



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 15, 2024

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street 2nd FL
Harrisburg, PA 17120

A-2024-3048837

RE: Emergency Application of the Department of Transportation of the Commonwealth of Pennsylvania and the City of Pittsburgh for approval to abolish the public above grade crossing and remove the bridge carrying the abandoned cartway of Pittsburgh & West Virginia Railway Company (and the West Side Belt Railroad Company) above S.R. 0051, DOT Number 472 968G in the City of Pittsburgh, Allegheny County and the allocation of costs incident thereto.

Dear Secretary Chiavetta,

Enclosed for filing please find the Department's *Petition for Protective Order* as proof of service for Testimony and Exhibits 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 cursive script that reads "Karen L. Cummings".

Karen L. Cummings
Senior Counsel

Cc: Parties of Record
Mark Chappell, P.E., Utilities and Right of Way Section Chief
Daniel Leonard, Grade Crossing Engineer, Central Office
Sarah Fenton, Grade Crossing Engineer, Central Office
Douglas M. Seeley, P.E., Asst. District Executive, District 11-0
Michele Acitelli, Manager, District 11-0
John F. Doherty, Associate Solicitor
Kevin T. Freyder, Assistant Solicitor

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re. Emergency Application of the Department of	:	
Transportation of the Commonwealth of Pennsylvania	:	A-2024-3048837
and the City of Pittsburgh for approval to abolish the	:	Electronically Filed
public above grade crossing and remove the bridge	:	
carrying the abandoned cartway of Pittsburgh & West	:	
Virginia Railway Company (and the West Side Belt	:	
Railroad Company) above S.R. 0051, DOT Number	:	
472 968G in the City of Pittsburgh, Allegheny County	:	
and the allocation of costs incident thereto.	:	

PETITION FOR PROTECTIVE ORDER

The Department of Transportation (PennDOT) and the City of Pittsburgh (City), collectively, the “Petitioners,” file this Petition for Protective Order pursuant to 51 Pa. Code § 5.365.

1. This matter concerns a severely deteriorated bridge crossing over State Route (SR) 51 (Bridge) and carrying the abandoned cartway of Pittsburgh & West Virginia Railway Company in the City of Pittsburgh.

2. Petitioners have filed a Petition for Special Relief Under 66 Pa.C.S. § 2702(f) requesting that the Public Utility Commission (PUC or Commission) find that the Bridge is an immediate danger to the safety and welfare of the public.

3. In order to demonstrate that the Bridge poses an immediate danger to public safety, Petitioners anticipate providing the Commission and other parties with bridge inspection reports, studies, and/or load rating analyses as part of these proceedings.

4. Additionally, it is anticipated that such inspection reports, studies, and/or load rating analyses may be prepared by various other parties to the present matter.

5. As such, the Department requests a Protective Order pursuant to Section 5.365 of the Commission’s Rules and Regulations. 52 Pa. Code § 5.365.

6. 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).

7. One of the factors that the Commissions 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).

8. Public disclosure of the detailed bridge 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.*

9. The subject reports, studies, and/or analyses are also protected from discovery and production into evidence in any federal and state court cases under 23 U.S.C. § 409.¹

10. The submission of any bridge inspection reports, studies, or analyses 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.

11. Producing any bridge 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).

¹ Petitioners recognize 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 Petitioners reference 23 U.S.C. § 409 to highlight the strong public policy favoring the non-disclosure in a public forum of this sensitive inspection information.

12. In order to properly evaluate and critically assess the status of a structure, engineers performing structure inspection reports, studies, and analyses should not be concerned with the ramifications of their report in a court proceeding.

13. 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 railroad bridge, settlement discussions, and/or a hearing in the present matter.

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

15. 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.

16. The potential harm to the parties 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.

17. 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.

18. 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.

19. The Commission has recently issued protective orders in the following cases: *Application of Norfolk Southern Railway Company For Approval to Reconstruct the Crossing of the North Avenue/Brighton Road bridge* (Docket A-2018-3006432); *Application of CSX Transportation Inc. for Approval of the Abolition of the Crossing* (Docket A-2019-3013783); and *Application of the Department of Transportation for Approval to Alter the Public Crossing* (Docket A-2020-3022825).

WHEREFORE, based upon the foregoing, Petitioners respectfully requests that the Commission grant the relief sought herein and enter the attached Protective Order.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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CITY OF PITTSBURGH

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DATED: May 15, 2024

VERIFICATION

I, Michele Acitelli, hereby state that the facts set forth in the above Petition for Protective Order are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. §4904 (relating to unsworn falsification to authorities).

Date: 5/15/24

**Michele
Acitelli**

Digitally signed by
Michele Acitelli
Date: 2024.05.15
08:59:40 -04'00'

Michele Acitelli, P.E.

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Virginia Railway Company (and the West Side Belt :
Railroad Company) above S.R. 0051, DOT Number :
472 968G in the City of Pittsburgh, Allegheny County :
and the allocation of costs incident thereto. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below:

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