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Friday, June 15, 2018

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

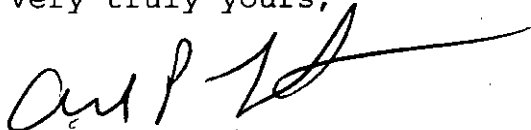
**RE: M-2013-2364201 & I-2015-2472242**

Dear Secretary Chiavetta:

Enclosed for filing please find the Joint Brief of Wyoming County and Nicholson Borough in the above captioned matter. This filing does not contain facts that are not current in the record. Therefore, a verification is not required.

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

Very truly yours,



Anthony P. Litwin  
Solicitor for Wyoming County  
and Nicholson Borough

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Enclosure

cc: Parties of Record

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bridge Structure where State Route 1025 :  
crosses over a single track of Delaware :  
and Hudson Railway Company, Inc. :  
(264 293 K) in Nicholson Borough, :  
Wyoming County : M-2013-2364201  
:  
Investigation upon the Commission's :  
own motion to determine the condition :  
and disposition of six (6) existing :  
structures carrying various highways :  
above the grade of the tracks of the :  
Canadian Pacific Railroad in Great :  
Bend Township, New Milford Township, :  
Brooklyn Township, Hop Bottom Borough, :  
Lathrop Township, Susquehanna County :  
and Benton Township, Lackawanna County :

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the County of Wyoming and Borough of Nicholson's Joint Brief was served upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by party), on this 15<sup>th</sup> day of June 2018:

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

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**TABLE OF CITATIONS**

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## STATEMENT OF THE CASE

This case concerns the responsibility of the Borough of Nicholson (“Borough”) and the County of Wyoming (“County”) (collectively “Municipalities”) towards maintenance and repair (or replacement) of a bridge believed to have been constructed by the Delaware, Lackawanna and Western Railroad Company located in Nicholson Borough, Wyoming County. The interests of the County and the Borough are limited to: Bridge Structure where State Route 1025 crosses over a single track of Delaware and Hudson Railway Company, Inc. (264 293 K) in Nicholson Borough, Wyoming County, M-2013-2364201 and not the other (proposed) consolidated matters filed to 1-2015-2472242.

On May 23, 2013, the Pennsylvania Utility Commission (“PUC”) entered an Order, *inter alia*, directing the Pennsylvania Department of Transportation (“PennDOT”) to close the Bridge where State Route 1025 crosses over a single track of Delaware and Hudson Railway Company, Inc. in Nicholson Borough, Wyoming County and to perform inspections and analysis necessary to determine the condition of, and reopen the bridge at its initial cost.

On November 8, 2013, in response to Joint Petition filed by PennDOT and Delaware and Hudson Railway Company (“D&H”), the then owner of the rail line, the PUC issued a Secretarial Letter, *inter alia*, directing PennDOT at its initial expense to perform work to open the bridge to a single lane of traffic.

On October 30, 2014, PennDOT filed a “Petition of the Department of Transportation Requesting a Hearing for the Purpose of Allocating Costs Associated with the Secretarial Letter Dated November 8, 2013.”

Ownership of the rail line and associated facilities was transferred from D&H to Norfolk Southern Railway Company (“NS”) during the pendency of this matter.



An Evidentiary Hearing was held of the Petition on April 24, 2018, before the Honorable Administrative Law Judge David A. Salapa.

### **SUMMARY OF ARGUMENT**

A Commission order presently exists for the subject bridge entered June 11, 1951, at Docket A-76276. The said Order recites at page 2 that the bridge is owned and maintained by the Railroad. Paragraph Number 13 of the said Order requires the Railroad, "at its sole cost and expense, furnish all materials and do all work necessary to maintain the substructure and superstructure of the bridge exclusive of the roadway paving." Paragraph 14 of the said Order requires PennDOT, "at its sole cost and expense, furnish all material and do all work necessary to maintain the remainder of the improvement, including any drainage facilities installed in accordance with this order and including the roadway paving located on the bridge at the crossing above grade, herein ordered altered. No evidence was introduced justifying why the 1951 Order should be modified in a manner giving the Municipalities responsibilities for the maintenance, repair or replacement of the bridge or the state highway that crosses it.

The Municipalities did not construct the bridge or highway. They have never maintained the bridge. The bridge serves a regional purpose beyond the Borough and County boundaries. The railroad has no stops, depots, passenger or transfer facilities or any other facilities in Nicholson Borough, Wyoming County that provide a benefit different than provided to the general population of Pennsylvania. There is no current or planned pedestrian facilities on the bridge. The Municipalities do not have the resources, financially or otherwise, to assist in the maintenance, repair or replacement of the bridge.

As such Nicholson Borough and Wyoming County should not be allocated any responsibility for maintenance, repair, replacement, or other costs associated with the bridge, now or in the future.

## ARGUMENT

### JUNE 11, 1951, ORDER

In or about 1951, PennDOT filed an application with the PUC to reconstruct and relocate a portion of the SR 1025, then known as SR 65015. PennDOT's proposed work included modifying the alignment and grade of the highway approaches to the crossing. In response following an evidentiary proceeding, the PUC Commissioners entered an Order on June 11, 1951, at Docket A-76276, inter alia, approving the proposed work with modifications ("1951 Order").

On page 2 of the 1951 Order, as the PUC Commissioners recite the facts of the case, they explicitly find that the "Bridge is owned and maintained by the Delaware, Lackawanna and Western Railroad Company." Delaware, Lackawanna and Western Railroad Company participated in the proceeding before the PUC and nothing in the record indicates that this fact was in dispute.

Paragraph 13 of the 1951 Order provides:

That, upon completion of the improvement herein ordered and its opening to the public use, the Delaware, Lackawanna and Western Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to maintain the substructure and superstructure of the bridge, exclusive of the roadway paving thereon at the crossing above grade, herein ordered altered.

Paragraph 14 of the 1951 Order provides:

That, upon completion of the improvement herein ordered and its opening to the public use, Department of Highways, at its sole cost and expense, furnish all material and do all work necessary to maintain the remainder of the improvement, including any drainage facilities installed in accordance with this order and

including the roadway paving located on the bridge at the crossing above grade, herein ordered altered.

Nothing in the record justifies a deviation from the existing responsibilities established in the 1951 Order. It is both just and reasonable for allocation of responsibilities to continue unaltered.

### JUST AND REASONABLE ANALYSIS

The PUC has the authority to determine the allocation of costs for the repair or replacement of any rail crossing in its discretion pursuant to Section 2704(a) of the Public Utility Code, 66 Pa.C.S. § 2704(a). In determining the allocation of costs the PUC should take all relevant factors into consideration. Department of Transportation v. Pennsylvania Public Utility Commission, 79 Pa.Cmwlth. 266, 469 A.2d 1149 (1983).

In Green Twp. Bd. Of Supervisors v. Pa. P.U.C., 668 A.2d 615 (Pa. Cmwlth 1995), the Commonwealth Court stated:

The Commission's discretion in allocating costs is not, however, unfettered. The Commission's decision must be just and reasonable. Moreover, the decision must be based upon some sound legal or factual basis and not just the Commission's policy. The Commission is required to make specific findings of fact concerning the factors it considered in rendering its decision. If the adjudication of the Commission is insufficiently detailed to permit this Court to assess the evidence and to evaluate the Commission's resolution of the contested issues, then a remand is appropriate. Moreover, if this Court determines that the Commission's findings of fact are insufficient, i.e., more specific findings would be more helpful in conducting a meaningful appellate review, or that the Commission's decision does not address all of the relevant factors in allocating costs, then it may remand the matter to the Commission to make such findings of fact and to address such factors. Id. at 618.

The Court in Green Twp. went on to examine some of the factors previously relied on by the PUC in exercising its discretion. They include: The party that originally built the crossing; The party that owned and maintained the crossing; The relative benefit initially conferred on each party with the construction of the crossing; Whether either party is responsible for the

deterioration of the crossing that has led to the need for its repair, replacement or removal; The relative benefit that each party will receive from the repair, replacement or removal of the crossing. Id. at 619.

Here, no evidence was submitted indicating that the Municipalities built, owned or maintained the crossing. To the contrary, there was specific evidence that Nicholson Borough does not own or maintain this or any other bridge carrying vehicular traffic.<sup>1</sup> Station Hill Bridge is not a County owned bridge.<sup>2</sup> The Municipalities cannot use liquid fuel funds to maintain, repair or replace a bridge that does not carry a municipal road or that they do not own.<sup>3</sup> The Municipalities do not have any available funds to budget towards the maintenance, repair or replacement of the Bridge.<sup>4</sup> The Municipalities do not have employees trained or experienced with bridge repair and maintenance.<sup>5</sup> There are no pedestrian facilities on the bridge.<sup>6</sup> There are no businesses located in Wyoming County (including Nicholson Borough) that are accessed by the bridge.<sup>7</sup> There are businesses such as stone quarries, gas wells and an antique business located in Susquehanna County that use the bridge for access.<sup>8</sup> Additionally, there is no evidence that there are any stops, depots (passenger or freight), or transfer facilities in Nicholson Borough, Wyoming County, or relatively close thereto that provide an economic benefit to the Municipalities or their residents that is different to the benefit the rail line provides to the citizens of the Commonwealth, nor was any evidence submitted that the crossing carries any municipally owned utilities or other improvements.

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<sup>1</sup> Nicholson Borough Statement 1, Page 4, Line 6.

<sup>2</sup> Wyoming County Statement 2, Page 2, Line 21.

<sup>3</sup> Wyoming County Statement 2, Page 2, Line 22. Nicholson Borough Statement 1, Page 4, Line 20.

<sup>4</sup> Wyoming County Statement 2, Page 3, Line 10. Nicholson Borough Statement 1, Page 5, Line 15.

<sup>5</sup> Wyoming County Statement 2, Page 2, Line 12. Nicholson Borough Statement 1, Page 4, Line 9.

<sup>6</sup> Nicholson Borough Statement 1, Page 2, Line 17.

<sup>7</sup> Wyoming County Statement 1, Page 4, Line 3.

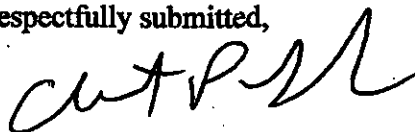
<sup>8</sup> Wyoming County Statement 1, Page 4, Line 8.

Clearly, as evidenced by the 1951 Order the Municipalities have not been responsible for maintenance or repair of the bridge and therefore have done nothing that has contributed to its current state of disrepair.

### CONCLUSION

Upon consideration of existing PUC Orders, the relevant factors in this matter, and the evidence presented, allocating any costs of maintenance, repair, or replacement of Station Hill Bridge to the Borough of Nicholson or to the County of Wyoming would be unjust, unreasonable and unsupported by evidence.

Respectfully submitted,



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Dated: April 28, 2018

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