

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In 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.

PUC Docket No. A-2024-3048837

**CONSOLIDATED PRELIMINARY
OBJECTIONS OF WABASH
PROPERTIES, LLC, TO THE
EMERGENCY APPLICATION AND
PETITION FOR SPECIAL RELIEF OF
THE DEPARTMENT OF
TRANSPORTATION AND THE CITY OF
PITTSBURGH**

NOTICE TO PLEAD

TO APPLICANTS:

You are hereby notified to file an answer to these Preliminary Objections within ten (10) days of the date of their service upon you pursuant to 52 Pa. Code §5.101.

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THE DEPARTMENT OF TRANSPORTATION AND THE CITY OF PITTSBURGH**

Wabash Properties, LLC submits these Consolidated Preliminary Objections to the Pennsylvania Department of Transportation's and the City of Pittsburgh's Emergency Application and Petition for Special Relief Under 66 Pa.C.S. §2702(f), stating as follows:

BACKGROUND

1. The above-captioned Application and Petition before the Court arise from the joint plan of Petitioners the City of Pittsburgh ("the City") and the Pennsylvania Department of Transportation ("PennDOT") to demolish the City-owned Wabash Bridge ("the Bridge").

2. The Bridge serves as a critical means for Wabash Properties, LLC ("Wabash"), as well as the hundreds of local daily delivery vehicles and customers that access Wabash's business,

to come and go from its property bordering the Bridge, which currently operates as an automobile parts distribution center that employs sixty individuals.

3. As depicted below, the Bridge spans across Saw Mill Run Boulevard/State Route 51, which runs under the Bridge and traverses Wabash's property. In the aerial view image pasted below, the approximate location of the Bridge is outlined in yellow:



4. There is no dispute that the City owns the Bridge. Application, ¶10.

5. The City has owned the Bridge since its construction nearly a century ago. The City constructed the Bridge when it extended Saw Mill Run Boulevard over and through property owned by Wabash's predecessor in interest, the Pittsburgh & West Virginia Railway Company ("the Railroad").

6. In its present condition, as depicted in the aerial view above, the surface of the Bridge is incorporated into the access road and parking lot serving Wabash's property. When the City originally constructed the Bridge, railroad tracks crossed the surface of the Bridge. Petition ¶18-19.

7. When the Railroad contracted with the City to build Saw Mill Run Boulevard over and under the Railroad's property in 1929, the Railroad received consideration in return including, *inter alia*, (1) the construction of the Bridge itself, so that the parts of the Railroad's property were not inaccessible; (2) a recorded right of way across the Bridge, so that its railway could cross it; and, *importantly*, (3) the City's agreement to maintain the Bridge in perpetuity. Petition ¶10 and Exhibit 3.

8. The City's duty to maintain the Bridge was so important to the Railroad that it was memorialized in two City ordinances which explicitly obligated the City to maintain the Bridge "forever." Petition ¶19 and Petition Exhibit 3.

9. The Railroad abandoned the railway crossing over the Bridge more than sixty years ago. Application ¶9, Petition ¶6.

10. The parcel where the Bridge is located and the property adjacent to the Bridge was sold in 1961 by the Railroad to the Hahn Furniture Company, a non-railroad entity, and was ultimately acquired by Wabash in 2004. Petition ¶7 and Petition Exhibit 2.

11. Wabash is a successor in interest to the Railroad and all benefits and consideration the Railroad received from the City pursuant to the agreement to build Saw Mill Run Boulevard and the Bridge, most importantly the duty to maintain the Bridge.

12. A Wabash affiliate currently operates an automobile parts distribution center there (“the Facility”), identified as “Rohrich GM Parts Center” in the aerial view above. Petition ¶16.

13. Wabash, as the current holder of the recorded right of way over the Bridge, as well as the myriad of employees and businesses relying on the jobs and parts being provided by the Facility, also rely on the Bridge as the critical means of ingress, egress and regress to the Wabash property.

14. On October 26, 2022, the City informed Wabash of its intent to shut down the Bridge.

15. The City and PennDOT have now scheduled bids for the demolition of the Bridge for April of 2024.

16. On December 5, 2023, the City informed Wabash that PennDOT would be immediately closing the Bridge to all vehicular and pedestrian traffic.

17. Without the Bridge and the right of way across it, the Facility cannot operate as desired as it has for decades, nor can the tractor trailer trucks that utilize the Facility appropriately access the same. In short, the proposed demolition of the Bridge will mean the closure of Wabash’s facility.

18. The decision to demolish the Bridge was made after the City had intentionally and willfully neglected its duties to maintain the Bridge for decades, and despite ample notice from Wabash and other interested parties, including PennDOT itself, that the Bridge required maintenance.

19. Presently, access across the Bridge is blocked by concrete barriers installed by the City and PennDOT. Petition ¶21 and Petition Exhibit 7.

20. Frustratingly, the Bridge's condition is *not* beyond repair: Wabash has, at its own expense, obtained engineering expert reports which opine that the Bridge can not only be repaired, but repaired at a cost comparable to the proposed cost to demolish it.

21. Nevertheless, the City and PennDOT remain adamant in their decision to demolish the Bridge, despite the reasonable alternatives laid before them.

22. To rush that plan to fruition, on May 2, 2024, the City and PennDOT filed a joint "Emergency Application" ("the Application") with the Public Utility Commission ("the Commission") seeking to (1) abolish the long-abandoned railway crossing and (2) "remove" the Bridge.

23. Shortly thereafter, on May 15, 2024, the City and PennDOT filed a "Petition for Special Relief" ("the Petition") with the Commission seeking to further expedite removal of the Bridge, premised on a theory that there is an "immediate danger to the safety and welfare of the public" because of the Bridge's condition.

24. The Application and Petition were filed while litigation is pending in the Commonwealth Court over the City's refusal to maintain the Bridge and the continuing harm caused to Wabash by that refusal.

25. In the Commonwealth Court action, Wabash seeks an order compelling the City to repair the Bridge, among other things.

26. By seeking approval of the Bridge's demolition from the Commission here, the City and PennDOT have subverted the original jurisdiction of the Commonwealth Court, which is the sole arbiter of the legal dispute between Wabash and the City and PennDOT.

27. Notwithstanding these jurisdictional barriers, the Public Utility Code (“the Code”) does not empower the Commission to order the demolition of the Bridge under the circumstances here.

28. As the City and PennDOT admit, the railway crossing was abandoned decades ago, leaving no stakeholders in this dispute who are utilities subject to the Commission’s regulatory hand.

29. For that reason, Wabash raises these Preliminary Objections to the Application and Petition. Those Preliminary Objections are presented in consolidated form given their common issues of fact and law.

ARGUMENT

I. Preliminary Objection Under 52 Pa. Code §5.101(a)(1) for Lack of Commission Jurisdiction

30. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

31. The Commission’s procedural rules provide that preliminary objections are available to the parties for lack of commission jurisdiction. 52 Pa. Code §5.101(a)(1).

32. Here, the Commonwealth Court has exclusive jurisdiction over the legal controversy between Wabash and the City and PennDOT.

33. Specifically, the Application and Petition seek two approvals: (1) abolishment of the long-abandoned railway crossing and (2) the expedited removal of the Bridge.

34. To the extent the City and PennDOT seek a formal abolishment of a railway crossing that, as a practical matter, has not existed for more than sixty years, Wabash does not oppose such a decision.

35. As the Petitioners aver, the crossing was effectively abolished long ago in 1961, when the Railroad abandoned it. Petition ¶¶48-49.

36. But abolishing an abandoned railway crossing and ordering the demolition of the Bridge are separate issues, the latter of which involves an adjudication of Wabash's legal rights to access and support across the Bridge.

37. Therein lies the controversy at center of this dispute: the City's and PennDOT's refusal to comply with specific, express *legal* duties—both contractual and by ordinance and state law—to maintain the Bridge.

38. Wabash filed suit seeking to enforce those duties in the Court of Common Pleas of Allegheny County (GD-23-2842) seeking, *inter alia*, a declaration of the City's obligations to repair the Bridge and an injunction prohibiting the Bridge's demolition.

39. By Order dated March 22, 2024, PennDOT was joined as a Defendant in that action, an act which divested the Court of Common Pleas of jurisdiction under 42 Pa.C.S. §761(a)(1), which vests the Commonwealth Court with original jurisdiction over “all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof.”

40. By Order dated April 25, 2024, the matter was transferred to the Commonwealth Court, where that litigation is currently pending.

41. In the Commonwealth Court action Wabash asserts claims for breach of contract, Mandamus, Declaratory Judgment and an Injunction, seeking enforcement of the City's and PennDOT's obligations to maintain the Bridge, confirmation of Wabash's access rights across the Bridge and the enjoinder of the Bridge's demolition by the City and PennDOT. A copy of the Amended Complaint is attached hereto as Exhibit A.

42. Despite their knowledge that the Bridge's fate will be determined by the Commonwealth Court—which has exclusive jurisdiction over that matter—the City and PennDOT have attempted to circumvent that litigation by applying for approval of the Bridge's demolition from the Commission in this proceeding.

43. For that reason alone, the Petition should be stricken and the Application should be dismissed for lack of jurisdiction over the legal dispute between Wabash and the Applicants/Petitioners.

44. Any other outcome would be contrary to the Common Pleas Court's order transferring the litigation to the Commonwealth Court.

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(1).

II. Preliminary Objection Under 52 Pa. Code §5.101(a)(4) for Legal Insufficiency of a Pleading

45. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

46. As discussed above, the Commission does not have jurisdiction to order the demolition of the Bridge given the Commonwealth Court's original jurisdiction over the legal dispute between Wabash and the City and PennDOT.

47. Jurisdictional barriers aside, the sections of the Code the City and PennDOT rely upon do not authorize the Commission to demolish the Bridge.

48. Specifically, the Application and Petition are founded upon the purported existence of a railway crossing, to which the regulations contained in §2702 apply.

49. Yet, as the City and PennDOT aver in the Application and Petition, the Bridge has not operated as a railroad crossing for more than sixty years. Application ¶9, Petition ¶48.

50. All rail facilities, including rails, ties, and warning devices, were removed from the Bridge at some point in the 1960s. Petition ¶40.

51. No railroad company has had any ownership or operating rights over the Bridge since at least 1961. Petition ¶48.

52. Apparently, the Railroad did not apply to the PUC or its predecessor, the Public Service Commission (PSC) to abolish the crossing, despite completely abandoning it. Petition ¶8.

53. For that reason, the Commission's role here is to make official what has been a reality for more than half a century: no railway exists, and therefore no utility has a stake in this dispute.

54. The City and PennDOT understand this and, despite the commerce and jobs at stake, as a matter of strategy have consistently claimed both in the pending civil litigation and in this PUC proceeding that the Bridge serves only "one private property owner". PennDOT Prehearing Memorandum ¶VI.

55. Therefore, the City and PennDOT have argued, their duties to maintain the Bridge have been extinguished.

56. Of course, they cannot have it both ways: the City and PennDOT cannot claim in the civil litigation that the Bridge is a private parking lot for Wabash's Facility solely providing vehicular access to the Facility, and at the same time seek the Commission's approval to demolish a railway crossing in these proceedings.

57. The Bridge has not been a railway crossing for decades, regardless of whether the Railroad applied to have the Commission formally abolish it.

58. Without a railroad interest at stake any relief afforded by §2702(c) or (f) evaporates.

59. What remains is a private legal dispute between Wabash and the City over a contract which the Commission cannot enforce. See *Adams v. PUC*, 819 A.2d 631, 636 (“the PUC lacks jurisdiction over private contractual disputes”).

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(4).

III. Preliminary Objection Under 52 Pa. Code §5.101(a)(6) for Pendency of a Prior Action

60. Wabash incorporates by reference the averments of the preceding paragraphs as if set forth more fully herein.

61. The Commission’s procedure rules provide that preliminary objections are available to the parties for pendency of a prior proceeding. 52 Pa. Code §5.101(a)(6).

62. On March 1, 2023, Wabash filed a Complaint in the Court of Common Pleas, Allegheny County (GD-23-2842) seeking, *inter alia*, a declaration of the City’s obligations to repair the Bridge and an injunction prohibiting the Bridge’s demolition.

63. As set forth above, on March 22, 2024, the Court of Common Pleas of Allegheny County ordered the joinder of PennDOT as a Defendant in that action and then on April 25, 2024, the case was transferred to the Commonwealth Court on jurisdictional grounds.

64. The ongoing civil litigation is a prior pending action, wherein the legal obligations owed by the City and PennDOT to Wabash will be determined.

65. The relief sought by the City and PennDOT from the Commission is an attempt to “cut the line” in hopes of securing permission to demolish the Bridge before the Commonwealth Court has rendered its decision.

66. The risk of inconsistent judicial determinations is therefore heightened: an outcome favorable to Wabash at the Commonwealth Court would be moot if the Bridge had already been demolished.

67. That is the expedited outcome the City and PennDOT seek here, in hopes of avoiding a declaration that the City and PennDOT must repair the Bridge.

68. Inconsistencies of that variety are precisely what the prior pending action Preliminary Objection is meant to avoid.

WHEREFORE, Wabash Properties, LLC, respectfully requests that the Court sustain its Preliminary Objections and dismiss the Application and strike the Petition for failure to comply with 52 Pa. Code §5.101(a)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by e-mail, this 22nd day of May, 2024, on the following:

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