



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 22, 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,

In accordance with the discussion at today's prehearing conference in the above-referenced matter, please find the Petitioner's *Supplement to Petition for Protective Order* with proposed language for the requested order. The Department can make the bridge inspection reports available to opposing counsel immediately upon the issuance of the proposed order and receipt of the signed Appendix A form relating to the treatment of Confidential Information.

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, KCB 7th Floor  
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  
Honorable Christopher P. Pell  
Honorable Mary Long  
Chaz Beckett, PUC  
Shalea Delvillar, PUC

**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	:	<b>Electronically Filed</b>
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.	:	

**SUPPLEMENT TO PETITION FOR PROTECTIVE ORDER**

Petitioners filed a Petition for Protective Order on May 15, 2024 for the protection of confidential bridge inspection reports. Pursuant to 52 Pa. Code § 1.33(a), Applicants’ Petition for Protective Order filed on May 15, 2024 under this docket is incorporated herein by reference as if set forth in its entirety. In accordance with the discussion at the May 22, 2024 prehearing conference, Petitioners submit this Supplement to the Petition for Protective Order and request that the following proposed Protective Order be issued.

**PROTECTIVE ORDER**

On May 15, 2024, the Department of Transportation and the City of Pittsburgh, collectively Petitioners, filed a Petition for a Protective Order pursuant to 52 Pa. Code § 5.362(7) and 52 Pa. Code § 5.365. Petitioners seek to limit the distribution and use of bridge inspection reports, studies and load rating analyses (“Reports”) for the bridge at the above referenced crossing that the parties intend to introduce into evidence.

The Commission’s Rules of Practice and Procedure permit the Commission to issue protective orders limiting the availability of certain proprietary or confidential information. 52

Pa. Code §§ 5.362 and 5.365. In considering whether to issue a protective order, the Commission, pursuant to Section 5.365(a), should consider the following factors:

- (1) The extent to which the disclosure would cause unfair economic or competitive damage.
- (2) The extent to which the information is known by others and used in similar activities.
- (3) The worth or value of the information to the party and to the party's competitors.
- (4) The degree of difficulty and cost of developing the information.
- (5) Other statutes or regulations dealing specifically with disclosure of the information.

52 Pa. Code § 5.365(a). The Commission's regulations further provide details regarding restrictions placed on the proprietary material, access to proprietary material by representatives of parties, special restrictions and the return of proprietary information at the conclusion of the proceeding. 52 Pa. Code §§ 5.365(c)-(f).

Petitioners aver that the Reports at issue include an in-depth safety study for the purpose of determining how to increase the safety of the bridge. Therefore, Petitioners continue, the Reports should be treated as confidential pursuant to 75 Pa.C.S. § 3754 in the event of a request under the "Right-to-Know Law." 65 P.S. §§ 67.101 *et seq.*

Petitioners also assert that producing the Reports for general public review, scrutiny, and use undercuts the main reason that these reports are treated as confidential. Confidentiality, Petitioners assert, promotes independent and critical analysis by engineering professionals without concern for the potential liability concerns the results of such reports or studies might raise. *See Harrison v. Burlington Northern R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992).

Petitioners further note that under 23 U.S.C. § 409, the Reports are protected from discovery and production into evidence in any federal and state court cases. Petitioners acknowledge; however, that the Commission has determined that 23 U.S.C. § 409 does not apply in Commission proceedings. *See* August 12, 2002 Order in the *West Road* case (M-00021610). Nevertheless, although the Commission found that the federal statute alone did not protect the material, the Commission ultimately granted a Protective Order for the bridge inspection report in accordance with 52 Pa. Code § 5.423 *See* Docket No. M-00021610 (Order entered October 29, 2002). Also, protection of independent and critical analysis by engineering professionals are compelling reasons for protection of the Report. The Petition for Protective Order will be granted.

## ORDER

Therefore, it is ORDERED:

1. That a Protective Order is hereby granted with respect to all materials and information identified in Paragraphs 2 and 3 below, which have been or will be filed with the Commission, produced in discovery, or otherwise presented during the above-captioned proceeding and all proceedings consolidated therewith. All persons previously or hereafter granted access to the materials and information identified in Ordering Paragraphs 2 and 3 of this Protective Order shall use and disclose such information only in accordance with this Protective Order.

2. That the materials or information subject to this Protective Order includes: any structure inspection report, study, and/or load rating analysis of the subject State Route 0322 bridge structure; any reports, surveys, schedules, lists, studies, analyses or data about the subject State Route 0322 bridge structure contained in such reports; any testimony and exhibits filed by various witnesses and parties that contains or is based upon any structure inspection report, study and/or load rating analysis of the State Route 0322 bridge structure; and/or if materials or information received have been marked as Confidential Information.

3. That public disclosure of “Confidential” materials are those materials which, if disclosed, 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 Pa.C.S.A. § 67.101 *et seq.*).

4. That Confidential Information shall be made available to counsel for the non-producing Party, subject to the terms of this Protective Order. Such counsel shall use or disclose the Confidential Information only for purposes of: determining the current condition of the subject railroad bridge; determining what work should be performed on the subject railroad bridge, if any; for settlement discussions; and in preparation for hearing(s) as may be deemed necessary in this proceeding.

5. That information deemed “Confidential” material shall be made available to a “Reviewing Representative” who is a person who is either (1) an outside expert or an employee

of an outside expert retained by a party for the purpose of advising, preparing for or testifying in this proceeding; or (2) employees or other representatives of a party appearing in this proceeding with significant responsibility for this docket. The parties may use the Non-Disclosure Certificate attached hereto as Appendix A.

6. That neither counsel nor the parties, including Commission staff, receiving any structure inspection report, study and/or load rating analysis shall provide access to the inspection report, study and/or load rating analysis to any other person except as authorized by further order of the Commission or the presiding officer.

7. 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.

8. That if any person who has had access to Confidential Information subsequently is assigned to perform any duties which would make that person ineligible to be a Reviewing Representative, that person shall immediately inform the producing Party of his or her new duties, shall dispose of any Confidential Information and any information derived therefrom in his or her possession, and shall continue to comply with the requirements of this Protective Order with regard to the Confidential Information to which that person previously had access.

9. That Confidential Information produced in this proceeding shall be made available to the Commission and its Staff. However, any copy and/or testimony based upon a structure inspection report, study, and/or load rating analysis or any of the information contained there that is made part of the official record in this matter shall be placed under seal, and such information shall be handled in accordance with routine Commission procedures inasmuch as the report folders are not subject to public disclosure. To the extent that Confidential Information is placed in the Commission's testimony or document folders, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Protective Order. Public inspection of Confidential Information shall be permitted only in accordance with this Protective Order.

10. That the nonproducing Party will consider and treat the Proprietary Information as within the exemptions from disclosure provided in the Pennsylvania Right to Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104, effective January 1, 2009, until such time as the information is found to be non-confidential.

11. That any public reference to Confidential Information by a Party shall be to the title or exhibit reference in sufficient detail to permit persons with access to the Confidential Information to fully understand the reference and not more. The Confidential Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review.

12. That parts of any record of this proceeding containing Confidential Information, shall be sealed for all purposes, including administrative and judicial review, unless such Confidential Information is released from the restrictions of this Protective Order, either through the agreement of the Parties or pursuant to an order of the Administrative Law Judge, the Commission or appellate court.

13. That a non-producing Party shall retain the right to question or challenge the confidential nature of items marked as “Confidential” Information. If a nonproducing Party challenges the designation of a document or information as within the definition established in paragraph 3 of this Protective Order, the Party providing the information retains the burden of demonstrating that the designation is appropriate.

14. That each party shall retain the right to question or challenge the admissibility of Confidential Information; to object to the production of Confidential Information on any proper ground other than confidentiality; to refuse to produce Confidential Information pending the adjudication of the objection; and to seek additional measures of protection of Confidential Information beyond those provided in this Protective Order.

15. That within 30 days after a Commission Final Order is entered in the above-captioned proceeding, or in the event of appeals, within thirty days after appeals are finally

decided, the nonproducing Party, upon request, shall either destroy or return to the producing Party all copies of all documents and other materials not entered into the record, including notes, which contain any Confidential Information. In the event that the nonproducing Party elects to destroy all copies of documents and other materials containing Confidential Information instead of returning the copies of documents and other materials containing Confidential Information to the producing Party, the nonproducing Party shall certify in writing to the producing Party that the Confidential Information has been destroyed.

**WHEREFORE**, based upon the foregoing, the Commission hereby grants the relief sought herein and enters the following Protective Order.

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Honorable Christopher P. Pell  
Administrative Law Judge

**APPENDIX A**

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. :

TO WHOM IT MAY CONCERN:

The undersigned is a Reviewing Representative of \_\_\_\_\_  
\_\_\_\_\_, a Party to this proceeding (Party), and the  
undersigned has read and understands the Protective Order in the above-referenced proceeding,  
which Protective Order deals with the treatment of Confidential Information. The undersigned  
agrees to be bound by, and comply with, the terms and conditions of said Protective Order.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
PRINT NAME

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
EMPLOYER

**BEFORE THE  
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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:

**Service by Electronic Mail**

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Respectfully submitted,  
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: May 22, 2024