 between County and Lehigh Valley Railroad Company.
5. The Lehigh Valley Railroad Company is a predecessor-in-interest to the Railroad.
6. Pursuant to a PUC Order, at Docket Number C-16444, the Department added varying heights to the original Retaining Wall to increase the elevation of South Lehigh Avenue, then State Highway 39093, so that it would meet the elevation of the new bridge constructed to replace the existing bridge that carried State Route 39093 over four tracks of the Lehigh Valley Railroad Company and the Lehigh River.
7. The Township's Complaint sought enforcement of the prior 1956 Order.
8. In 1976, South Lehigh Avenue was deleted from the State Highway System and turned back to the Township pursuant to Act 229 of 1976. 1976 P.L. 1115, No. 229.
9. The present matter was initially referred to the Office of Administrative Law Judge and assigned to Administrative Law Judge ("ALJ") Kandace F. Melillo.
10. The initial evidentiary hearing was held on June 29, 2006.
11. On May 29, 2007, the ALJ issued her Recommended Decision, sustained the Township's Complaint, and ordered the Department to, *inter alia*, perform a drainage study and repair the drainage system and the Retaining Wall in accordance with the drainage study and any other reports.
12. On July 26, 2007, the Commission entered an Opinion and Order adopting the aforementioned Recommended Decision and directed the Department to perform repair work on the Retaining Wall and drainage system. Specifically, the Commission ordered:

7. That the Pennsylvania Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of this Opinion and Order, obtain a drainage study, with copies provided to all Parties, to examine whether improper drainage is contributing to the retaining wall's deterioration and to recommend a remediation plan, if warranted.

8. That the Pennsylvania Department of Transportation, at its initial cost and expense, within eighteen (18) months from the date of service of the instant Opinion and Order, take all necessary preliminary steps, including obtaining funding, for the commencement of the repair to the drainage system, if required, and the retaining wall, consistent with this Opinion and Order.

9. That the Pennsylvania Department of Transportation, at its initial cost and expense, after the expiration of six (6) months measured from the submission of the drainage study to all Parties, shall furnish all materials and do all work necessary to repair the drainage system, as recommended in the study, and to repair the retaining wall, consistent with this Opinion and Order, and shall complete the repairs within twelve (12) months.

13. The Department obtained a drainage study, dated October 2008, and revised on January 2009, as ordered by the Commission.
14. The rehabilitation of the Retaining Wall, including repairs to the drainage system, was completed by the Department on October 28, 2014.
15. In performing the work required by the Commission Order, the Department incurred costs totaling \$1,825,807.97. Cost breakdown is as follows:

Drainage Design Feasibility Study and TS&L Report and Plan:	\$ 36,871.52
Design Work:	\$ 248,086.06
Construction Support Services:	\$ 15,432.54
Right-of-Way Acquisitions:	\$ 19,400.00
<u>Construction Work:</u>	<u>\$ 1,506,017.85</u>
Total Costs:	\$ 1,825,807.97

16. The Retaining Wall, as repaired, consists of three (3) portions: (1) the portion south of the Race Street Bridge, from Station 0+88 South to Station 0+24 South; (2) the Race

Street Bridge abutment, from Station 0+24 South to Station 0+50 North; and (3) the portion north of the Race Street Bridge, from Station 0+50 North to Station 4+50 North.

17. The Retaining Wall, as repaired, including the abutment portion, totals 538 feet.
18. The Retaining Wall was last inspected on March 29, 2016 by the Department.
19. The Retaining Wall, as repaired, presents no safety concerns for the travelling public.
20. On May 29, 2015, the Department gave notice that it had completed the work pursuant to the Commission Order.
21. On June 9, 2015, the Commission's Bureau of Technical Utility Services provided the Department with notice that the final inspection will be held on July 7, 2015.
22. On June 19, 2015, the Department filed a Petition requesting a hearing to allocate costs associated with the present proceeding and to assign future maintenance for the Retaining Wall.
23. The matter was then assigned to Administrative Law Judge Joel Cheskis.
24. On January 15, 2016, the Commission issued a Secretarial Letter, at Docket Number A-2015-2511696, which abolished the present crossing. However, the Commission expressly stated that maintenance responsibilities shall be consistent with any prior Orders and/or any subsequent Orders in the present proceeding.
25. On February 10, 2016, an initial prehearing conference was held in Harrisburg, Pennsylvania. The following counsel were present: Nicholas Mertens, Esquire, on behalf of the Department; Rhonda Daviston, Esquire, on behalf of BIE; Thomas Caffrey, Esquire, on behalf of the County; and Charles Fonzone, Esquire, on behalf of the Township. Despite notice being sent to the Railroad, no representatives appeared on its behalf.

26. On February 11, 2016, the service list in the present matter was limited to the four (4) active Parties.
27. An administrative hearing in the present matter was originally scheduled for July 12 and 13, 2016.
28. On March 24, 2016, the Department requested that the matter be referred to the Commission's Mediation Unit for mediation review and that the July 2016 hearing be cancelled.
29. However, while mediation discussions were fruitful, no settlement was reached by the end of 2016.
30. On January 24, 2017, a further prehearing conference was held in Harrisburg, Pennsylvania. A new hearing date was set for July 25 and 26, 2017, to be held in the Commonwealth's Keystone Building in Harrisburg, Pennsylvania.
31. On or about April 24, 2017, the Parties hereto submitted their respective pre-served written direct testimony and accompanying exhibits.
32. On July 11, 2017, the Parties hereto notified ALJ Joel Cheskis that they have reached the terms of a mutually agreed upon settlement of all remaining issues.
33. On July 11, 2017, the July 25 and 26, 2017 hearing was cancelled.
34. The terms of the settlement are set forth in the Joint Stipulation of Settlement, dated on the 20<sup>th</sup> day of July, 2017, signed by counsel for the Department, County, BIE, and the Township's Mayor, Edward D. Hozza, Jr. and the President of the Township's Board of Commissioners, Philips M. Armstrong (pursuant to the authorization granted by Township's Board of Commissioners on July 10, 2017).

## II. PROPOSED CONCLUSIONS OF LAW

35. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. §§ 102, 501, 2702, 2704; *Norfolk Southern Railway Company v. Pa. P.U.C.*, 875 A.2d 1243 (Pa. Cmwlth. 2005); *Springettsbury v. Pa. P.U.C.*, 289 A.2d 762 (Pa. Cmwlth. 1972).
36. The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities, municipal corporations, municipal authority or non-profit organization authorized under section 2702(h) (relating to construction, relocation, suspension and abolition of crossings) concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties. 66 Pa.C.S. § 2704(a).
37. It is the policy of the Commission to encourage settlements. 52 Pa.Code § 5.231.
38. The Joint Stipulation and Settlement is in the public interest. 52 Pa.Code § 5.232(d).

### III. PROPOSED ORDERING PARAGRAPHS

39. The Stipulation of Settlement entered into by the Pennsylvania Department of Transportation, Whitehall Township, Lehigh County, and the Commission's Bureau of Investigation and Enforcement on the 20<sup>th</sup> day of July, 2017 in the present proceeding is hereby approved and adopted.
40. Whitehall Township, at its sole cost and expense, shall furnish all material and perform all work necessary to maintain the portion of the Retaining Wall north of the Race Street abutments starting at Retaining Wall Station 0+50N and ending at Retaining Wall Station 4+50N.
41. The Department, at its sole cost and expense, shall furnish all material and perform all work necessary to conduct the repairs referenced in Section Six (6) of the Stipulation of Settlement entered into between the Parties on the 20<sup>th</sup> day of July, 2017.
42. The Department, at its sole cost and expense, shall furnish all material and perform all work necessary to maintain the Race Street abutment and the portion of the Retaining Wall south of the Race Street abutment starting at Retaining Wall Station 0+88S and ending at Retaining Wall Station 0+50N.
43. The Department shall, at its initial cost and expense, perform inspections of the Retaining Wall once every six (6) years. A copy of the inspection report shall be provided to Whitehall Township. Whitehall Township shall reimburse the Department for the costs associated with the inspection of the Retaining Wall.
44. Any inspection reports of the Retaining Wall shall be kept confidential by any party in possession of such a report and shall not be provided to the public unless in compliance with a court order or in compliance with State or Federal law.

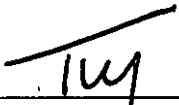


45. The Department is hereby allocated the sole cost and expense of the repairs performed on the Retaining Wall, and drainage system, which amount totaled \$1,825,807.97.
46. In the event of a failure of the Retaining Wall from Retaining Wall Stations 0+50N to 4+50N, within twenty-four (24) years from the date of the completion of the repair work, the Department shall conduct the necessary repairs or rehabilitation to ensure the safety of the Retaining Wall, and the Department and Whitehall Township shall agree on and equally share the costs and expenses of such repairs or rehabilitation pursuant to the terms of the Stipulation of Settlement entered into on the 20<sup>th</sup> day of July, 2017.
47. This Order, insofar as it allocates costs and expenses to the Parties, is without prejudice to their rights to recover those costs and expenses from others pursuant to any applicable law or lawful agreement.
48. That this matter be marked closed.

**WHEREFORE**, the Department of Transportation, Whitehall Township, Lehigh County, and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Pennsylvania Public Utility Commission accept the foregoing jointly proposed findings of fact, conclusions of law, and ordering paragraphs in the above captioned matter.

Respectfully Submitted,

Date: 7-17-2017

  
\_\_\_\_\_  
Thomas M. Caffrey, Esquire  
Counsel for Lehigh County

Date: \_\_\_\_\_

\_\_\_\_\_  
Rhonda L. Daviston, Esquire  
Counsel for Commonwealth of Pennsylvania  
Public Utility Commission, Bureau of Investigation  
& Enforcement

Date: \_\_\_\_\_

\_\_\_\_\_  
Charles Fonzone, Esquire  
Counsel for Whitehall Township

Date: \_\_\_\_\_

\_\_\_\_\_  
Nicholas D. Mertens, Esquire  
Counsel for Commonwealth of Pennsylvania  
Department of Transportation

**WHEREFORE**, the Department of Transportation, Whitehall Township, Lehigh County, and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Pennsylvania Public Utility Commission accept the foregoing jointly proposed findings of fact, conclusions of law, and ordering paragraphs in the above captioned matter.

Respectfully Submitted,

Date: \_\_\_\_\_

\_\_\_\_\_  
Thomas M. Caffrey, Esquire  
Counsel for Lehigh County

Date: 7/13/17 \_\_\_\_\_

*Rhonda L Daviston*  
\_\_\_\_\_  
Rhonda L. Daviston, Esquire  
Counsel for Commonwealth of Pennsylvania  
Public Utility Commission, Bureau of Investigation  
& Enforcement

Date: \_\_\_\_\_

\_\_\_\_\_  
Charles Fonzone, Esquire  
Counsel for Whitehall Township

Date: \_\_\_\_\_

\_\_\_\_\_  
Nicholas D. Mertens, Esquire  
Counsel for Commonwealth of Pennsylvania  
Department of Transportation

Commonwealth of Pennsylvania  
Department of Transportation

JUL 17 2017

Office of Chief Counsel  
Western Regional Office

**WHEREFORE**, the Department of Transportation, Whitehall Township, Lehigh County, and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Pennsylvania Public Utility Commission accept the foregoing jointly proposed findings of fact, conclusions of law, and ordering paragraphs in the above captioned matter.

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Thomas M. Caffrey, Esquire  
Counsel for Lehigh County

Date: \_\_\_\_\_

\_\_\_\_\_  
Rhonda L. Daviston, Esquire  
Counsel for Commonwealth of Pennsylvania  
Public Utility Commission, Bureau of Investigation  
& Enforcement

Date: 7/17/17

*Charles Fonzone Esquire*  
\_\_\_\_\_  
Charles Fonzone, Esquire  
Counsel for Whitehall Township

Date: \_\_\_\_\_

\_\_\_\_\_  
Nicholas D. Mertens, Esquire  
Counsel for Commonwealth of Pennsylvania  
Department of Transportation

**WHEREFORE**, the Department of Transportation, Whitehall Township, Lehigh County, and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Pennsylvania Public Utility Commission accept the foregoing jointly proposed findings of fact, conclusions of law, and ordering paragraphs in the above captioned matter.

Respectfully Submitted,

Date: \_\_\_\_\_

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Thomas M. Caffrey, Esquire  
Counsel for Lehigh County

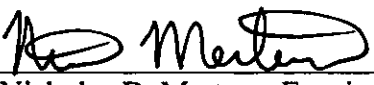
Date: \_\_\_\_\_

\_\_\_\_\_  
Rhonda L. Daviston, Esquire  
Counsel for Commonwealth of Pennsylvania  
Public Utility Commission, Bureau of Investigation  
& Enforcement

Date: \_\_\_\_\_

\_\_\_\_\_  
Charles Fonzone, Esquire  
Counsel for Whitehall Township

Date: 7/20/2017

  
\_\_\_\_\_  
Nicholas D. Mertens, Esquire  
Counsel for Commonwealth of Pennsylvania  
Department of Transportation


**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Whitehall Township	:	Docket No. C-20054822
	:	
v.	:	
	:	<b>Electronically Filed</b>
R.J. Corman Railroad Company	:	

**VERIFICATION**

I, Nicholas D. Mertens, Assistant Counsel, Commonwealth of Pennsylvania, Department of Transportation, in the foregoing document, make the following statement subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authority, and do state that as Assistant Counsel for the Commonwealth of Pennsylvania, Department of Transportation, I am authorized to make this statement on behalf of the Commonwealth of Pennsylvania, Department of Transportation, and that the facts set forth in the foregoing document are true and correct to the best of my information, knowledge and belief.

DATED: July 24, 2017

  
\_\_\_\_\_  
Nicholas D. Mertens  
Assistant Counsel  
Office of Chief Counsel  
PennDOT Western Regional Office

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the *Joint Proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs*, was served upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54, by United Parcel Service, postage prepaid, this 24<sup>th</sup> day of July, 2017:

Charles Fonzone, Esq.  
Gross McGinley, LLP  
33 South Seventh Street  
P.O. Box 4060  
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



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Nicholas D. Mertens  
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Commonwealth of Pennsylvania  
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nimertens@pa.gov



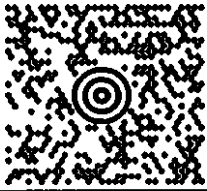
LEWIS STOLBURG  
412-565-7555  
OCC-PITTSBURG, PA  
301 5TH AVENUE  
PITTSBURGH PA 15222

1 LBS

1 OF 1

**SHIP TO:**

ROSEMARY CHIAVETTA, SECRETARY  
PA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET  
**HARRISBURG PA 17120-0200**

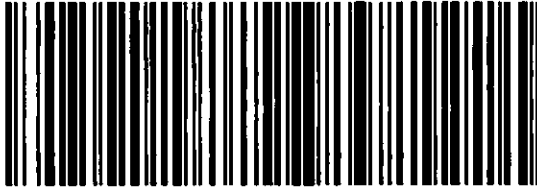


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