

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

Commissioners Present:

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

Emergency Application of the Department of
Transportation of the Commonwealth of
Pennsylvania and City of Pittsburgh for the
Approval to Abolish the Public Above Grade
Crossing and Remove the Bridge Carrying the
Abandoned Cartway of Pittsburgh and West
Virginia Railway Company (and West Side Belt
Railroad Company) above S.R. 0051 in the
City of Pittsburgh, Allegheny County and the
Allocation of Costs Incident Thereto

A-2024-3048837

Petition for Interim Emergency Order Under
52 Pa. Code § 3.6

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission or PUC)
for consideration and disposition is the Material Question raised by the June 6, 2024
“Order Granting Interim Emergency Relief and Certifying Material Question”

(*Interim Emergency Order*) issued by Administrative Law Judge (ALJ) Mary D. Long in the above-captioned matter.

The ALJ's *Interim Emergency Order* granted the emergency relief requested, *i.e.*, authorization for removal of a rail bridge that crosses a major highway in the City of Pittsburgh as planned in July and August 2024.

I. Material Question

The Material Question presented for our review is as follows:

Did ALJ Long properly issue *Interim Emergency Order* granting the emergency relief requested by the Department of Transportation of the Commonwealth of Pennsylvania and the City of Pittsburgh?

We answer the above question in the affirmative.

II. Background

A. The Parties

The Parties in support of the *Interim Emergency Order*, granting emergency relief for removal of a bridge constructed at an above grade rail crossing, are the Department of Transportation of the Commonwealth of Pennsylvania (the Department) and the City of Pittsburgh (City) (collectively, the Petitioners). The City is the owner of the bridge and has been since its construction in 1929. As the owner of the bridge, the City is working in cooperation with the Department, pursuant to a “local project sponsor” agreement in which the Department has agreed to handle the

construction contract for removal of the bridge. *See*, Petitioners Memorandum in Support of the Section 3.6 Petition (Petitioners Memorandum).

The Party in opposition to the *Interim Emergency Order* granting removal of the bridge is Wabash Properties, LLC (Wabash). Wabash is the owner of the real property above and on each side of the bridge and has been since its purchase in 2004. *See*, Wabash Memorandum in Opposition to the Section 3.6 Petition (Wabash Memorandum).

B. The Rail Crossing Bridge and Adjoining Property

The bridge in question is a City-owned bridge which spans Saw Mill Run Boulevard, commonly known at State Route 51, (the Bridge).¹ The Bridge was constructed pursuant to the Application of Allegheny County (the County) to construct the Bridge “under the tracks and right of way” of Wabash’s predecessor in interest, the Pittsburgh and West Virginia Railroad (the Railroad)². The Commission’s predecessor, the Public Service Commission (the PSC) approved the County’s Application on June 4, 1929. (*See*, Wabash Exhibit G). All rail facilities, including rails, ties, and warning devices, were removed from the Bridge at some point in the 1960’s. However, the Commission’s records reflect that the Railroad never sought Commission approval to abolish the crossing under Chapter 27 of the Code. 66 Pa. C.S.A. § 2702. The Bridge has not been used for rail service in 80 years. *Interim Emergency Order* at 7; *See*, Petition for Special Relief at ¶¶ 40-44.

¹ S.R. 0051 traverses the City of Pittsburgh, Allegheny County (Route 51). Route 51 is a major artery in the City’s highway system, carrying nearly 40,000 vehicles per day and connecting to other major highways in the Pittsburgh area, including Interstate 376 and the Liberty Boulevard and Tunnel. *Interim Emergency Order* at 3; Application at ¶¶ 12-14.

² *See*, Wabash Exhibit A. The Bridge was constructed to replace the hillside through which the City extended Saw Mill Run Boulevard. *See*, Wabash Exhibit H.

Since Wabash's purchase of the real property above and on either side of the Bridge, until the Petitioners' closing of the Bridge Deck for safety reasons, Wabash has used the Bridge for employee parking and as an entrance access to an automobile parts distribution center on property adjacent to the Bridge. The Bridge served as an intended and preferred, but not exclusive, means of access to the business, which was blocked by the City's action in closing portions of the bridge in 2020. In December 2023, the Petitioners closed the Bridge entirely by erecting concrete barriers at both ends. *Interim Emergency Order* at 3,7; Wabash Memorandum at 1-2.

C. Litigation Between the Petitioners and Wabash

The Bridge became the subject of litigation between the City and Wabash when, on March 1, 2023, Wabash filed a Complaint against the City in the Allegheny County Court of Common Pleas at Docket Number G.D. 23-002842. The Complaint was in response to the October 26, 2022 letter of the City to Wabash, in which the City informed Wabash of the City's intention to close the Bridge due to its poor condition. Wabash initially requested a preliminary injunction against the City, which was denied following a hearing before the Allegheny County Court of Common Pleas on March 7, 2023. On March 20, 2024, Wabash sought leave of the Court to include the Department as a defendant. After joinder, the Department and City were ordered to inform the PUC of the proceeding to obtain the PUC's position given the Bridge was a former active railroad crossing. The Common Pleas Court proceeding between Wabash and the Petitioners has now been transferred to the Commonwealth Court in its original jurisdiction. Wabash Memorandum at 8.

D. Application to Abolish Crossing and Petition for Interim Emergency Relief

This case was initiated by the request of the Petitioners for Commission approval to abolish the above grade rail crossing and remove the Bridge above Route 51

(Application)³. The Petitioners characterized the Application as an “emergency” based upon the alleged unsafe and deteriorating condition of the Bridge. Based upon the alleged emergency, the Petitioners also filed a Petition for Interim Emergency Relief Under 52 Pa. Code § 3.6 (Section 3.6 Petition)⁴ requesting that the Commission make a finding of immediate danger to the public and order the removal of the Bridge pursuant to the Commission’s authority to direct the abolishment of highway crossings under Section 2702(f) of the Pennsylvania Public Utility Code (Code). 66 Pa.C.S. § 2702(f) (establishing the Commission’s duty to act to address the condition of a crossing upon finding of an immediate danger to the safety and welfare of the public). Application; Section 3.6 Petition.

In the Application and Section 3.6 Petition, the Petitioners alleged that, due to serious structural concerns, the Bridge was scheduled for demolition. To that end, the Department sought and obtained federal funding for the removal of the Bridge, scheduled to be completed by the Department in July and August 2024. The Application included a location map and final structure plans for the project.

The Petition seeks Commission approval to act immediately to remove the Bridge in the interest of public safety, given the existing poor and deteriorating condition of the Bridge and the pending scheduled demolition set to occur in July and August of this year. However, Wabash, the adjacent property owner, opposes the Petitioners’ plans to demolish the Bridge. Wabash asserts that no emergency exists and that the Bridge

³ Emergency Application of the Department of Transportation of the Commonwealth of Pennsylvania and City of Pittsburgh for the Approval to Abolish the Public Above Grade Crossing and Remove the Bridge Carrying the Abandoned Cartway of Pittsburgh and West Virginia Railway Company (and West Side Belt Railroad Company) above S.R. 0051 in the City of Pittsburgh, Allegheny County and the Allocation of Costs Incident Thereto, Docket No. A-2024-3048837.

⁴ The Section 3.6 Petition was not assigned a separate docket number and was docketed at the Application Docket No. A-2024-3048837.

should be repaired rather than removed. Wabash asserts that the City should be compelled to repair the Bridge because the PSC’s approval of the construction of the Bridge was made in reliance upon certain City Ordinances and an agreement between the County and the City, whereby the City would own the Bridge and exclusively bear the cost to maintain and renew the Bridge “forever”. *See*, Wabash Exhibit A-C, E-G.

III. Procedural History

As previously noted, on May 2, 2024, the Petitioners filed the Application docketed at A-2024-3048837, seeking permission from the Commission to both abolish the above-grade crossing and remove the Bridge authorized by the PSC’s 1929 order issuing a Certificate of Public Convenience (CPC).^{5 6 7}

By letter dated May 3, 2024, the Commission’s Rail Safety Division scheduled a virtual field investigation for Tuesday May 7, 2024.

The counsel for Wabash entered an appearance on May 6, 2024, in objection to the Application.

⁵ The case caption was amended at the hearing on June 3, 2024, to remove the reference to “DOT Number 472 968G.” Upon investigation, the Department determined that S.R. 51 does not have a DOT number. Tr. 44, 49.

⁶ The Application included a location map and final structure plans for the project. The Department and the City represented that due to serious structural concerns the structure was scheduled for demolition in July and August of 2024.

⁷ As discussed, *supra*, in the course of ongoing litigation between Wabash and the City, the Allegheny County Court of Common Pleas directed that the Department be joined as a necessary party, and that the Department and the City confer with the PUC regarding the status of the crossing. The court also transferred the matter to the Commonwealth Court.

Following the virtual field investigation, the Rail Safety Division referred the Application to the Office of Administrative Law Judge (OALJ) for an “expedited” hearing, noting the objection to the Application by Wabash. By notice dated May 9, 2024, OALJ assigned the Application to Deputy Chief Administrative Law Judge (DCALJ) Christopher Pell and scheduled a prehearing conference by telephone for May 22, 2024. DCALJ Pell issued a prehearing conference order on May 9, 2024.

On May 15, 2024, the Petitioners filed a Petition for Special Relief Under 66 Pa.C.S. § 2702(f) (Petition for Special Relief). In the Petition for Special Relief, the Department and the City represented that the crossing had never been formally abolished by application to the Commission, and that abolishment and removal of the bridge is necessary due to the immediate danger to public safety caused by the poor and deteriorating condition of the Bridge. Accordingly, the Petitioners requested that the Commission make a finding of immediate danger to the public and order the removal of the Bridge pursuant to 66 Pa.C.S. § 2702(f).

As directed by DCALJ Pell’s prehearing order, the Petitioners and Wabash filed prehearing memoranda.

The prehearing conference before DCALJ Pell convened as scheduled on May 22, 2024. The counsel for the Department, the City and Wabash appeared. The counsel for the Railroad also appeared.

The Petitioners filed the instant Petition for Interim Emergency Relief Under the Commission’s Regulations at 52 Pa. Code § 3.6 (Section 3.6 Petition) on May 22, 2024.⁸ The Petitioners’ Section 3.6 Petition alleged that abolishment and

⁸ The Section 3.6 Petition incorporates the averments in the Petition for Special Relief.

removal of the bridge is necessary due to the immediate danger to public safety caused by the poor and deteriorating condition of the Bridge. Accordingly, the Petitioners requested that the Commission make a finding of immediate danger to the public and order the removal of the Bridge.

By notice dated May 22, 2024, the matter was reassigned to ALJ Long. ALJ Long scheduled an in-person hearing on the Section 3.6 Petition for June 3, 2024, in Pittsburgh, and served a prehearing order on May 23, 2024.

Also on May 22, 2024, Wabash filed Preliminary Objections to the Application. On May 24, 2024, ALJ Long issued an order striking the Preliminary Objections because Wabash had not made the appropriate filing to become a party to the case. On May 27, 2024, Wabash filed a Protest.

Also on May 27, 2024, Wabash filed an Answer and New Matter to the Section 3.6 Petition. The Department and the City filed a Reply to Answer and New Matter on May 29, 2024.

Wabash filed a Petition to Intervene on May 29, 2024.

The Petitioners filed a Petition for a Protective Order on May 15, 2024, and a Supplemental Petition for Protective Order on May 22, 2024. By email dated May 31, 2024, Wabash and the Petitioners submitted a revised Petition for Protective Order to which all of the parties agreed. ALJ Long granted the Petition for Protective Order and issued the Protective Order on May 31, 2024.

By email dated May 31, 2024, ALJ Long granted Wabash's Petition to Intervene and advised the parties that the issue for the Emergency Hearing would be limited to the question of whether the condition of the bridge constitutes an "emergency"

necessitating its immediate removal within the meaning of the Code and Commission Regulations and would not address the merits of any remaining issues.

Hearings were held on June 3, 2024, and June 4, 2024. Counsel for the Department, the City and Wabash appeared and participated. The Department offered the testimony of three witnesses: Michele Acitelli, P.E., Jason Zang, P.E., and Stephanie Zolnak. The Department Exhibits 1-7 were admitted into evidence.⁹ Wabash offered the testimony of two witnesses: John Schneider, P.E., and David Rohrich. Wabash Exhibits A, B, C, E, F, G, H, K, L, M, N, O, P, R, S, T, U, and V were admitted into the record.

As previously noted, on June 6, 2024, ALJ Long issued the *Interim Emergency Order* granting the requested emergency relief and certifying the ruling to the Commission as a Material Question, in accordance with 52 Pa. Code § 3.10(b). ALJ Long determined that the Petitioners had proven all four elements required to warrant a grant of emergency relief.

On June 13, 2024, the Petitioners filed a Brief in Support of Interim Emergency Order and Certifying Material Question, and Wabash filed a Brief Addressing the Merits of the Certified Question Pursuant to 52 Pa. Code § 5.305, in opposition to the *Interim Emergency Order*.

⁹ DOT Ex. 6/Wabash Ex. O were identified as Confidential Security Information. The ALJ made every effort to protect the information presented which was marked confidential or proprietary. The ALJ noted that the confidential treatment of information was hampered by the failure of either party to clearly mark which portions of testimony and memoranda should be designated as confidential. The ALJ further noted that a detailed review of Mr. Zang's and Mr. Schneider's initial hearing testimony was not included in the Recommended Decision, as their testimony was marked as proprietary and many of the documents relied upon were marked as Confidential Security Information. R.D. at 8, fn. 8-9. The Department offered a succinct summary of Mr. Zang's testimony regarding the condition of the Bridge in its Memorandum in Support of Emergency Relief at 7-8. Finally, Mr. Zang's rebuttal testimony was not marked as confidential. *Id.*

IV. Discussion

We note that any issue we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Interim Emergency Relief – The Legal Standard

The purpose of an interim emergency order is to grant or deny injunctive relief during the pendency of a proceeding. 52 Pa. Code § 3.1. The standards that govern the issuance of interim emergency orders are set forth at 52 Pa. Code § 3.6. Section 3.6 requires that a petition for interim emergency relief be supported by a verified statement of facts that establishes the existence of the need for emergency relief, including facts to support the following:

- (1) The petitioner's right to relief is clear.
- (2) The need for relief is immediate.
- (3) The injury would be irreparable if relief is not granted.
- (4) The relief requested is not injurious to the public interest.

52 Pa. Code § 3.6(b).

The Commission may grant interim emergency relief only when *all* of the foregoing elements exist. *Glade Park East Home Owners Association v. Pa. PUC*, 628 A.2d 468 (Pa. Cmwlth. 1993). Further, as to the first element, it is not necessary to determine the merits of the controversy in order to find that a petitioner's right to relief is

clear; rather, the only required determination is that the petition raises substantial legal questions. *T.W. Phillips Gas and Oil Company v. Peoples Natural Gas Company*, 492 A.2d 776 (Pa. Cmwlth. 1985).

“Emergency” is defined in our 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. *See also, Petition of Direct Energy Services, LLC for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*, Docket No. P-00062205 (Order entered April 20, 2006) (while Pike County’s retail rates rose to an unexpectedly high level, they did not constitute a clear and present danger to life or property within the meaning of the Code); *Petition of National Fuel Gas 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) (the threat of depletion of gas stores in unusually cold conditions constituted a clear and present danger to life or property justifying the waiver of charges for over deliveries required by tariff).

The party seeking relief bears the burden of proving that the facts and circumstances meet all four of the requirements in the Commission’s Regulation. 66 Pa. C.S. § 332; 52 Pa. Code § 3.6(b). The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). That is, the Petitioner’s evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, any finding of fact necessary to support the Commission’s adjudication 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); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

52 Pa. Code § 3.10(a) provides that an order granting or denying interim emergency relief is immediately effective upon issuance by the ALJ and that no stay of the order will be permitted pending Commission review of the order. 52 Pa. Code § 3.10(b) requires the ALJ to certify the question of the grant or denial of relief to the Commission as a material question in accordance with 52 Pa. Code § 5.305.

52 Pa. Code § 5.305 sets forth the procedure to be followed when an ALJ certifies a material question to the Commission for interlocutory review. Within thirty days¹⁰ of receipt of the certified question, the Commission is required to do one of the following:

- (1) Continue, revoke or grant a stay of proceedings.
- (2) Determine that the certification was improper and return the matter to the presiding officer for resolution.
- (3) Answer the certified question.

52 Pa. Code § 5.305(e).

¹⁰ 52 Pa. Code § 5.305(f) provides that, if the Commission fails to act upon a certified question within thirty days of its receipt, the Commission's inaction will be deemed an affirmation of the decision of the presiding officer.

D. Four Elements for Emergency Relief Under 52 Pa. Code § 3.6(b)

The issue the Commission must resolve in this emergency proceeding is whether ALJ Long correctly determined that the facts set forth in the Petitioners' Section 3.6 Petition justify the Commission issuing an interim emergency order authorizing the Bridge to be removed as scheduled by the Department in July and August. Therefore, it is necessary to evaluate whether the ALJ properly found that all four elements of Section 3.6(b) have been satisfied. 52 Pa. Code § 3.6(b); *Glade Park East Home Owners Association v. Pa. PUC*, 628 A.2d 468 (Pa. Cmwlth. 1993).

1. Whether the Petitioner's Right to Relief is Clear (52 Pa. Code § 3.6(b)(1))

a. Positions of the Parties

Generally, as to the first element, the Petitioners contended that the right to relief is clear where removal of the Bridge is necessary to address the condition of the Bridge, which has deteriorated to the point that it creates a risk to the 40,000 vehicles per day that cross underneath the bridge. The Petitioners also represented that Route 51 is a principle arterial highway, connecting major neighborhoods as well as major points of access to the City, including the Liberty Bridge and Tunnel and Fort Pitt Bridge and Tunnel. The Petitioners asserted that the significantly deteriorated condition of the Bridge raises significant safety concerns to the travelling public, which threaten to necessitate the closure of Route 51 if the Bridge is not promptly removed. The Petitioners stressed that due to the deteriorated condition of the Bridge, the Bridge deck has been closed to pedestrian and vehicle traffic, first by the City in 2020 and later by the Department in 2023 with concrete barriers bolted to the top of the Bridge and necessitates Bridge inspection every three months. Petitioners Memorandum at 3-6.

In support of its position regarding the threat to public safety due to the condition of the Bridge, the Department offered the expert testimony of the Department's witness, Mr. Jason Zang, P.E., District Executive for the Department's Engineering District 11-0. Mr. Zang testified regarding the National Bridge Inspection Standards (NBIS¹¹) report of the condition of the Bridge, and that the removal of the Bridge is the best long-term option to ensure the safety of vehicles and pedestrians on Route 51. He further testified to the necessity of completing the project during the 2024 construction season due to the continuing deterioration of the Bridge, which, if unaddressed, could cause the closure of Route 51 for safety reasons. Mr. Zang testified that while the Department has federal funding in place to remove the Bridge, no funding is currently available to repair the Bridge. As to the need for immediate repairs, Mr. Zang testified that the Department is not able to repair the Bridge in the next two months. Mr. Zang also testified that even if repairs were made to the Bridge now, the repairs themselves may further compromise the Bridge's structural integrity or that more repairs would be required next year. *Id*; *Interim Emergency Order* at 9-10.

Generally, Wabash objected to the Petitioners' Application and requested that the Petitioners' request for relief seeking removal of the Bridge be denied. Specifically, Wabash represented that no emergency exists as contemplated by 52 Pa. Code § 3.1, which would qualify for removal of the Bridge. Wabash asserted that the City, which owns the bridge, has failed to maintain it as obligated by the PSC's grant of the Certificate of Public Convenience, when the construction of the Bridge was approved. Wabash further argued that the Bridge could be repaired rather than removed. Wabash further represented that as the owner of the property on both sides of the Bridge, and a right-of-way over the Bridge, the Bridge offers essential access to an automobile parts distribution center. Finally, Wabash contended that the Commission does not have

¹¹ The NBIS are the standards established over the safety inspections of highway bridges on public roads throughout the United States established by the United States Department of Transportation.

jurisdiction to approve the removal of the Bridge by virtue of ongoing proceedings in the Commonwealth Court. Wabash Memorandum. Interim Emergency Order at 10; Wabash Memorandum at 3-10.

In support of Wabash's position that the Bridge need only be repaired and that the repair of the Bridge should be ordered over its removal, Wabash offered the expert testimony of Mr. John M. Schneider, P.E. In Mr. Schneider's opinion, the condition of the Bridge warrants repair over removal. Mr. Schneider's testimony was based upon, *inter alia*, review of preliminary Bridge repair and renovation plans commissioned by Wabash, as well as a sight visit to observe the condition of the beams and columns and base of the deck that was visible from below the structure. Mr. Schneider offered the opinion that the repairs would extend the useful life of the Bridge. However, he could not specify either a time period or an opinion that the repairs would restore Wabash's use of the Bridge deck for any purpose. *Id.*

b. ALJ Long's Ruling

Initially, ALJ Long observed that Mr. Zang's testimony was more credible and convincing than the testimony offered by Mr. Schneider. The ALJ considered that both are expert professional engineers with significant expertise in their respective disciplines. However, ALJ Long concluded that Mr. Zang's expertise in bridge engineering carried more weight than that of Mr. Schneider's expertise as a structural engineer. The ALJ noted that Mr. Schneider's engineering experience, primarily focused on the construction and renovation of buildings and other structures such as parking garages, has no experience with highway bridges, and no significant experience in the structural requirements of bridges generally. *Interim Emergency Order* at 9-11.

The ALJ concluded Mr. Zang's professional career, most of which has involved the engineering and evaluation of bridges, afforded more credibility to Mr.

Zang's professional opinion on the question of the condition of the Bridge. The ALJ noted that Mr. Zang's current responsibilities specifically include the safety regarding the construction of state roads and bridges. Finally, the ALJ acknowledged that Mr. Zang was qualified as an expert in this proceeding, specifically as an expert in bridge engineering. *Id.*

The ALJ concluded that on balance, more weight should be assigned to Mr. Zang's opinion that the Bridge should be removed, than to Mr. Schneider's opinion that the condition of the Bridge does not require its removal, and that it should be repaired instead. *Interim Emergency Order* at 10-11.

The ALJ concluded that the Petitioners' Section 3.6 Petition raises substantial legal questions, and the Petitioners produced sufficient evidence to find that the Petitioners have a reasonable expectation of success on the merits of the underlying Application. Accordingly, the ALJ found that the Petitioners sustained their burden of proving that their right to relief is clear within the meaning of Section 3.6. *Interim Emergency Order* at 9-11, fn. 20 (citing *T.W. Phillips Gas and Oil Co. v. The Peoples Natural Gas Co.*, 492 A.2d 776 (Pa. Cmwlth. 1985); *Core Communications, Inc. v. Verizon Pennsylvania Inc.*, Docket No. P-2011-2253650 (Opinion and Order entered September 23, 2011)(*Core 2011*)).

c. Argument in Briefs

The Petitioners assert that they have satisfied the first element in seeking emergency relief that the "right to relief is clear." 52 Pa. Code § 3.6(b)(1) and *Core 2011*. The Petitioners maintain that the ALJ's determination that the first element is satisfied based upon substantial evidence showing a clear right to relief and, as such, the Commission should affirm the ALJ's well-reasoned conclusion. The Petitioners assert that, while the Commission is the ultimate fact-finder, the findings of ALJ Long should

be given deference as to issues of credibility and weight of the evidence. Petitioners Brief at 3-7 (citing 66 Pa.C.S. § 335).

The Petitioners stress that the Department's public mandate, as conveyed to it by the General Assembly, is to protect the travelling public, similar to the Commission's mandate to protect the public safety. Petitioners Brief at 6 (citing 71 P.S. § 512). It was in following that mandate, the Petitioners assert, that the Petitioners requested interim emergency relief to address the poor and deteriorating condition of the Bridge and to prevent the threat of extended closure of Route 51 because of the condition of the Bridge. *Id.*

The Petitioners reiterate that the testimony of the Department's expert, Mr. Zang, should be afforded more weight and credibility on the question of the condition and advisability for removal of the Bridge based upon Mr. Zang's experience as a Professional Engineer, District Executive for the Department's Engineering District 11-0, and the former District Bridge Engineer with 26 years of engineering experience with a focus on bridge engineering. The Petitioners also aver that Mr. Zang's credentials stand in contrast to the expert witness presented by Wabash, Mr. Schneider, who, while an experienced engineer, specializes in the renovation of buildings and parking structures as opposed to bridge engineering. Petitioners Brief at 6-7 (citing Tr. at 76-77, 352). The Petitioners assert that the ALJ properly afforded more weight to the expert opinion testimony of Department's witness and correctly concluded that the Petitioners raised a substantial legal question (while not expressly stated) as to whether the Bridge poses an emergency requiring demolition on the Department's proposed schedule. Petitioners Brief at 7.

In its Brief in opposition, Wabash avers that as to the first element, a petitioner has a clear right to relief when it has raised "substantial legal questions," and that to the extent the "emergency" asserted by the Petitioners raises a "substantial legal

question,” the proper question is whether the Commission should enforce the PSC’s 1929 order which authorized construction of the Bridge and obligates the City to maintain and renew it. Wabash Brief at 10-12, citing *Birdsboro Kosher Farms Corporation Birdsboro Kosher Meats, LLC, and PWCH LLC v. Pennsylvania-American Water Company*, 2021 WL 2911805 (Pa. P.U.C.).

Wabash asserts that a Commission decision to enforce the PSC’s 1929 order would be consistent with the Commonwealth Court decision in *Norfolk Southern v. PUC*, 971 A.2d 545, 547 (Pa. Cmmwlth. 2009), where the City successfully argued that the PUC had jurisdiction to enforce a 1938 PUC Order obligating the railroad (who owned the crossing) to maintain and repair the bridge carrying a crossing. *Id.*

Wabash asserts that a Bridge utilized by automobile traffic is not similar to the abandoned railroad crossing that is under the Commission’s Section 2702 jurisdiction, and also denies that the Bridge constitutes a “clear and present danger” as required for an “emergency” under 52 Pa. Code § 3.1. Wabash also asserts that, if such a danger does exist, the Commission’s jurisdiction is limited to altering, improving or suspending the crossing or repairing the Bridge consistent with both the PSC’s 1929 order and Section 2702(f).

Wabash argues that any other conclusion would fall outside the Commission's jurisdiction, based upon the pending litigation in the Commonwealth Court, No. 279 MD 24, in which Wabash argues that the City and the Department refuse to comply with legal duties to maintain the Bridge which supports the surface that is owned by Wabash. Wabash asserts that the “fate of the Bridge” will be determined by the Commonwealth Court, which Wabash asserts has exclusive jurisdiction over that matter. Wabash maintains that the present Section 3.6 Petition is an attempt by the Petitioners to circumvent that litigation. Wabash Brief at 11-12.

Further, Wabash asserts that, contrary to Petitioners' and the ALJ's conclusion, an order authorizing removal of the Bridge would preclude Wabash's claims in Commonwealth Court. Wabash Brief at 12, citing *Interim Emergency Order* at 13. Wabash argues that the ALJ's reliance on *CONRAIL v. City of Harrisburg*, 842 A.2d 268 (Pa. 2004) (*CONRAIL*) is misplaced. Wabash argues that the facts in *CONRAIL* are distinguishable from the present case, because the disposition of the contractual rights at issue in that case could be deferred to a subsequent determination without prejudice to the parties. Here, Wabash asserts, the continued existence of the Bridge in a repaired state is the right which Wabash seeks as relief. Wabash avers that if the Bridge is removed, Wabash will be deprived of its ultimate relief. *Id.*

d. Disposition

Based on our review of the record, we conclude that the Petitioners have established a clear right to emergency relief. The basis for determining whether a petitioner has met this standard is whether the petitioner has raised "substantial legal questions." *T.W. Phillips Gas and Oil Company v. Peoples Natural Gas Company*, *supra*. The inquiry into whether this standard has been met does not require a determination of the merits of the underlying controversy. *See, Core 2011*.

To the extent Wabash asserts that upon a finding of immediate danger to the public safety and welfare under Section 2702(f) that this Commission would lack jurisdiction to authorize removal of the Bridge, we reject Wabash's position. The Commission's authority to direct removal of the Bridge in the interest of public safety is established as general matter under Chapter 27 of the Code, and our authority to act in response to the demonstrated immediate danger to public safety and welfare is specifically established under Section 2702(f), including directing removal of the Bridge. 66 Pa. C.S. § 2702(f). We also reject Wabash's position that the Commission is required to treat removal of the bridge as a "last resort" and direct repair rather than removal

where repair is arguably possible. To the contrary, the Commission is not required to treat removal as a last resort, and may order removal where, in the Commission's determination, the safety of the traveling public and other relevant factors warrant removal. *See, Buffalo & Pittsburgh Railroad, Inc. v. Pa. PUC*, 2024 Pa. Commw. Unpub. LEXIS 105, fn. 17 ("nothing in the Commission's statutory authority requires that removal or demolition be ordered only as a last resort").

We note that the deteriorating condition of the Bridge which warranted closing the Bridge deck to all traffic is inherently dangerous. In our view, the narrow question presented by the Petitioners' Section 3.6 Petition, and as testified to by the Department's expert, Mr. Zang, is whether the poor and deteriorating condition of the Bridge which led to the closing of the Bridge deck for safety reasons and the threat posed by the continuing deterioration and risk of the need for prolonged closure of Route 51, give rise to an "emergency" as defined in our regulations. We are persuaded that it does. Moreover, we note that the Petitioners' right to relief is predicated upon the authority of the Commission to direct removal of the Bridge under Section 2702 of the Code. 66 Pa. C.S. § 2702. The factors to consider in the determination are within the discretion of the Commission. Given our conclusion that the circumstances and condition of the Bridge constitute an emergency, we are persuaded that the Petitioners have a clear legal right to the relief requested in the Petition.

2. **Whether the Need for Relief is Immediate (52 Pa. Code 3.6(b)(2)), and**
3. **Whether the Injury Would be Irreparable if Relief is not Granted (52 Pa. Code 3.6(b)(3))¹²**

- a. **Position of the Parties**

The Petitioners asserted that the need for relief is immediate, and the harm irreparable, if relief is not granted. The Petitioners' position was supported by Mr. Zang's expert opinion testimony that the Bridge should be removed during the 2024 construction season. Mr. Zang advised that the Bridge superstructure is rated as "poor," and the substructure is rated as "serious," such that in recent years the Bridge has required temporary supports and steel repairs to its columns and beams. *See*, Application at 11.

The Petitioners asserted that irreparable harm would occur if there were a delay in the scheduled removal of the Bridge. The Petitioners asserted that a delay in the scheduled removal of the Bridge would not only result in continued deterioration of the Bridge, but also have a negative impact on the financing and the timeframe for completion of the project. The Petitioners argued that if the removal is delayed, the Bridge may deteriorate to the point that Route 51 would be closed for an extended period, longer than the seventeen (17) days required under the Department's present approved construction plans. Petitioners Memorandum at 6-9.

Wabash asserted that the need for relief is not immediate because the Bridge could be repaired, based on the repair plans Wabash commissioned, and that the

¹² Both the Department and Wabash briefed the second and third elements together, *i.e.*, whether the need for relief is immediate and whether the injury would be irreparable if relief is not granted. Accordingly, our summary of the parties' positions disposition will jointly address those elements.

only irreparable harm would be to Wabash if the Commission were to authorize removal of the Bridge. According to Wabash, the Commission should instead enforce the conditions of the 1929 Certificate of Public Convenience and require the City to repair or renovate the Bridge. Wabash Memorandum at 10-12.

Wabash argued that it will suffer irreparable harm if the Bridge is demolished due to the harm to the business operation and the 60 employees at the Wabash facility. Wabash further asserted that removal of the Bridge harms the operation of the facility because large semi trucks that deliver inventory to the facility have difficulty making deliveries without access to the Bridge. *Id.*

b. ALJ Long's Ruling

The ALJ observed that the evidence presented was sufficient to establish both that the need for relief is immediate, and if denied, that the harm would be irreparable. *Interim Emergency Order* at 11-13. The ALJ concluded that the Petitioners met their burden in this regard by reliance upon the testimony submitted by the Department's District Executive, Mr. Zang, and his significant experience as a bridge engineer. The ALJ concluded that the evidence clearly demonstrated that the immediate removal of the Bridge on the proposed construction schedule is necessary to protect the traveling public and that without such relief, the injury to the Petitioners, by means of the traveling public, would be irreparable. *Id.*

The ALJ rejected Wabash's position that the repair of the Bridge was a reasonable and viable alternative to its removal, especially noting that Wabash's expert Mr. Schneider conceded that his recommended repairs could not likely be completed by August 2024, the time in which the Department has approved plans and financing in place for removal. Given that the Bridge undoubtedly requires immediate attention, the ALJ found Wabash's repair plans to be deficient. *Interim Emergency Order* at 12. The

ALJ likewise rejected Wabash's position that Wabash would suffer irreparable harm if the Bridge were to be removed, given that Wabash has been utilizing alternative means of ingress and egress from its property since the Bridge was partially closed in 2020 and fully closed in late 2023. The ALJ concluded that the inconvenience to Wabash did not amount to irreparable harm. *Interim Emergency Order* at 13.

c. Argument in Briefs

The Petitioners assert that the ALJ's finding is supported by substantial evidence. Petitioners Brief at 7-12. The Petitioners aver that the Bridge has reached the end of its useful life and cannot remain in place without necessitating the closure of SR 51 within the reasonably foreseeable future. The Petitioners also assert that removal of the Bridge, which long ago ceased operation for its intended purpose, should have been programmed, designed, and completed years ago. Petitioners Brief at 9 (citing Tr. 137, 467, 478-79; Tr. at 136, 141, 213, 266).

The Petitioners assert that Wabash's plans for repair rather than removal of the Bridge are entirely irrelevant in this proceeding. The Petitioners note that local and state governments are owed significant deference in administrative decisions, such as the need for removal of a bridge, absent proof that said decision lacked good faith, was arbitrary, or otherwise done in a capricious manner. *Id.* (citing *see Schenck v. Pittsburgh*, 70 A.2d 612, 614 (Pa. 1950) and, *see Washington Park, Inc. Appeal*, 229 A.2d 1, 5 (Pa. 1967)). The Petitioners assert that, to the extent the City and the Department have rendered a judgement as to the engineering need for closure and removal of the Bridge, that judgement is presumed to have been performed in the interest of the public welfare, and reached by the exercise of intelligent judgment, in a legal manner after suitable investigation. Petitioners Brief at 9-10.

The Petitioners argue that Wabash's repair plans should be given no weight, as the engineer who developed the plans did not testify and the engineer who did testify did not seal the same plans. The Petitioners further assert that the plans are initial and inadequate and fail to address, *inter alia*, the key elements necessary to even evaluate the plans, such as the longevity of repairs relative to both the upfront and maintenance costs, as well as the impact of the work on the overall transportation network. Petitioners Brief at 10 (citing Tr. at 187, 280). The Petitioners reject Wabash's plans as they are not final design plans based upon review of all relevant factors including the NBIS report, various tests, and traffic control measures. The Petitioners assert that even if it was economical and justified to rehabilitate the Bridge, significant maintenance would be required going forward. *Id.* (citing Tr. at 473). The Petitioners maintain that the repairs and maintenance proposed by Wabash are not justified given that both the useful life span of the Bridge has expired and the fact that the Bridge does not serve the general travelling public. *Id.*

The Petitioners note that their plans for removal of the Bridge are finalized, and the project is ready to proceed, including the necessary federal funding being in place. The Petitioners further assert that it would be unreasonable for a transportation agency to engage in a complex rehabilitation project on a nearly 100-year-old structure which serves no public use, as opposed to the removal of the structure. The Petitioners aver that the removal plans prepared by the Department are the only reasonable and viable means to immediately address the threat to public safety caused by the condition of the Bridge. Petitioners Brief at 11 (citing Tr. at 57, 465, 481-82).

The Petitioners aver that:

Without removal of the Bridge there is a risk that steps will need to be taken to close a portion of SR 51 that serves nearly 40,000 vehicles per day. (N.T., 299-300, 462, 467-468, 478-479). While the Department's removal project will require the closure of Route 51 for approximately 17 days, potential closure due to the Bridge's condition if

removal does not occur in the near future could be for a significantly longer period of time. (N.T. 283-284, 467-468). Closure of SR 51 presents safety concerns as passenger vehicles, heavy truck traffic, and emergency vehicles would be required to detour around the Bridge for an unknown time period. (N.T. 300-301 , 467-468). As such, the risk to the traveling public is immediate and without such relief the Petitioners' interest, and indeed the PUC's interest—the protection of the traveling public—would be irreparably harmed.

Petitioners Brief at 12.

In its Brief, Wabash asserts that there is no immediate need for relief, as the Bridge deck is currently closed to all vehicular traffic by way of concrete barriers and the Bridge can support its deadload. Wabash further asserts that the Petitioners cannot prove that they have any right to immediate relief in the form of the demolition of the Bridge. Wabash asserts that, to the extent the Petitioners argue that the “longevity” of the proposed repair work would be an “irresponsible use of taxpayer money,” such economic considerations are not relevant to the issue before the Commission: Whether an emergency exists which necessitates the immediate removal of the Bridge? Wabash Brief at 13-14.

Therefore, Wabash maintains that the Petitioners cannot satisfy the burden of proof that an immediate, irreparable harm would occur without an order authorizing the removal of the Bridge as required by 52 Pa. Code § 3.6. Wabash avers that, to the extent any irreparable harm would be suffered by any party, it would be to Wabash, because its business would be inoperable if the Bridge were demolished. Wabash concludes that removal of the Bridge would “cause far reaching irreparable harm not only to Wabash's Facility and 60+ employees who work there, but also to the thousands of businesses that rely upon deliveries from Wabash 's facility.” *Id.*

d. Disposition

Based on our review of the record, we find that the preponderance of the evidence demonstrates both Petitioners' immediate need for relief and irreparable harm if relief is not granted. As discussed above, the circumstances giving rise to the emergency are the existing poor and deteriorating condition of the bridge. The same poor condition which gave rise to the need to close the Bridge deck to all traffic has only progressed to the point where the Department must act to remove the Bridge. Therefore, we agree with and adopt the ALJ's reasoning that the need for relief is immediate.

We likewise adopt the ALJ's reasoning and conclusion that there will be irreparable harm if the relief is not granted. The Department's impending construction schedule requires immediate action for the Bridge's removal as scheduled for July and August 2024. If removal does not occur in the near term, there will be an increased risk to both the safety of the traveling public due to the deteriorating condition of the Bridge as well as of the need to close Route 51 for an extended period. There is no dispute that the Bridge's use has long been abandoned by the Railroad for its intended purpose. We are unpersuaded by Wabash's argument that irreparable harm would occur due to removal of the Bridge. As noted by the ALJ, the Bridge deck has been fully closed since December 2023, and Wabash's facility retains a viable, if less convenient, means of ingress and egress. *Interim Emergency Order* at 9, 13.

The Petitioners stated that they initiated their Section 3.6 Petition to protect public safety, *i.e.*, the traveling public in the City of Pittsburgh. Based upon the evidence presented, we find that the removal of the Bridge is necessary to address the immediate danger presented to the traveling public by the poor and deteriorating condition of the Bridge, as authorized under Section 2702 of the Code. Therefore, we find sufficient grounds on which to conclude that the Petitioners need relief in advance of our completing a decision on the merits of the Application which is now pending before ALJ

Long. Further, based on our review of the record, we agree with and adopt the analysis of the ALJ. Consequently, we find that the Petitioners have carried their burden of demonstrating, by a preponderance of the evidence, both that there is immediate need for relief and that the injury would be irreparable if relief is not granted.

4. Whether the Relief Requested is Not Injurious to the Public Interest (52 Pa. Code § 3.6(b)(4))

a. Positions of the Parties

The Petitioners contended that if the condition of the Bridge further deteriorates, risk to the traveling public would be exacerbated, not only due to the condition of the Bridge, but also due to the increased risk that the Department may be required to close Route 51, which would result in detours for the more than 40,000 vehicles that use the route, including cars, trucks, school buses, and public transit. The Department's expert noted that trucks carrying hazardous and oversized loads cannot be re-routed through the tunnels and would require significant detours. Finally, the Department's expert, Mr. Zang, testified that the City of Pittsburgh would lose the connection of a high-volume roadway for an extended period and would result in a drastic disruption to the travelling public. Petitioner's Memorandum at 9-12.

Wabash asserted that the repair of the Bridge as opposed to its removal would serve the public interest by requiring the City to repair the Bridge in accordance with the 1929-issued CPC and other legal obligations. Wabash also asserted that the public interest is served by the repair of the Bridge in consideration of the interests of the 60 employees and various vendors which utilize the Bridge to access the facility. Wabash Memorandum at 12-14.

b. ALJ Long's Ruling

The ALJ compared and weighed the interests asserted by the parties. As to Wabash, the ALJ acknowledged that removal of the Bridge works to the detriment of Wabash's business interest due to the hinderance of access to the property by large semi-trucks and the reduction of turn around radius. As to the Petitioners, the ALJ concluded the interests asserted were in service to the safety of the public at large. The ALJ concluded that the benefit to the safety of the travelling public outweighed the private interests, despite the negative impact to Wabash. *Interim Emergency Order* at 13-14 (citing *Monroeville v. Pa. PUC*, 600 A.2d 655 (Pa. Cmwlth. 1991); *Schwartz v. Delaware and Hudson Railway Company, Inc.*, Docket Nos. C-2011-2237486, P-2011-2241780 (Opinion and Order entered December 5, 2013) (approving abolishment of the bridge crossing despite the crossing dissecting complainant's property, finding that evidence of a personal need for the bridge did not establish a public necessity for the bridge crossing)). *Interim Emergency Order* at 14-15.

The ALJ noted that Wabash has not been able to use the Bridge for either parking or truck access for some time, however the facility's business operation has continued, although not the preferred or optimal use of the property from a business standpoint. The ALJ further noted that the disposition of the Section 3.6 Petition and removal of the Bridge neither resolves the ultimate disposition of the crossing, nor necessarily precludes Wabash's claims against the City in Commonwealth Court. *Id.* at 15 (citing *Consolidated Rail Corp. v. City of Harrisburg*, 842 A. 2d 369 (Pa. 2004)).

As to the public interest in removal of the Bridge, the ALJ concluded:

If the condition of the Bridge further deteriorates, the Department may be required to close S.R. 51, which would result in detours for the more than 40,000 vehicles that use the route, including cars, trucks, school buses and public

transit. Trucks carrying hazardous and oversized loads cannot be re-routed through the tunnels and would require significant detours. Pittsburgh would lose the connection of a high-volume roadway and be very disruptive to the travelling public.

Interim Emergency Order at 16.

After considering the positions of the parties, the ALJ concluded that granting the Petitioners' Section 3.6 Petition is not injurious to the public interest.

c. Arguments in Briefs

As to the fourth element, in its Brief, the Petitioners assert that substantial evidence supports the finding that the relief sought by the Petitioners is in the public interest. The Petitioners note that the Department presented the NBIS Report and testimony of District Executive, Mr. Zang., which demonstrate the concerns raised by the Petitioners. The Petitioners assert that the threat to public safety is the primary issue raised by the Petitioners which they seek to alleviate by removal of the Bridge. The Petitioners argue that the interests of the traveling public are only remedied by the immediate removal of the Bridge and mitigation of the safety concerns raised during the emergency hearing. As such, the Petitioners argue that the Commission should find that the ALJ correctly concluded that the relief sought, the removal of the Bridge, is in the public interest. The Petitioners note that while the fourth requirement for obtaining interim emergency relief is a demonstration by a petitioner that the relief requested *would not be injurious to the public interest*, the removal of the Bridge would *benefit the public interest* by protecting and enhancing public safety. Petitioners Brief at 12-14.

The Petitioners argue that any detrimental impact to Wabash’s private interest is not substantial. Specifically, the Petitioners note that:

The testimony presented demonstrated that the Bridge has been closed entirely since December 2023 and, despite this fact, Wabash has been able to receive deliveries to its business. (N.T. 447). While the turning radius has been reduced by the closure of the Bridge, deliveries are still able to be made. Furthermore, the Department's designed removal will not cause further concerns because the post removal barricades will be approximately six inches from the current barricades thus permitting further truck movements. (N.T. 474).

Petitioners Brief at 13.

The Petitioners assert that as between the countervailing private business interest alleged by Wabash, and the Petitioner’s asserted public interest, the public interest must prevail. Petitioners Brief at 14 (citing Tr. at 90, 92, 129; Exh. 6 at 3). The Petitioners assert that ALJ Long properly weighed the Petitioners' statutory mandates to provide safe and efficient transportation infrastructure against the private business interests of the adjacent property owner, Wabash. *Id.*

The Petitioners further argue that Wabash's alleged property interest can be addressed through parallel legal action. Petitioners Brief at 13, fn. 2 (citing *CONRAIL*) (“substantial reasons support the view that Section 2704 does not divest the common pleas courts of jurisdiction to enforce private agreements, where the Commission has issued its decision without prejudice to such proceedings”) and, 26 Pa. C.S. § 502(c), *see Thomas A. McElwee & Son, Inc. v. SEPTA*, 948 A.2d 762 (Pa. 2008) (defacto taking on the basis of the interference with access during construction); *Sienkiewicz v. Com., Dept. of Transp.*, 842 A.2d 973 (Pa. Cmwlth. 2004) (alteration of traffic flow resulted in a defacto taking)).

The Petitioners note that prior Commission decisions demonstrate that removal of a crossing may still be in the public interest despite negative impacts to some members of the public, such as adjacent property owners. Petitioners Brief at 13 (citing *Monroeville v. Pa. PUC*, 600 A.2d 655 (Pa. Cmwlth. 1991) (PUC balanced the poor condition of the road and bridge and concluded that it was appropriate to close the bridge despite objections). *See also*, *Schwartz v. Delaware and Hudson Ry. Co. Inc.*, Docket Nos. C-2011-2237486, P-2011-2241780 (Opinion and Order entered December 5, 2013) (crossing closed and abolished given that it provided no benefits to the transportation network despite objections from adjacent property owner)).

The Petitioners reject Wabash's proposed repair plans as inadequate to address the condition of the Bridge, and an unreasonable solution to address the Petitioners' obligations for the long-term safety of the travelling public. The Petitioners characterize Wabash's plans as a temporary fix which does not offer a comprehensive rehabilitation of the Bridge. Petitioners Brief at 14 (citing Tr. at. 94, 137, 267, 364). The Petitioners note that the proposed steel repairs are insufficient in scope given the extent of the current deterioration. *Id.* (citing Tr. at 263-64, 458, 463). The Petitioners further note that the dirt fill and concrete deck would need to be removed to mitigate the threat of loose and falling concrete and this would likely uncover additional losses to steel cross sections, which are not visible at this time. *Id.* (citing Tr. at 101, 229, 471). The Petitioners conclude that in order to fully develop a comprehensive rehabilitation plan, additional plans and studies would need to be done. *Id.* (citing Tr. at 462-65, 471-75).

The Petitioners aver that in the present matter, time is of the essence given the condition of the Bridge. The Petitioners assert their readiness to immediately proceed with the planned removal of the safety concern which impacts a major arterial highway carrying approximately 40,000 vehicles per day and connecting to other major highways in the Pittsburgh area, *i.e.*, Interstate 376 and Liberty Boulevard and Tunnel. *Id.* (citing Tr. at 299-301).

In its brief, Wabash argues that when weighing one course of action versus another, *i.e.*, removal of the Bridge versus repairing the Bridge, the public interest is best served by enforcing the original order of the PSC issued in 1929 authorizing the construction of the Bridge and obligating the City to maintain the Bridge in perpetuity. Wabash Brief at 14-15 (citing *Electric v. South Canaan*, 2013 WL 1461735 (Pa. P.U.C.)). Wabash asserts that the public interest is best served by the Commission enforcing the mandates given the City in the 1929 order. *Id.*

Wabash further asserts that the public interest is also served by the Wabash employees working at the facilities which would be impacted by the removal of the Bridge and the many vendors and businesses transacting business with the facilities. Wabash also argues that the Petitioners have failed in their duty to maintain the Bridge in a safe and fiscally responsible manner and should not be permitted to evade its duty based upon “NBIS recommendations with the suppositions of one PennDOT employee who has been District Manager for less than a year.” Wabash Brief at 15.

d. Disposition

Based on a review of the record, we find that the Petitioners have demonstrated, by a preponderance of the evidence, that the requested authorization for removal of the Bridge would not be injurious to the public interest. In fact, we find that removal of the Bridge will expressly benefit and serve the public interest. We agree with the ALJ’s reasoning and analysis to conclude that, on balance, the public interest is served by the imminent removal of the Bridge to prevent the increased risk to the safety of the travelling public not only due to the poor condition of the bridge but also due to the increased risk of the need to close Route 51 should the deteriorating Bridge remain in place.

Consequently, we find that the Petitioners have carried the burden of demonstrating, by a preponderance of the evidence, that the authorization for removal of the Bridge as scheduled for July and August 2024, is not injurious to public interest.

E. Answer to the Material Question

The protection of the traveling public is the paramount issue in this matter. Under Chapter 27 of the Code, the question of whether the condition of the Bridge warrants immediate action to authorize its removal as scheduled in July and August 2024 falls squarely within our jurisdiction. Namely, Section 2702(a) of the Code expressly states that:

No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

66 Pa. C.S. § 2702(a). Further, the Code specifically charges the Commission with “the prevention of accidents and the promotion of the safety of the public.” 66 Pa. C.S. § 2702(b). Section 2702(c) of the Code provides, in relevant part, that the Commission “may abandon or vacate such highways or portions of highways as, in the opinion of the [C]ommission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any such crossings.” 66 Pa. C.S. § 2702(c). Under Section 2702(c) safety is one factor among many that the Commission may consider. See, *N. Lebanon Twp. v. Pa. PUC*, 962 A.2d 1237 (Pa. Cmwlth. 2007). If safety requires

the immediate alteration of a crossing, including removal of the Bridge, the Commission is vested with the power to do so by Section 2702(f), which provides that:

Upon the [C]ommission's finding of an immediate danger to the safety and welfare of the public at any such crossing, the [C]ommission shall order the crossing to be immediately altered, improved or suspended. Thereafter hearing shall be held and costs shall be allocated the manner prescribed in this part.

66 Pa. C.S. § 2702(f).

The record reflects that the subject above grade highway rail crossing was established pursuant to an order of the PSC in 1929 and was never abolished under a Commission proceeding. Therefore, the Commission still retains jurisdiction over the crossing. *See Norfolk S. Ry. Co. v. Pa. PUC*, 875 A.2d 1243 (Pa. Cmwlth. 2005)(the order of the PSC remains enforceable until vacated or modified by the Commission). The fact that the railroad sold the adjacent property does not divest the Commission of its jurisdiction. *See PA Game Comm'n v. Pa. PUC*, 651 A.2d 596 (Pa. Cmwlth. 1994), *appeal denied*, 664 A.2d 977 (Pa. 1994) (Commission retains jurisdiction over a highway-rail crossing even when the property is no longer owned by the railroad); *see also, AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999) (Section 2702(a) precludes any party from physical alteration of a crossing without PUC approval); *Dep of Transp. v. Pa PUC*, 282 A.2d 313, 316 (Pa. Cmwlth. 1971) (the Commission has the exclusive jurisdiction to determine whether and how a rail-highway crossing should be abolished, as well as to determine which party or parties should bear the costs of such abolition).

We conclude that the ALJ properly found that all four elements for emergency relief under 52 Pa. Code § 3.6(b) have been satisfied and supported by substantial evidence, and that therefore, the grant of relief requested by the Petitioners' Section 3.6 Petition was warranted in the circumstances. *See Interim Emergency Order*

at 16; 52 Pa. Code § 3.6(b). We note that the request for emergency relief by the moving party in this case seeks permission to act, *i.e.*, removal of the Bridge, as opposed to requesting that another party be required to act or be precluded from acting. Here, the moving party seeks an injunction for the Commission to direct the moving party to remove the bridge as a matter of public safety. While not typical, the emergency conditions and the scenario raised by the Petitioners' Section 3.6 Petition nevertheless raises the question of the immediate safety of the Bridge, which falls within our jurisdiction under Section 2702(f) (establishing the Commission's duty to act to address the condition of a crossing upon finding of an immediate danger to the safety and welfare of the public).

Accordingly, for the reasons set forth above, we conclude that the ALJ correctly determined that the Petitioners carried the burden of proof as to all four elements of Section 3.6(b) and satisfied the standard for the grant of emergency relief. *Glade Park East Home Owners Association v. Pa. PUC*, 628 A.2d 468 (Pa. Cmwlth. 1993).

Finally, we note that the ALJ's *Interim Emergency Order* was focused exclusively on the grant of interim emergency relief, *i.e.*, removal of the Bridge. Therefore, in addition to answering the certified question in the affirmative, we shall return the matter to the OALJ for such further proceedings as deemed necessary, to address the matter of the formal abolishment of the crossing and allocation of associated costs pursuant to Section 2704 of the Code, if any.

V. Conclusion

The ALJ concluded that the Petitioners demonstrated, by a preponderance of the evidence, that it is entitled to interim emergency relief, pursuant to 52 Pa. Code § 3.6(b). Accordingly, the ALJ granted the request for interim emergency relief.

Interim Emergency Order at 16. The question of the correctness of that ruling was then certified to us as a material question.

For the above-outlined reasons, we agree with the ALJ's conclusion. Accordingly, the certified question should be answered as follows:

Yes. ALJ Long properly issued the *Interim Emergency Order* granting the emergency relief requested by the Petitioners.

Based upon the foregoing discussion, we conclude initially that the question certified by ALJ Long is properly before the Commission. We will answer the material question in the affirmative and refer this matter back to the OALJ for further proceedings, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the following question certified to the Commission by Administrative Law Judge Mary D. Long, on June 6, 2024, is properly before the Commission:

Did ALJ Long properly issue the *Interim Emergency Order* granting the emergency relief requested by the Department of Transportation for the Commonwealth of Pennsylvania and the City of Pittsburgh?

2. That the Answer to the above material question is as follows:

Yes. ALJ Long properly issued the *Interim Emergency Order* granting the emergency relief requested by the Department of Transportation for the Commonwealth of Pennsylvania and the City of Pittsburgh.

3. That this matter is referred to the Office of Administrative Law Judge for further proceedings consistent with 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: July 1, 2024

ORDER ENTERED: July 1, 2024