



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

July 31, 2023

Via Electronic Filing

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

Re: Knox Township v.
Buffalo & Pittsburgh Railroad Inc.
Docket No. C-2019-3009358
I&E's Answer to Buffalo & Pittsburgh Railroad Company's Motion

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pennsylvania Public Utility Commission's **Bureau of Investigation and Enforcement's Answer to Buffalo & Pittsburgh Railroad Company's Motion for Stay of Commission Order Dated April 20, 2023** in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 322768
(717) 787-1888
karost@pa.gov

KLR/ac
Enclosures

cc: As per Certificate of Service
Office of Special Assistants (*via email* – ra-OSA@pa.gov)
William Sinick, P.E. (*via email* – wilsinick@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|------------------------------------|---|---------------------------|
| Knox Township | : | |
| | : | |
| v. | : | Docket No. C-2019-3009358 |
| | : | |
| Buffalo & Pittsburgh Railroad Inc. | : | |

**BUREAU OF INVESTIGATION AND ENFORCEMENT’S
ANSWER TO
BUFFALO & PITTSBURGH RAILROAD COMPANY’S
MOTION FOR STAY OF
COMMISSION ORDER DATED APRIL 20, 2023**

I. Introduction

On April 20, 2023, the Commission issued an Opinion and Order adopting the Recommended Decision of Administrative Law Judge Mary D. Long and sustaining the complaint filed by Knox Township. Specifically, the Commission ordered the alteration and removal of the public crossings at Ramsaytown Road (T-841; DOT 863 298 X); Harriger Hollow Road (T-420; DOT 863 296 J); and East Bellport Road (T-405; DOT 863 302 K) and the backfilling and grading of the area disturbed at the sole cost and expense of Buffalo & Pittsburgh Railroad, Inc., (“BPRR”), and the abolishment of the public crossings once the work was completed.

On or about May 18, 2023, BPRR filed a Petition for Review with the Pennsylvania Commonwealth Court, Docket No. 489 CD 2023, and subsequently filed a Notice of Appeal with the Commission on May 19, 2023.

On July 11, 2023, BPRR filed a Motion for Stay of Commission Order Dated April 20, 2023.

For the reasons fully explained below, I&E respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny BPRR’s Motion for Stay as BPRR failed to demonstrate a likelihood of prevailing on the merits, failed to show irreparable harm, and failed to show how the stay will not adversely affect the public.

II. I&E’s Answer

1. Admitted.

2. Admitted in part, denied in part. By way of further response, the Formal Complaint was filed by Knox Township on April 8, 2019. The Formal Complaint was received by the Commission on April 10, 2019.

3. Admitted.

4. Admitted in part, denied in part. By way of further response, BPRR’s Answer and New Matter speak for themselves, and any interpretation, quotation, or characterization thereof is denied.

5. Admitted.

6. Admitted in part, denied in part. By way of further response, the September 10, 2019 Secretarial Letter speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted in part, denied in part. It is admitted that BPRR presented testimony from lay and expert witnesses. By way of further response, the testimony offered and findings of fact related to BPRR's witnesses speak for themselves, and any interpretation, quotation, or characterization thereof is denied. Specifically, the documentary evidence showed that the public crossings cannot safely accommodate vehicular traffic.

12. Admitted.

13. Admitted.

14. Admitted upon information and belief.

15. Denied. By way of further response, I&E is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph and, therefore, they are denied.

16. Denied. The averment states a conclusion of law and request for relief to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, *Pa. P.U.C. v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983)(citing *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)) determined that a grant of stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

Pa. P.U.C. v. Process Gas Consumers Group, 467 A.2d 805, 808-809 (Pa. 1983).

The Pennsylvania Supreme Court noted that “An application for a stay pending appeal always involves a situation in which the merits of the dispute have been fully considered in an adversary setting and a final decree rendered. Under these circumstances, it is essential that the unsuccessful party, who seeks a stay of a final order pending appellate review, make a strong showing under the *Virginia Jobbers* criteria in order to justify the issuance of a stay.” *Pa. P.U.C. v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983).

17. Denied. By way of further response, BPRR is not likely to prevail as the Commission’s Opinion and Order is supported by substantial evidence. The Commonwealth Court’s scope of review of a Commission Order is limited to whether or not there is a violation of constitutional rights, an error of law, a violation of agency procedure or a lack of evidence to support the findings.¹ The construction given a statute by those charged with its execution and application is entitled to great weight and should be disregarded or overturned only for cogent reasons and if such construction is clearly erroneous.²

Here, the Commission April 20, 2023 Order is clearly supported by substantial evidence of record. The Commission correctly held that a lack of accidents at a public crossing does not establish that the crossing is adequate, efficient, safe, and reasonable.³ In rendering this decision, the Commission determined that the ALJ properly considered the evidentiary record in this matter and acknowledged prior Commission decisions.⁴ Specifically, the ALJ found that two cars cannot pass safely through any of the crossings, the

¹ *Pennsylvania Power & Light Co. v. Pennsylvania Pub. Util. Comm’n*, 516 A.2d 426 (Pa. Cmwlth. 1986).

² *Appeal of Longo*, 132 A.2d 899 (Pa. Super. 1957).

³ See generally Opinion and Order dated April 20, 2023.

⁴ Opinion and Order dated April 20, 2023, pg. 35.

abutments at the crossings are immovable objects in the roadway clear zone, the Harriger Hollow Road crossing has limited sight distance at each approach, and the visual evidence and testimonial evidence related to the deteriorating condition of the inside concrete arch barrels of Ramsaytown Road and East Bellport Road clearly support a finding that the public crossings are a safety hazard to the public.⁵ Thus, the testimony offered and the photographic evidence support the Commission's Order affirming the ALJ's Recommended Decision.

Moreover, the Commission's Order is not arbitrary and capricious simply because it determined that the testimony of Mr. William Sinick and Mr. James Berry were more credible than the testimony of BPRR's witnesses.⁶ In determining credibility, the ALJ articulated the following reasoning for her decision:

The testimony of Mr. Berry and Mr. Sinick describing the concrete falling from inside the arch barrels of Ramsaytown Road and East Bellport Road are more credible than the testimony of Mr. Duffett. Mr. Duffett was overly dismissive of the risk of falling concrete damaging vehicles or harming pedestrians and is contradicted by the photographic evidence which clearly shows cobbles of concrete along the roadway which are much larger than "flakes" or "dust." Moreover, photographs also show sections of concrete which are missing from the walls and ceiling of the arch barrels. Although Mr. Duffett claimed he had inspected the crossings at some point in the 1990s, Mr. Duffett did not have a progression of inspection reports which would support his position that these sections came from the walls gradually over time as "dust" or "flakes."

BPRR has neglected these crossings for many years. There is no evidence that any of the structures had been inspected before 2019, shortly after Knox Township filed its complaint. There is no evidence of any inspection done when rail service was abandoned sometime in 2005 or 2006. Although Mr. Duffett testified that he recalls inspecting the crossings in the 1990s, he

⁵ See generally Opinion and Order dated April 20, 2023 and Recommended Decision.

⁶ The Commonwealth Court may not substitute its judgment for that of the Commission or engage in the processes of weighing evidence or resolving conflicting testimony. *Philadelphia Electric Co. v. Pennsylvania Public Utility Commission*, 433 A.2d 620 (Pa. Cmwlth. 1981).

did not have copies of any reports. Further, it is not credible that, given the thousands of bridge inspections that Mr. Duffett performs, he would have a reliable memory of two crossings in a rural area of Pennsylvania.⁷

Finally, the Commission properly applied the doctrine of *stare decisis*⁸ by following the decision reached in the *Putneyville Crossing*⁹ matter. In the interest of not repeating arguments, I&E refers the Commission to its Reply to Buffalo & Pittsburgh Railroad Company's Exceptions filed on July 25, 2022, pages 18-19.

18. Denied. By way of further response, BPRR will not suffer irreparable harm if the Motion for Stay is denied. At the onset, it is important to note that the word "irreparable" is defined as "an injury sever in nature that it is impossible to calculate the extent by awarding money,"¹⁰ "incapable of being rectified, remedied, or made good,"¹¹ or "too bad or too serious to repair or put right."¹²

The April 20, 2023 Opinion and Order directed BPRR to demolish and remove the existing railroad structures at Ramsaytown Road, Harriger Hollow Road, and East Bellport Road at its sole cost and expense.¹³ The record is clear that BPRR abandoned rail service on these crossings in 2005 and 2006, and has no immediate plans to return railroad traffic to this

⁷ Recommended Decision, pg. 26.

⁸ *Stare decisis* is "a principle as old as the common law itself." *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1249 (Pa. 2016). "Without *stare decisis*, there would be no stability in our system of jurisprudence." *Flagiello v. Pennsylvania Hosp.*, 208 A.2d 193, 205 (Pa. 1965). An administrative agency is not subject to the principle of *stare decisis* to the same degree as is an appellate court, although if an agency renders inconsistent decisions it should distinguish or overrule its own precedents. *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Public Utility Commission*, 672 A.2d 352 (Pa. Cmwlth. 1995).

⁹ *Mahoning Twp. v. Buffalo & Pittsburgh R.R. Inc.*, Docket C-2017-2585787 (Order adopting Recommended Decision entered August 2, 2018) (hereinafter "Putneyville Crossing").

¹⁰ The Law Dictionary, <https://thelawdictionary.org/irreparable-damage/>.

¹¹ Dictionary.com, <https://www.dictionary.com/browse/irreparable>.

¹² The Free Dictionary, <https://www.thefreedictionary.com/irreparable>.

¹³ See generally Opinion and Order dated April 20, 2023, pgs. 39-40.

abandoned line.¹⁴ Thus, BPRR demolishing and removing the railroad structures has no impact on its rail service.

The only impact on BPRR if the Motion for Stay is denied is monetary, i.e., the costs associated with demolishing and removing the structures in addition to backfilling and grading the area. This impact is not an irreparable harm, rather, it is calculated and can be rectified in the unlikely event BPRR is successful in its appeal before the Commonwealth Court. Thus, BPRR will not suffer irreparable harm and the Motion for Stay should be denied.

19. Denied. By way of further response, staying the April 20, 2023 Opinion and Order will adversely affect the public interest. ALJ Long concluded that the railroad structures at Ramsaytown Road and Easy Bellport Road presented a hazard to the public, and further concluded that the sight distance at Harriger Hollow Road was an unacceptable risk to the traveling public.¹⁵ The Commission affirmed ALJ Long's findings, concluding that a review of the visual evidence in the proceeding was compelling to support the finding of the hazards to the traveling public from conditions of concrete at each structure and presence of remaining abutments.¹⁶ Thus, the public will be adversely affected by BPRR's motion to stay the ordering paragraphs of the April 20, 2023 Opinion and Order as the hazardous conditions will continue to exist and the concrete structures and abutments will continue to deteriorate.

Denied. The averment states a conclusion of law and request for relief to which no response is required. To the extent a response is deemed to be required, it is denied.

¹⁴ Opinion and Order dated April 20, 2023, pg. 13; Recommended Decision, pg. 19.

¹⁵ *See generally* Opinion and Order dated April 20, 2023, pgs. 23-25; Recommended Decision, pgs. 26-27.

¹⁶ Opinion and Order dated April 20, 2023, pgs. 36-37.

III. Requested Relief

WHEREFORE, for all the foregoing reasons, the Bureau of Investigation and Enforcement respectfully requests that the Motion for Stay of Commission Order Dated April 20, 2023 of Buffalo & Pittsburgh Railroad Company be denied.

Respectfully submitted,



Kayla L. Rost

Prosecutor

PA Attorney ID No. 322768

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Dated: July 31, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have this day, July 31, 2023, served a true copy of the foregoing **Bureau of Investigation and Enforcement’s Answer to Buffalo & Pittsburgh Railroad Company’s Motion for Stay of Commission Order Dated April 20, 2023**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail:

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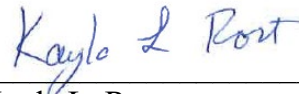
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