

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held October 19, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman  
Kimberly Barrow, Vice Chair  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

Knox Township:

C-2019-3009358

Complaint filed by Knox Township versus Buffalo & Pittsburgh Railroad Inc. involving roadway clearance issues and falling concrete from abandoned railroad overpasses at public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) where T-841, T-420, and T-405 cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., located in Knox Township, Jefferson County<sup>1</sup>

v.

Buffalo & Pittsburgh Railroad, Inc.

**OPINION AND ORDER**

---

<sup>1</sup> By Commission Secretarial Letter of September 10, 2019, *infra*, the caption of the subject proceeding was revised.

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Motion for Stay of Commission Order Dated April 20, 2023 (*Motion for Stay*) filed by Buffalo & Pittsburgh Railroad, Inc. (BPRR or Movant) on July 11, 2023. Through the *Motion for Stay*, BPRR requests the issuance of a stay of the Opinion and Order entered April 20, 2023 (*April 2023 Order*), in the above-captioned formal complaint proceeding, pending appeal. A Petition for Review of the *April 2023 Order* has been filed May 18, 2023. *See*, No. 489 CD 2023 (Commonwealth Court Middle District).

On July 31, 2023, the Commission's Bureau of Investigation and Enforcement (I&E) filed an Answer (in opposition) to the *Motion for Stay* of BPRR.

On consideration of the *Motion for Stay* and the Answer, we shall deny the motion. We conclude that it does not meet the standards for the issuance of a stay established in *Pa. PUC v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*).

**I. History of the Proceeding**

The matter before the Commission is a formal complaint filed by Knox Township against BPRR regarding three railroad crossings. On April 10, 2019, Knox Township filed a formal complaint wherein it averred that three overpasses on a railroad

right-of-way were creating a traffic and safety problem.<sup>2</sup> For relief, Knox Township requested that the Commission direct BPRR to remove the overpasses.

BPRR filed an Answer and New Matter to the Complaint. In pertinent part, BPRR admitted that the overpasses are located on its right-of-way. BPRR, however, denied that the structures were creating a traffic and safety problem, or, otherwise, were necessitous of being removed. The matter was assigned to the Commission's Rail Safety Division, Technical Utility Services (Rail Safety Division) which conducted a field conference.

Pursuant to certain understandings reached after the field conference, the interested parties, in the immediate interests of public safety, agreed to certain mitigation measures for each of the crossings. A Commission Secretarial Letter dated September 10, 2019, memorialized the observations derived from the field conference, identified safety issues and directed certain Parties to perform interim remedial safety work at the crossings. The work directed by this letter was completed.

Another field conference was held on February 21, 2020. Thereafter, the Parties were unable to reach an agreement regarding the resolution of the Complaint and the matter was referred to the Office of Administrative Law Judge (OALJ) for evidentiary hearings and the issuance of a Recommended Decision (R.D.). Administrative Law Judge (ALJ) Mary D. Long was assigned the matter as presiding officer.

---

<sup>2</sup> The overpasses were identified as located on: (1) Harriger Hollow Road (DOT 863 296 J); (2) East Bellport Road (DOT 863 302 K); and (3) Ramsaytown Road (DOT 863 298 X). *See*, Finding of Fact No. 3, *infra.*, citing September 10, 2019, Commission Secretarial Letter, *infra.*; BPRR St. 1 at 1 entered into the record.

An evidentiary hearing convened on January 25, 2022, and was conducted by telephone. Witnesses were presented by BPRR, Knox Township, I&E, and the Pennsylvania Department of Transportation (PennDOT).

After hearings, a Recommended Decision was issued.

Exceptions and Replies to Exceptions to the R.D. were filed by the Parties. By the *April 2023 Order*, the Exceptions of BPRR were denied, and the R.D. adopted. In pertinent part, the *April 2023 Order* directed the following:

1. That the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, in the matter of the formal complaint of Knox Township versus Buffalo & Pittsburgh Railroad, Inc. at Docket No. C-2019-3009358 is adopted, consistent with the discussion in this Opinion and Order.
2. That the Motion (as Amended) of Buffalo & Pittsburgh Railroad, Inc. filed July 15, 2022, Requesting the Commission to Accept the Filing of Buffalo & Pittsburgh Railroad, Inc.'s Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing to the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, at Docket No. C-2019-3009358, is granted and the Exceptions are considered on their merits.
3. That the Exceptions of Buffalo & Pittsburgh Railroad, Inc. filed July 15, 2022 (*Nunc Pro Tunc*) to the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, at Docket No. C-2019-3009358, are denied, consistent with the discussion in this Opinion and Order.
4. That the formal complaint of Knox Township filed against Buffalo & Pittsburgh Railroad, Inc. at

Docket No. C-2019-3009358 is sustained consistent with the discussion in this Opinion and Order.

5. That the public crossings, 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) cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., in Knox Township, Jefferson County, shall be altered in accordance with the work ordered herein.
6. That Buffalo & Pittsburgh Railroad, Inc., at its sole cost and expense, within nine (9) months of the date of service of the Commission's Order, shall furnish all material and perform all work necessary to alter the public crossings at Ramsaytown Road 38 (T-841), Harriger Hollow Road (T-420), and East Bellport Road (T-405) by: (1) demolishing and removing the existing railroad structures, which includes the reinforced concrete arch structures, reinforced concrete abutments, and/or bridge structure material, in their entirety from the public crossing locations and surrounding areas; (2) backfilling and grading the area thus disturbed; (3) providing 28-foot minimum of graded roadway and shoulder area between the embankments at Ramsaytown Road (T-841) before sloping the embankments behind the removed structures to a safe 2:1 grade; (4) providing a 24-foot minimum of graded roadway and shoulder area between the embankments at Harriger Hollow Road (T-420) and East Bellport Road (T-405) before sloping the embankments behind the removed structures to a safe 2:1 grade; and (5) grading and seeding the area thus disturbed on the embankments and surrounding areas to prevent soil erosion, all in safe and satisfactory condition.
7. That Buffalo & Pittsburgh Railroad, Inc., at its initial cost and expense, shall furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work by furnishing any watchmen, flagmen and/or inspectors that may be deemed necessary to

protect the railroad's operations or facilities during the time of the removal of the abutment substructures.

8. That Buffalo & Pittsburgh Railroad, Inc., at least thirty (30) days prior to the start of work, shall prepare and submit to the Commission's Bureau of Technical Utility Services for approval, and to all parties of record for examination, complete and detailed final plans that include proposed final grading dimensions, slope of embankments, and dimensioned area available for roadway and shoulders between the toe of embankments at the crossing locations.
9. That Knox Township at its sole cost and expense, within twelve (12) months of the date of service of the Commission's Order, shall furnish all material and perform all work necessary (1) to finish grade the roadway and shoulder approaches to the crossings in a safe manner by widening the one-lane roadway crossings to two-lanes to match, at a minimum, the existing roadway approaches in dimension and with in-kind roadway and shoulder material once the bridge structures are removed, and (2) to grade and seed the highway approaches to the crossing and areas disturbed to match the surrounding existing topography, all in safe and satisfactory condition.
10. That Knox Township and Jefferson County, at their equally shared cost and expense, shall furnish all material, and perform all work necessary to establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway and pedestrian traffic during the time of the removal of the railroad bridge structures and reestablishment of the roadway and shoulder areas at the crossings.
11. That Knox Township and Buffalo & Pittsburgh Railroad, Inc., at their sole cost and expense, perform all work necessary to identify, locate, and provide notification to all non-carrier public utility companies, municipal authorities or other entities that may have facilities located above or below the public crossings

that may be impacted by all work described herein in accordance with the PA One Call system.

12. That any non-carrier public utility company or municipal authority, upon notification from Buffalo & Pittsburgh Railroad, Inc., and Knox Township of this proceeding and work prescribed herein, which may be required to relocate, change or move their facilities or structures in accordance with ordering paragraphs specified here within, shall immediately file under Docket No. C-2019-3009358 as a party of record to this proceeding including a contact name, address, phone number, email address and include a brief narrative description of the facilities impacted.
13. That any relocation of, changes in and/or removal of any adjacent structures, equipment or other facilities of any non-carrier public utility company or municipal authority, which may be required as incidental to the removal of the bridge structures, shall be made by said public utility company or municipal authority, at its initial cost and expense, and in such a manner as will not interfere with the alteration of the crossing; and such relocated or altered facilities thereafter shall be maintained by said public utility company or municipal authority, at its sole cost and expense.
14. That all Parties involved herein shall cooperate fully with each other so that during the time the work is being performed, vehicular and pedestrian traffic will not be endangered or unnecessarily inconvenienced, and so that the requirements of each of the Parties will be provided for and accommodated insofar as possible.
15. That all work necessary to complete the removal of the railroad structures and grading at the subject crossings shall be done in a manner satisfactory to the Commission within nine (9) months of the date of the final Commission Order, and that on or before said date, Buffalo & Pittsburgh Railroad, Inc., shall notify the Commission's Bureau of Technical Utilities, Rail Safety Division by electronic mail, as to the date of actual completed work. Buffalo & Pittsburgh

Railroad, Inc. shall also file with the Commission's Secretary's Bureau, under Docket No. C-2019-3009358, notice of the date of actual completion of their work, with a copy of the notice to all parties.

16. That all work necessary to complete the re-establishment of the roadway and shoulder areas with in-kind material at the subject crossings shall be done in a manner satisfactory to the Commission within twelve (12) months of the final Commission Order, and that on or before said date, Knox Township shall notify the Commission's Bureau of Technical Utilities, Rail Safety Division by electronic mail, as to the date of actual completed work. Knox Township shall also file with the Commission's Secretary's Bureau, under Docket No. C-2019-3009358, notice of the date of actual completion of their work, with a copy of the notice to all parties.
17. That Buffalo & Pittsburgh Railroad, Inc., pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of their construction activities at the crossings described herein.
18. That Knox Township pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of their construction activities at the crossings described herein.
19. That upon completion of all work described herein, Knox Township, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain the roadways, shoulders, drainage facilities, signing, guiderail if necessary, and any other roadway ancillary features of the improvement constructed herein, including snow, debris and ice removal on the roadways.
20. That upon completion of all work described herein, Buffalo & Pittsburgh Railroad Inc., at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain its property, railroad



grade, embankments, drainage facilities, and any other railroad facilities of the improvement constructed herein.

21. That upon completion of the removal of the railroad bridge structures and re-establishment of the roadway and shoulder areas, each non-carrier public utility company and municipal authority, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its respective facilities, existing or altered, located within the limits of the public right-of-way.
22. That upon completion of the work herein directed, and upon a written request by any Party hereto, this proceeding shall be scheduled for a further hearing at a time and a place assigned by this Commission, upon due notice to all Parties, to receive evidence relative to the allocation of initial costs incurred, if any, by the public utility companies and municipal authorities, and any other matters relevant to this proceeding.
23. That upon the Commission receiving notice from both Buffalo & Pittsburgh Railroad, Inc., and Knox Township of the completion of work ordered herein and after a final inspection of the work has been completed and deemed satisfactory by the Commission's Bureau of Technical Utilities, Rail Safety Division, and there are no outstanding issues, the Complaint of Knox Township filed at Docket No. C 2019-3009358 shall be deemed satisfied.
24. That upon the Commission findings that all work has been satisfactorily completed as described herein, all three public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) at Ramsaytown Road (T-841), Harriger Hollow Road (T-420), and East Bellport Road (T-405), respectively, shall hereby be abolished.

Order at 39-45.

As noted, a Petition for Review of the *April 2023 Order* was filed and, thereafter, the instant *Motion for Stay*.

## II. Discussion

### A. Legal Standards

The BPRR *Motion for Stay* is authorized pursuant to 52 Pa. Code § 5.572. “**Petitions for relief**,” which provides, in pertinent part: “(a) **Petitions for rehearing**, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like must be in writing and specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired.”<sup>3</sup>

As noted, the Commission applies the well-settled standards of *Process Gas* to determine the propriety of issuing a stay or supersedeas. The Pennsylvania Supreme Court, in *Process Gas*, adopted the standards established by the court in *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958), as refined by the court in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977). *Process Gas*, 502 Pa. at 554, 467 A.2d at 809.

---

<sup>3</sup> See, also Pa. R.A.P. 1781(a): “[a] *Application to government unit*.- Application for a stay or supersedeas of an order or other determination of any government unit pending review in an appellate court on petition for review or petition for specialized review shall ordinarily be made in the first instance to the government unit.”

Pursuant to the holding of *Process Gas*, for issuance of a stay and/or supersedeas, a petitioner must establish the following:

1. Make a strong showing of likelihood to prevail on the merits;
2. Show that denial of relief will cause irreparable injury;
3. Show that the issuance of a stay will not substantially harm other interested parties in the proceedings; and
4. Show that the issuance of a stay will not adversely affect the public interest. *Process Gas*, 502 Pa. at 552-553, 467 A.2d at 808-809. The Supreme Court further stated: “[I]t is essential that the unsuccessful party, who seeks a stay of a final order pending appellate review, make a strong showing under the[se] criteria in order to justify the issuance of a stay.” *Id.*

The criteria for our consideration as to whether to issue a stay have been elucidated further in subsequent decisions of this Commission. *See, Application of Aqua Pennsylvania Wastewater, Inc., pursuant to 66 Pa. C.S. §§ 1102 and 1329*, Docket No. A-2021-3027268 (Opinion and Order entered August 25, 2022) (*Application of Aqua Pa.*), discussing *Pa. PUC, et al. v. Pennsylvania Electric Company, et al.*, Docket No. M-2008-2036188, 2010 Pa. PUC LEXIS 248 (Opinion and Order entered March 25, 2010) (*Pennsylvania Electric*); *Pa. PUC v. UGI Corp.*, 57 Pa. P.U.C. 83, 88-89 (1983) (*UGI*); *also Pa. PUC v. Nat'l Fuel Gas Dist. Co.*, 65 Pa. P.U.C. 210, 213 (1987); *Re: General Elec.*, 59 Pa. P.U.C. 61, 63 (1984); *also Petition of Librandi Machine Shop, Inc. For Declaratory Order*, Docket No. P-2018-3000047 (Opinion and Order entered March 10, 2022) (*Opinion and Order re: Stay, March 10, 2022*).

In *Pennsylvania Electric*, certain electric utilities filed tariff revisions seeking to adjust their transmission service charges. After subsequent tariff filings and challenges to those filings, the issues were litigated before an administrative law judge resulting in the issuance of a Recommended Decision. After consideration of Exceptions filed to the Recommended Decision, the Commission adopted an order on March 3, 2010.

It was this order that the utilities sought to stay and that was ruled on in an order entered on March 25, 2010. *Pennsylvania Electric* at 1-7. Based on these facts and the procedural history, the Commission, relying on a prior decision in *Pa. PUC v. Makovsky Brothers, Inc.*, 53 Pa. P.U.C. 510 (1979) (*Makovsky*), “. . .[d]eclined to engage in a review of the case as well as any further review of substantive determinations underlying the March 3 Order.” *Id.* at 10.

It was found significant in *Pennsylvania Electric*, that a stay was requested from a Commission order where the Commission ruled after fully litigated proceedings addressing substantive determinations, which addressed facts and arguments raised by the parties during the proceeding. Such is the case in the instant matter. *See, Application of Aqua; also Petition of Librandi for Declaratory Order, March 10, 2022 Order re Stay.*

## **B. Burden of Proof**

BPRR has filed the instant *Motion for Stay*. Therefore, BPRR is the proponent of a rule or order from the Commission and has the burden of proof under the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* (Code). Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides, in pertinent part, that “[e]xcept as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.”

BPRR has the burden to establish the requisite elements in support of the issuance of a stay and/or supersedeas. Additionally, it has been determined that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). “[A] litigant must satisfy its burden of proof with evidence that is substantial and legally credible, not with mere ‘suspicion’ or by only a ‘scintilla’ of

evidence.” *Id. citing Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc.*, 345 Pa. 398, 400, 29 A.2d 90, 92 (1942).

### **C. BPRR Petition**

Having familiarity with the standards of *Process Gas*, BPRR makes the following argument(s) (summarized) in support of its *Motion for Stay*:

#### **1. Substantial Case on the Merits**

BPRR argues that it is likely to prevail on the merits due to its position that the *April 2023 Order* is not supported by substantial evidence. BPRR asserts that substantial evidence is lacking because: (1) there was no evidence of any accidents at the crossings; and (2) no expert testimony based upon a professional engineering inspection was submitted to support the argument that the existing railroad structures are unsafe. *Motion for Stay* at ¶ 17.

BPRR additionally supports its position that it can make a strong showing of likelihood of success on the merits by making the argument that the Commission “arbitrarily and capriciously” disregarded competent testimony and relevant evidence in reaching its determination in the *April 2023 Order*. BPRR states that it presented testimony of qualified engineering experts in the fields of bridge and traffic safety, each of whom performed engineering inspections of the railroad structures and roadways, and whose opinions were ignored or marginalized without any basis or justification. *Motion for Stay* at ¶ 17. In addition, the Movant asserts that the Commission improperly relied upon a PennDOT Highway Design Manual for its determination despite competent testimony from BPRR’s professional traffic engineer that the Manual does not apply to existing structures. *Id.*

Finally, it is asserted that the Commission improperly applied the doctrine of *stare decisis* by following the conclusion reached in a prior decision that was not substantially similar to the instant matter. *Motion for Stay* at ¶ 17.

## **2. Irreparable harm**

In support of its position for a finding of irreparable harm, the BPRR *Motion for Stay* argument is reprinted, below:

18. Without the requested relief, BPRR will suffer irreparable injury because the nine (9) month time period set forth in the PUC's Order will expire or be nearly expired prior to the Commonwealth Court's disposition of BPRR's appeal. BPRR must either begin work to demolish the structures before receiving the Commonwealth Court's ruling, which would require it to incur costs and expenses that could not be recovered, or in the alternative, face the imposition of civil penalties under 66 Pa. C.S.A. §3301 for violation of the PUC's Order if it waits for the Commonwealth Court's ruling to begin work and the PUC's Order is affirmed leaving BPRR without adequate time to perform the work prescribed in the Order before the nine (9) month period expires.

*Motion for Stay* at ¶ 18.

## **3. Substantial Harm to Other Parties to the Proceeding**

It is the position of BPRR that issuing the requested stay will not substantially harm the other interested Parties to this proceeding, nor will it adversely affect the public interest. BPRR explains that a stay will maintain the status quo as it has been for the 100 or more years the structures have been in place. And, as BPRR argued

previously, there is no public safety hazard presented by the structures at issue. *Motion for Stay* at ¶ 19.

#### **4. Adverse effect on the public interest**

The position of whether a stay will adversely affect the public interest has been alluded to in the, above, summarized, argument.

#### **D. I&E Answer**

I&E disagrees with the position of BPRR concerning a strong showing of a likelihood of success on the merits of its appeal. I&E, initially, emphasizes the scope and standard of review of the courts in railroad crossing appeals. 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. *See*, I&E Answer at ¶ 17. Also, I&E states, 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. *Id.*

I&E further responds that the *April 2023 Order* is supported by substantial evidence of record. In summary, I&E explains that in the *April 2023 Order* the Commission held that a lack of accidents at a public crossing does not establish that the crossing is adequate, efficient, safe, and reasonable. It further states, “[i]n rendering this decision, the Commission determined that the ALJ properly considered the evidentiary record in this matter and acknowledged prior Commission decisions. Specifically, the ALJ found that two cars cannot pass safely through any of the crossings, the 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.” I&E Answer at ¶ 17.

Concerning the irreparable harm element of *Process Gas*, I&E points out that BPRR abandoned rail service on the three subject crossings in 2005 and 2006. BPRR has no immediate plans to return railroad traffic to this abandoned line. I&E Answer at ¶ 18. Based on the foregoing, the directive to BPRR to demolish and remove the railroad structures has no impact on its rail service. *Id.* Consequently, I&E argues 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 does not amount to irreparable harm. Rather, as I&E contends, it is harm easily calculated and harm which can be rectified in the event BPRR is successful in its appeal. *Id.*

In response to the question of whether granting a stay will result in an adverse affect on the Parties to the proceeding and the public, I&E notes that the public will be adversely affected by granting BPRR’s Motion for Stay. I&E refers to the ordering paragraphs of the *April 2023 Order* which, *inter alia*, accepted the recommendations and testimony of the I&E witness that there existed hazardous conditions at the crossing which will continue to exist and the concrete structures and abutments will continue to deteriorate.

## **E. Disposition**

We advise the Parties that any issue or contention that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *See, Wheeling*



*& Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), *also see, generally, Univ. of Pa., et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984).

**1. Whether Petitioner Makes a Strong Showing that He is Likely to Prevail on the Merits**

On consideration of the positions of the Parties, we conclude that the first prong of the *Process Gas* standards counsels against the issuance of a stay. We have noted in *Makovsky*, that on consideration of the question of whether to issue a stay, we stated that “[i]n deciding whether to stay one of our orders pending appeal, this Commission should not indulge in a further review of the case.” *Makovsky*, 53 Pa. P.U.C. at 511. That principle is the general rule. The Commission has distinguished proceedings in which the “strong showing . . . of a likelihood of success on the merits.” is considered in a request for the issuance of a stay after a full and fair opportunity of the parties to the matter to litigate substantive issues has been given, and the Commission has decided such issues, from those proceedings in which we have not decided substantive issues.<sup>4</sup>

There are two substantive issues raised by the likelihood of success on the merits element of the *Process Gas* standards. They are the determination by the Commission for the alteration of the crossings and the allocation of costs. *See*, 66 Pa. C.S. §§ 2702 and 2704. These issues are in conjunction with an appellate review of whether the Commission’s determination is supported by substantial evidence in the record. We note the Answer of I&E has adequately summarized the scope and standard

---

<sup>4</sup> *See, Implementation of Act 40 of 2017, Petition of Cypress Creek Renewables, LLC for a Stay or Supersedeas of the Commission's Final Implementation Order Entered May 3, 2018, Docket No. M-2017-2631527 (Order entered August 2, 2018); 2018 WL 3740734 (Cypress Creek Stay Order), discussed in Petition of Librandi for Declaratory Order re Stay, at n. 9; 16-17.*

of review of the courts in an appeal from a railroad crossing determination of the Commission.

The essential basis of BPRR's position lay in the fact that it views the testimony of its expert witnesses as conclusive or, innately superior in probative value, to meet its burden of coming forward with evidence in this matter. It is the position of BPRR that its expert witness testimony should be afforded more evidentiary weight to the trier of fact, as to the safety of the crossings, their structural integrity, and the need for their removal, than that presented by I&E and Knox Township. This is BPRR's fundamental position, notwithstanding it has, of record, abandoned service on the subject lines and, in its *Motion for Stay*, touts the "status quo" as beneficial to the public because the crossings have been in existence for 100 years.

Uncontested expert testimony may be found by the trier of fact to be insufficient or inadequate to carry the burden of proof when it is not believed or is too indefinite or inconsistent to be accepted as the basis of findings of fact. *John Vaneria et al. v. Mountainhome Water Company*, Docket No. R-860330C001; *Township of Barrett v. Mountainhome Water Company*, Docket No. R-860330C002 (Opinion and Order entered April 2, 1987): 1987 WL 258049 (Pa. P.U.C.), 87 P.U.R.4th 603, citing *Stampono v. Anthony Dally & Sons, Inc.*, 149 A.2d 129 (Pa. Sup. Ct. 1959); *Rozauski v. Glen Alden Coal Co.*, 69 A.2d 142 (Pa. Sup. Ct. 1949).

We will not engage in further consideration of the substantive determinations of the *April 2023 Order* as we find that all Parties were given a full and fair opportunity for litigation in the underlying proceedings. *See, also Alexia and Lawrence McKnight v. PECO Energy Company*, Docket No. C-2017-2621057 (Opinion and Order entered August 8, 2019); 2019 WL 3859536 (Pa. P.U.C.), citing *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order issued August 25, 2015) (*Moore*).

**2. Whether Petitioner has Demonstrated that Denial of Relief will Cause Irreparable Injury**

On consideration of the positions of the Parties, we conclude that BPRR has not shown that denial of a stay will result in irreparable harm. The harm alleged by BPRR is, essentially, economic harm. Mere financial harm, generally, is not a proper basis to support a finding of irreparable harm. *See, Opinion and Order re: Stay, March 10, 2022*, at 19, citing *SBG Management Services, Inc., et al.*, Docket Nos. C-2012-2304183, and C-2012-2304324 (Order entered March 28, 2019); 15 2019 WL 1506820 (Pa. P.U.C.), citing *Duquesne Interruptible Complainants v. Duquesne Light Co.*, Docket No. C-00913424 (Order entered May 14, 1993) at 10 (citing *Samerica Corporation v. Gross*, 448 Pa. 497, 295 A.2d 277 (1972), *Goadby v. Philadelphia Electric Co.*, 639 F.2d 117 (3d Cir. 1981), and *Virginia Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958)).

**3. Whether Petitioner has Demonstrated that the Issuance of a Stay will Not Substantially Harm Other Interested Parties in the Proceedings**

Turning to the third prong of the *Process Gas* test, BPRR takes the position that issuance of a stay pending appeal will not substantially harm other interested parties. We disagree. This matter involving three rail crossings proceeded from a formal complaint initiated by Knox Township. Further delay will, from our review of the record, adversely affect the public.

**4. Whether Petitioner has Demonstrated that the Issuance of a Stay will Not Adversely Affect the Public Interest**

On consideration of BPRR's arguments, we find that it has not demonstrated that the issuance of a stay will not adversely affect the public interest.

In determining the public interest, a balancing and evaluation of competing considerations must be performed, *i.e.*, the “benefits and detriments of the proposed transaction on all affected parties must be considered.” *See, Opinion and Order re: Stay, March 10, 2022* citing *Application of CMV Sewage Company, Inc.*, Docket No. A-230056F2002 (Opinion and Order entered December 23, 2008), citing *Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995) (*CMV Sewage*). In *CMV Sewage*, we noted with approval the reasoning of the presiding ALJ who concluded that the “Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community.”

On consideration of the public interest, we find that this element of *Process Gas* counsels against the grant of the *Motion for Stay*.

## II. Conclusion

On consideration of the *Motion for Stay* and on application of the criteria of *Process Gas*, the *Motion for Stay* is denied; **THEREFORE**,

**IT IS ORDERED:**

That the Moton for Stay of Order Dated April 20, 2023, in the matter of Knox Township: Complaint filed by Knox Township versus Buffalo & Pittsburgh Railroad Inc. involving roadway clearance issues and falling concrete from abandoned railroad overpasses at public crossings (DOT 863 298 X), (DOT 863 296 J), and (DOT 863 302 K) where T-841, T-420, and T-405 cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., located in Knox Township, Jefferson County,. . . at Docket No. C-2019-3009358 is denied, consistent with the discussion in this Opinion and Order.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: October 19, 2023

ORDER ENTERED: October 19, 2023