



GOLDBERG, KAMIN & GARVIN, LLP
ATTORNEYS AT LAW

A-2024-3048837

1806 FRICK BUILDING
437 GRANT STREET
PITTSBURGH, PA 15219
TEL: 412-281-1119
FAX: 412-281-1121

From the desk of:
Jonathan G. Preston, Esquire
jpreston@gkgattorneys.com

June 5, 2024

DATE OF DEPOSIT

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA FEDERAL EXPRESS

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

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.

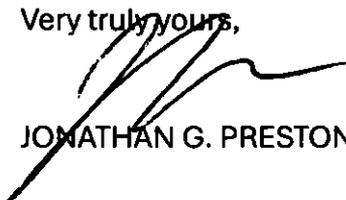
Dear Secretary Chiavetta:

Enclosed please find Intervenor/Protestant Wabash Properties, LLC's Memorandum of Law in Opposition to Petition for Interim Emergency Order in the above referenced matter. Please note that the Memorandum has **NOT** been E-Filed as it contains references to various documents and information which constitutes confidential security information. Pursuant to 52 Pa. Code § 102.3, please find enclosed both a redacted copy for public filing and an unredacted copy for the confidential file in a separate sealed envelope.

Copies have been sent to all parties of record as indicated by the Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



JONATHAN G. PRESTON

JGP/djh

Enclosures

cc: All Parties of Record (w/encl)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

**INTERVENOR/PROTESTANT WABASH PROPERTIES, LLC's MEMORANDUM
OF LAW IN OPPOSITION TO PETITION FOR INTERIM EMERGENCY ORDER**

Intervenor/Protestant Wabash Properties, LLC ("Wabash") submits this Memorandum of Law in Opposition to the Petition for Interim Emergency Order of the Department of Transportation ("PennDOT") and the City of Pittsburgh ("the City"; with PennDOT "Petitioners"), stating as follows:

I. INTRODUCTION AND BACKGROUND FACTS

By way of brief background, the above-captioned Application arises from the joint plan of the City and PennDOT to demolish a City-owned bridge which spans State Route 51 in the City of Pittsburgh ("the Bridge"). The Bridge serves as a critical means of access for 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. Without the Bridge and the right of way across it, Wabash cannot operate the automobile parts distribution center as desired or as intended 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 which will create a ripple effect of harm to the 60 individuals employed at the Facility, as well as the thousands of vendors that purchase automobiles and parts there.

The decision to demolish the Bridge was made after the City had intentionally and willfully neglected its express legal obligations to maintain the Bridge for decades, and despite ample notice from Wabash and other interested parties, including PennDOT itself, that the Bridge required maintenance. The top of Bridge is currently closed to vehicular traffic and is scheduled for demolition. 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 that once ran across the Bridge and (2) "remove" the Bridge.

That Application was followed by a May 22, 2024, *Petition for Interim Emergency Order* ("the Petition") 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. The Petition came before the Honorable Administrative Law Judge Mary A. Long for hearing on June 3 and 4, 2024. As explained by the Court on the record, the scope of the hearing on the Petition was narrowed as follows: "I also caution that the issue for today's hearing is the [sic] whether the condition of the bridge constitutes an emergency necessitating immediate removal within the meaning of the Public Utility Code. [...] I will simply caution that the focus of today's hearing is really the condition of the bridge. The allocation of costs and the allocation of responsibility will be dealt with after the emergency petition is dealt with." See transcript, pg. 44, 64.

For that reason, Wabash submits that several issues raised in the City's and PennDOT's *Joint Memorandum in Support of Emergency Relief* are not relevant at this stage of these proceedings. Those issues include, but are not limited to, (1) the cost of measures necessary to repair vs. rehabilitate the Bridge, (2) the scope of work necessary to completely rehabilitate the Bridge (as opposed to work necessary to obviate any purported "emergency"), (3) the economic and political consequences of rehabilitating a Bridge that allegedly only serves a private property owner and (4) alternative remedies available to Wabash under the Eminent Domain Code, 26 Pa.C.S. §502(c). Wabash preserves all defenses on those issues and incorporates by reference the averments of its *Petition to Intervene and Answer and New Matter* herein.

However, for the purposes of this Memorandum, Wabash will limit its arguments as the Court instructs, to the issue of "emergency." A review of the documentary and testimonial evidence reveals that clearly no emergency exists as contemplated by the Commission: the Bridge is closed to vehicular traffic: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. ARGUMENT

a. No "emergency" exists as contemplated by 52 Pa. Code § 3.1

"Emergency" is defined in the Commission's Regulations as a "situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting." 52 Pa. Code §3.1. *Petition of National Fuel Gas Distribution Corp. for Emergency Order Granting a Temporary Waiver of Certain Tariff Rules Related to*

Transportation Service, Docket Nos. P-961022 and P-961021 (Order entered March 19, 1996) (threat of depletion of gas stores in unusually cold conditions constituted a clear and present danger to life or property).

In the context of this case, therefore, the Court must consider whether the condition of the Bridge presents a “clear and present danger to the life and property” of motorists using State Route 51. First, the documentary evidence admitted by the Court reveals that no such emergency exists:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

- █ [REDACTED]

- █ [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- █ [REDACTED]

[REDACTED] To the extent any relief is necessary, the sole remedy is the enforcement of the 1929 Public Service Commission Order dated June 4, 1929 (Exhibit G, Wabash 0061), which adopted the Ordinances and City-County Contract (Exhibits A-C, E-G). Those instruments of record expressly obligate the City to maintain and renew the Bridge “forever,” which was the consideration given to the Railroad when State Route 51 was constructed. Wabash agrees that this Court has the authority to enforce its own orders. Exhibit G, Wabash 0061.

b. The City and PennDOT cannot satisfy the standard set by 52 Pa.Code §3.6(b)(1)-(4) governing Petitions for Interim Emergency Orders

An Interim Emergency Order is an “*interlocutory*” order issued by a presiding officer which is immediately effective and grants or denies injunctive relief during the pendency of a proceeding.” 52 Pa. Code §3.1. The Commission has stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such a showing may be made by a petitioner by establishing that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, 2023 WL 3624766 (Pa.P.U.C.).

To prevail on a Petition for Interim Emergency Order the City and PennDOT must prove that (1) their right to relief is clear, (2) the need for relief is immediate, (3) the injury would be irreparable if relief is not granted, and (4) the relief requested is not injurious to the public interest. These requirements parallel those of an injunction, a very high standard that the City and PennDOT

cannot satisfy here. The party seeking relief bears the burden of proving that the facts and circumstances meet all four of the requirements of 52 Pa. Code § 3.6(b). See 66 Pa. C.S. § 332; 52 Pa. Code § 3.6(b). Additionally, any finding of fact necessary to support the Commission's decision must be based upon *substantial evidence*. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993).

i. the Petitioner's right to the relief requested is not clear (52 Pa.Code §3.6(2))

As to the first element, a petitioner has a clear right to relief when it has raised “substantial legal questions.” *Birdsboro Kosher Farms Corporation Birdsboro Kosher Meats, LLC, and PWCH LLC v. Pennsylvania-American Water Company*, 2021 WL 2911805 (Pa.P.U.C.). To the extent the “emergency” before the Court for consideration raises a “substantial legal question,” the only such question over which this Court has jurisdiction is the enforcement of the Public Service Commission Order which authorized construction of the Bridge and obligates the City to maintain and renew it.

In short, the only relief the Commission can offer in response to the Petition for Emergency Interim Order—or, for that matter, in any future proceedings in this matter—is an Order compelling the City to maintain and renew the Bridge pursuant to the 1929 PUC Order. *Norfolk Southern v. PUC*, 870 A.2d 924 (2005). The City and PennDOT have failed to enter any testimony as to why the 1929 Order cannot be enforced by the PUC in a manner analogous to *Norfolk* case in which the City of Pittsburgh successfully argued that the PUC had jurisdiction to enforce “old contracts” to find the railroad responsible for maintenance and repair of a bridge carrying a crossing; yet, in the instant matter, the City does not wish to see fulfillment of the terms of the “old contract” with the railroad *Id.* at 947. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Enforcement of the 1929 Order is not the relief sought by the City and PennDOT now in the instant Petition, or in its Application. Rather, the City and PennDOT seek, *inter alia*, an Order authorizing the demolition of the Bridge. Such an adjudication is outside of the Commission's jurisdiction. 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. The City's and PennDOT's refusal to comply with specific, express *legal* duties—both contractual and by ordinance—to maintain the Bridge are the subject of ongoing litigation currently pending in the Commonwealth Court, No. 279 MD 24.

That litigation originated when 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. 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 of over "all civil actions or proceedings ... [a]gainst the Commonwealth government, including any officer thereof." By Order dated April 25, 2024, the matter was transferred to the Commonwealth Court. 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.

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 Petitioning for the expedited approval of the Bridge's demotion from the Commission in this proceeding.¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For those reasons alone, the Petition for Interim Emergency Petition should be denied.

ii. The City and PennDOT cannot prove that their need for relief is immediate (52 Pa.Code §3.6(2)) or that any injury would be irreparable (52 Pa.Code §3.6(3))

The second and their requirement for obtaining interim emergency relief is a demonstration by the petitioner that its need for relief is immediate and that any injury would be irreparable. 52 Pa. Code §3.6(2)-(3). For the purposes of this proceeding, the City and PennDOT must demonstrate that the Bridge must be demolished immediately. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ The City and PennDOT offer two cases in support of their claim that the Commission may authorize demolition of the Bridge even though a railway no longer exists and without prejudicing Wabash's private contractual rights. See *Pa. Game Commission v. PA PUC*, 651 A.2d 596 (Pa. Cmwlth. 1994) and *CONRAIL v. City of Harrisburg*, 577 Pa. 7 (Pa. 2004). Although not determinative on the issue of "emergency" before the Court presently, these cases can be readily distinguished for a critical reason: in both cases the railway crossing was owned by the railroad (or the railroad's successor in *Game Commission*) and the underlying dispute was the allocation of costs associated with an agreed-upon removal of the crossing. That is the opposite of the situation before the Court here: Wabash does not own the Bridge, although it is beneficiary of a contractual duty to maintain the Bridge owed by the City. Further, the controversy at issue in the Commonwealth Court case involves express property rights and contractual duties. An Order by the Commission to demolish the Bridge would extinguish those rights before Wabash has had an opportunity to seek their enforcement in the Commonwealth Court action.

[REDACTED]

[REDACTED]

The City and PennDOT cannot prove that they have any right to immediate relief in the form of the demolition of the Bridge. [REDACTED]

[REDACTED]

Therefore, the City and PennDOT cannot satisfy their burden of proof that an immediate, irreparable harm would occur without an Order granting the demolition of the Bridge as required by 52 Pa. Code §3.6. To the extent any irreparable harm would be suffered by any party, it would be Wabash, whose business would be inoperable if the Bridge were demolished. Such action

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]. The interests of the public to have the Bridge repaired also include the 60 employees working at the facilities and the many vendors and business relying on the business for parts.

The 1929 PUC Order gives the current-day PUC the opportunity to both resolve any emergent safety conditions at the Bridge, [REDACTED]

[REDACTED]

[REDACTED], the only provided for relief is enforcement of the 1929 Order and repair of the Bridge by the City pursuant to its own position in *Norfolk Southern*, NBIS Reports and the wisdom and authority of the federal government.

III. CONCLUSION

For the foregoing reasons the Petition for Interim Emergency Order should be denied. [REDACTED]

[REDACTED]

■ Wabash respectfully requests that the Commission deny the Petition for Interim Emergency Order and enforce the City's obligation to maintain and renew the Bridge pursuant to the 1929 Order.

Respectfully submitted,

By: /s/ Jonathan M. Kamin
JONATHAN M. KAMIN, ESQUIRE
PA ID # 81958
jonathank@gkgattorneys.com
JONATHAN G. PRESTON, ESQUIRE
PA ID # 209493
jpreston@gkgattorneys.com

Goldberg, Kamin & Garvin, LLP
1806 Frick Building
437 Grant Street
Pittsburgh, Pa 15219
(412) 281-1119

JENNA R. DIFRANCESCO, ESQUIRE
jdifrancesco@c-wlaw.com
PA I.D. NO. 309365

Cipriani & Werner, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
(412) 563-2500
(412) 563-2080 – Fax

Counsel for Wabash Properties, LLC

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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 5th day of June, 2024, on the following:

Karen L. Cummings, Esq.
Nicholas D. Mertens, Esq.
Senior Counsel
Pennsylvania Department of Transportation
Office of Chief Counsel
PO Box 8212
Harrisburg, PA 17105-8212
Counsel for applicant PennDOT
kcummings@pa.gov
nimertens@pa.gov
Counsel for Applicant the PennDOT

Krysia Kubiak, Esq.
John F. Doherty, Esq.
Kevin T. Freyder, Esq.
City Solicitor
City of Pittsburgh, Department of Law
City-County Building, Suite 313
PO Box 8212
Pittsburgh, PA 15219
krysia.kubiak@pittsburghpa.gov
john.doherty@pittsburghpa.gov
kevin.freyder@pittsburghpa.gov
Counsel for Applicant the City of Pittsburgh

Kathleen Jones Goldman, Esq.
Bradley J. Klitowski, Esq.
Buchanan Ingersoll & Rooney PC
Union Trust Building
501 Grant Street, Suite 200
Pittsburgh, PA 15219
kathleen.goldman@bipc.com
bradley.kitlowski@bipc.com
Counsel for Wheeling & Lake Erie Railway Company

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**PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

/s/ Jonathan M. Kamin
JONATHAN M. KAMIN, ESQUIRE
Co-Counsel for Wabash Properties, LLC

**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

ORDER DENYING INTERIM EMERGENCY RELIEF

AND NOW, this _____ day of _____, 2024, it is ORDERED, ADJUDGED and DECREED that the Petition for Interim Emergency Order Under 52 Pa. Code §3.6 and the Petition for Special Relief under 66 Pa.C.S. §2702(f) of the City of Pittsburgh and the Commonwealth of Pennsylvania, Department of Transportation are DENIED.

Honorable Mary D. Long, ALJ
Office of Administrative Law Judge

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ORIGIN ID: BTPA (412) 281-1119
JONATHAN G. PRESTON
GOLDBERG KAMIN & GARVIN, LLP
1806 FRICK BUILDING
437 GRANT STREET
PITTSBURGH, PA 15219
UNITED STATES US

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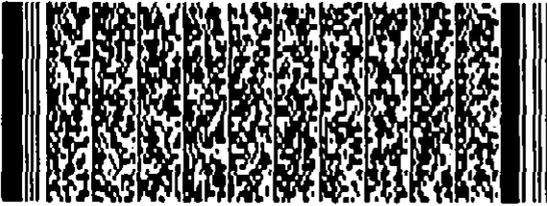
BILL SENDER

TO **ROSEMARY CHIAVETTA, SECRETARY**
PA PUBLIC UTILITY COMMISSION
400 NORTH STREET
2ND FLOOR
HARRISBURG PA 17120

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