

**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

INTERVENOR/PROTESTANT WABASH PROPERTIES, LLC'S MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER PURSUANT TO 52 PA. CODE §5.633, MOTION FOR DETERMINATION OF FINALITY PURSUANT TO PA.R.A.P. 341(C), AND MOTION FOR STAY

NOTICE TO DEFEND

To the above-named Applicants:

You are hereby notified to file a written response to these Motions within Twenty (20) days of service hereof or a judgment may be entered against you.

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**INTERVENOR/PROTESTANT WABASH PROPERTIES, LLC's MOTION FOR
CERTIFICATION OF INTERLOCUTORY ORDER PURSUANT TO 52 PA. CODE
§5.633, MOTION FOR DETERMINATION OF FINALITY PURSUANT TO PA.R.A.P.
341(C), AND MOTION FOR STAY**

Intervenor/Protestant Wabash Properties, LLC (“Wabash”) submits the following Motion for Certification of Interlocutory Order Pursuant to 52 Pa. Code §5.633, Motion for Determination of Finality Pursuant to Pa.R.A.P. 341(c), and Motion for Stay, stating as follows:

FACTUAL HISTORY AND PROCEDURAL

1. On May 23, 2024, the City of Pittsburgh (“the City”) and the Pennsylvania Department of Transportation (“PennDOT”) filed a *Petition for Interim Emergency Order*, seeking emergency authorization to demolish the Wabash Bridge (“the Bridge”) pursuant to 66 Pa.C.S. §2702(f) and 51 Pa.Code §3.6.

2. Specifically, §2702(f) of the Public Utility Code authorizes the Commission to alter, improve or suspend a railroad crossing if it creates “an immediate danger to the safety and welfare of the public.”

3. Procedurally, Rule §3.6 of the Public Utility Commission’s Rules of Administrative Practice and Procedure authorize the Public Utility Commission (“the Commission”) to issue emergency relief when “a situation presents a clear and present danger to life or property.” 42. Pa.Code §3.1, §3.6.

4. Here, the City and PennDOT’s *Petition for Interim Emergency Order* sought the Commission’s “rubber stamp” for the Bridge’s demolition, which demolition had been scheduled presumptively, and before the City and PennDOT had even instituted these proceedings before the Commission.

5. In response to the *Petition for Interim Emergency Order*, on May 28, 2024, Wabash filed an *Answer and New Matter*, averring that the Commission is without jurisdiction to authorize the demolition of the Bridge because there is litigation presently pending in the Commonwealth Court, Docket No. 279 MD 2024, which includes contractual and property issues that are not properly before the Commission.

6. In that Commonwealth Court litigation Wabash seeks an adjudication of its property rights and contractual rights related to the Bridge. A copy of Wabash’s *Amended Petition for Review* is attached hereto as Exhibit 1.

7. The City and PennDOT’s *Petition for Interim Emergency Order* came before Administrative Law Judge (“ALJ”) Mary D. Long for a hearing on June 3 and June 4, 2024.

8. On June 6, 2024, ALJ Long issued an *Order Granting Interim Emergency Relief and Certifying Material Question* which declared, *inter alia*, that PennDOT “is authorized to remove the bridge carrying the abandoned cartway of Pittsburgh & West Virginia Railway Company (and West Side Belt Railroad Company) above S.R. 0051 in the City of Pittsburgh,

Allegheny County, consistent with the Final Structure Plans attached to the May 2, 2024, Application.”

9. The parties submitted Briefs in support of, and in opposition to, the ALJ’s Order, and then on July 1, 2024, the Commission issued an *Opinion and Order* declaring that ALJ Long properly authorized the demolition of the Bridge.

10. For the reasons set forth below, Wabash now moves the Commission to certify its interlocutory *Opinion and Order* for appeal to the Commonwealth Court pursuant to 52 Pa. Code §5.633 and declare the *Opinion and Order* final pursuant to Pennsylvania Rule of Appellate Procedure 341(c).

11. Both §5.633 and Rule 341(c) set forth procedures to convert interlocutory orders like the Commission’s *Opinion and Order* into final orders which may be appealed to the Commonwealth Court.

12. An immediate appeal of the Commission’s interlocutory order is appropriate here because the Commonwealth Court is the tribunal that has both original jurisdiction of Wabash’s currently pending claims and appellate jurisdiction over the issues presented in the Commission’s interlocutory *Opinion and Order*.

13. In short, all roads in this dispute lead to the Commonwealth Court, so they should be before that tribunal now, and consolidated accordingly.

14. To ensure that occurs, and consistent with the mandatory requirements of Rule 341(c)(1), Wabash further moves the Commission for a stay of the Bridge’s removal and/or demolition while the instant Motions are pending.

STANDARD

15. PUC Rule of Administrative Practice and Procedure §5.633, “Certification of interlocutory orders,” provides the following:

(a) When the Commission has made an order which is not a final order, a party may by motion request that the Commission find, and include the findings in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal to Commonwealth Court from the order may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and is procedurally governed by § 5.103(a)—(c) (relating to hearing motions). Unless the Commission acts within 30 days after the filing of the motion, the motion will be deemed denied.

(b) Neither the filing of a motion under subsection (a), nor the adoption of an amended order containing the requested finding, will stay a proceeding unless otherwise ordered by the Commission or Commonwealth Court.

16. Pennsylvania Rule of Appellate Procedure §341(c) provides the following:

Determination of Finality. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the trial court or other government unit may enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered. In the absence of such a determination and entry of a final order, any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order. In addition, the following conditions shall apply:

(1) An application for a determination of finality under subdivision (c) must be filed within 30 days of entry of the order. ***During the time an application for a determination of finality is pending, the action is stayed.***

(2) Unless the trial court or other government unit acts on the application within 30 days after it is filed, the trial court or other government unit shall no longer consider the application and it shall be deemed denied.

(3) A notice of appeal may be filed within 30 days after entry of an order as amended unless a shorter time period is provided in Pa.R.A.P. 903(c). Any denial of such an application is reviewable only through a petition for permission to appeal under Pa.R.A.P. 1311.

17. The Comments to Rule §341(c) provide the following:

Subdivision (c)—Determination of finality—Subdivision (c) permits an immediate appeal from an order dismissing less than all claims or parties from a case only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Factors to be considered under subdivision (c) include, but are not limited to:

- (1) whether there is a significant relationship between adjudicated and unadjudicated claims;
- (2) whether there is a possibility that an appeal would be mooted by further developments;
- (3) whether there is a possibility that the court or government unit will consider issues a second time; and
- (4) whether an immediate appeal will enhance prospects of settlement.

ARGUMENT

I. The Commission’s Opinion and Order Should be Certified Final Under §5.633

1. The Commission’s July 1, 2024, Opinion and Order Involves Controlling Questions of Law as to which there are a Substantial Grounds for Difference of Opinion

18. Wabash incorporates by reference the averments set forth in the proceeding paragraphs as if set forth in full herein.

19. The Commission’s July 1, 2024, *Opinion and Order* involves multiple controlling questions of law on which there are substantial grounds for difference between Wabash and the City and PennDOT.

20. First, Wabash and the City and PennDOT disagree whether the Bridge’s condition constitutes an “emergency” as defined by §3.1 and an “immediate danger” as required by §2702(f).

21. For a complete analysis of this issue, Wabash incorporates by reference the averments set forth in its *Brief in Opposition to Order Granting Interim Emergency Relief and Certifying Material Question* filed with the Commission on June 13, 2024.

22. In sum, PennDOT's expert witness, Jason Zang, PE, conceded that the Bridge can bear its own weight, or dead load, and its overall condition may be improved with regularly scheduled maintenance.

23. PennDOT's expert witness further conceded that PennDOT's own National Bridge Inspection Standards ("NBIS") Reports only note that the Bridge should continue to be inspected every three months while no "Priority 0" measures were required.

24. Indeed, multiple years of NBIS Reports state the condition of the Bridge presents no clear and present danger to life or property.

25. Conversely, Wabash's expert witness, John Schneider, PE, opined that the Bridge's load rating could be increased with modest repairs similar to those performed by the City and PennDOT previously and which have been recommended for multiple years by PennDOT's NBIS reports.

26. Accordingly, there is substantial ground for a difference of opinion over the condition of the Bridge and whether the Bridge should be repaired in accordance with the NBIS report findings. That difference of opinion was determinative in deciding a controlling legal question posed by the City and PennDOT's *Petition for Interim Emergency Order*: does the Bridge's condition constitute an "emergency" and "immediate danger"?

27. Additionally, the Commission failed to enforce a 1929 Public Service Commission ("PSC") Order which requires the City to forever maintain the Bridge as part of these proceedings.

28. The enforcement of the 1929 PSC Order was another controlling question of law for which there was a substantial ground for difference of opinion between the parties.

29. Further, and equally critical, in its *Answer and New Matter* to the City and PennDOT's *Petition for Interim Emergency Order Wabash* raised the related affirmative defenses of jurisdiction and prior pending action.

30. In the Commonwealth Court action Wabash asserts claims for breach of contract, Mandamus, Declaratory Judgment, Due Process and an Injunction.

31. In the Commonwealth Court action Wabash seeks enforcement of the City's and PennDOT's obligations to maintain the Bridge, protection of Wabash's rights of support from the Bridge below and the enjoinder of the Bridge's demolition by the City and PennDOT.

32. The adjudication of those rights is within the exclusive jurisdiction of the Commonwealth Court.

33. The Public Utility Code empowers the Commission to enforce those regulations expressly created by the Code and generally to supervise and regulate all public utilities doing business within the Commonwealth. 66 Pa.C.S §501(a)-(b).

34. While enforcement of the 1929 PSC Order is within Commission jurisdiction, there can be no dispute that the Commission has no jurisdiction to adjudicate the common law rights of support that the City and PennDOT owe to Wabash, or the City's contractual duties to repair and renew the Bridge "forever" as set forth in the relevant City of Pittsburgh Ordinances.

35. Yet the Commission's July 1, 2024, *Opinion and Order* is just such an abdication and adjudication. By authorizing the Bridge's demolition, and failing to enforce the contractual obligations contained in the 1929 PSC Order, the Commission has irreversibly prejudiced Wabash's property and contractual rights.

36. The Commission and ALJ Long concluded that the Bridge could be demolished without prejudicing Wabash's property rights and contractual rights advanced in the Commonwealth Court litigation.

37. In reaching that conclusion the Commission and ALJ Long relied upon the Pennsylvania Supreme Court's decision in *CONRAIL v. City of Harrisburg*, 842, A.2s 369 (Pa. 2004).

38. *CONRAIL* was a cost allocation case related to a private maintenance agreement between a railroad and municipality over a sewer. The Commission allocated costs in a manner inconsistent with the maintenance agreement, and the Supreme Court held that Conrail could still pursue its contractual remedies under the maintenance agreement in a Commonwealth Court action.

39. That is precisely what Wabash is doing with in the Commonwealth Court litigation, including seeking to enjoin the demolition of the Bridge.

40. Importantly, there is a significant distinction to be drawn from the contractual remedy sought in the *CONRAIL* decision and the demolition the City and PennDOT seek in these proceedings.

41. The process of allocating costs for a sewer relocation is simply too different from the facts of this case to act as a controlling precedent here. Wabash cannot enforce a duty to repair the Bridge if there is no Bridge to repair. The facts of this case therefore stand in stark contrast to *CONRAIL*.

42. The facts of this case are instead analogous to *Norfolk Southern Railway Company v. Pennsylvania Public Utility Commission*, 875 A.2d 1243 (2005) in which Norfolk Southern was required to maintain a decades old bridge in accordance with a 1930 PSC Order directing Norfolk's

predecessor be responsible for all costs and expenses in connection with the subject bridge, including its future maintenance.

43. Permanently removing the Bridge will destroy the sole means of vertical and lateral support for Wabash's property and is directly contrary to the 1929 PSC Order which requires the City to forever maintain the Bridge.

44. This jurisdiction dispute is likewise a controlling legal issue on which the parties disagree, and which is determinative in this action: if ALJ Long or the Commission determined that jurisdiction was proper in the Commonwealth Court, these PUC proceedings would have been dismissed.

45. For that reason, Wabash has demonstrated that there are several controlling issues of law which are both determinative in these proceedings and for which there is a substantial difference of opinion.

2. An Immediate Appeal to the Commonwealth Court from the Interim Emergency Order Will Materially Advance the Ultimate Termination of the Matter

46. On June 19, 2024, Wabash filed a *Petition for Preliminary Injunction* in the Commonwealth Court litigation.

47. That Preliminary Injunction is scheduled for a hearing on July 10, 2024.

48. Prior to the hearing, the Court Ordered the parties to file briefs on the issues of, *inter alia*, jurisdiction and the merits of Wabash's *Petition for Preliminary Injunction*.

49. An immediate appeal to the Commonwealth Court from the Commission's *Opinion and Order* will materially advance the ultimate termination of this PUC proceedings as required by §5.633.

50. The Commonwealth Court has both original jurisdiction over the claims Wabash has made in the Commonwealth Court litigation, and appellate jurisdiction over the determinations of the Commission.

51. In short, the Commonwealth Court is the ultimate arbiter of all controversies between these parties.

52. Accordingly, because there is a disagreement between the parties over a controlling issue of law and the appeal to the Commonwealth Court may advance the ultimate determination of the Commission proceedings, Wabash respectfully requests the Commission certify its July 1, 2024, interlocutory *Opinion and Order* for appellate review with the Commonwealth Court.

II. The Emergency Interim Order Should be Determined Final Under the Four-Step Analysis of Pa.R.A.P. 341(c)

1. There is a significant relationship between adjudicated and unadjudicated claims.

53. Pennsylvania Rule of Appellate Procedure 341(c) authorizes a governmental unit to enter a final order as to fewer than all claims upon an express determination that an immediate appeal would facilitate resolution of the entire case.

54. Here, Wabash moves the Commission to determine that its interlocutory *Opinion and Order* is final so that Wabash may take those issues on appeal to the Commonwealth Court and consolidate that them with the existing litigation in that forum.

55. To assist in making the determination of whether an interlocutory order should be deemed final, the Comments to Rule 341(c) offer guidance in the form of four considerations, all of which must be considered when determining whether an immediate appeal will facilitate resolution of the entire care. *Bailey v. RAS Auto Body, Inc.*, 85 A.3d 1064, 1068-1068 (Pa. Super 2014).

56. The first is whether the adjudicated claim and the unadjudicated claims bear a “significant relationship.”

57. Given the parallel forums where the parties are litigating these issues—before the Commission and the Commonwealth Court—there are in fact two sets of “unadjudicated claims” to consider, both of which are significantly related to the demolition authorization contained in the Commission’s *Opinion and Order*.

58. First, in the PUC proceedings there remains the adjudication of the City and PennDOT’s application to abolish the Bridge. The application to demolish the Bridge and the application to abolish the crossing arise from the same section of the Code, §2702, as does the allocation of costs for the same.

59. Therefore, the adjudicated and unadjudicated claims are significantly related in the Commission proceedings.

60. Second, Wabash’s unadjudicated claims in the Commonwealth Court action are also significantly related to the Commission’s adjudication in the July 1, 2024, *Opinion and Order*.

61. As described above, one form of relief Wabash seeks is enforcement of contractual and common law duties to repair the Bridge and provide vertical and horizontal support to the surface of its property.

62. Clearly those contractual and property rights, which depend on the Bridge’s existence, are significantly related to an order authorizing its demolition.

63. Accordingly, the claim adjudicated by the Commission’s July 1, 2024, *Opinion and Order* is significantly related to both the unadjudicated claims in these PUC proceedings and the Commonwealth Court.

2. *There is no possibility that an appeal would be mooted by further developments.*

64. The second consideration provided by the Comments to Rule 341(c) is whether further proceedings before the Commission could moot the demolition authorization contained in the Commission's July 1, 2024, *Opinion and Order*.

65. In these proceedings the City and PennDOT seek two forms of relief: the demolition of the Bridge and abolition of the railroad crossing.

66. The Commission has authorized the demolition of the Bridge, which is scheduled to begin imminently.

67. The City and PennDOT's remaining claim—the abolition of the crossing—remains to be adjudicated by the Commission.

68. As a practical matter, that railroad crossing was abandoned more than sixty (60) years ago. Proceedings formally abolishing the crossing will not change the emergency order authorizing the Bridge's demolition.

69. It is therefore impossible for future developments in the remaining abolishment claim to render the demolition order moot, if for no other reason than the demolition would have already transpired.

3. There is no possibility that the court or government unit will consider this issue a second time.

70. The third consideration provided by the Comments to Rule 341(c) is whether the court or government unit will consider the Bridge's demolition a second time.

71. The City and PennDOT have never expressed an intention to reconsider their decision to demolish the Bridge.

72. Quite the contrary, the City and PennDOT sought the Commission's authorization to demolish the Bridge through emergency proceedings, in an attempt to circumvent the

Commonwealth Court's jurisdiction over the property and contractual rights that are being litigated presently in that forum.

73. In fact, during a telephone conference with the Honorable Judge Michael J. Wojcik in the Commonwealth Court litigation, counsel for the City and PennDOT confirmed that the Bridge's demolition remains scheduled for July 24, 2024.

74. Further, ALJ Long and the Commission have authorized the Bridge's demolition in consecutive orders.

75. There is therefore no reason to believe that either the City, PennDOT or the Commission will ever reconsider demolishing the Bridge.

76. This conclusion is particularly assured given that the demolition is scheduled to start in less than three weeks.

4. An immediate appeal will enhance prospects of settlement.

77. Fourth and finally, the Comments to Rule 341(c) recommend considering whether an appeal to the Commonwealth Court could enhance any prospects of settlement and resolution to the dispute between Wabash and the City and PennDOT.

78. An immediate appeal does not only enhance the prospect of settlement, but it is the ***only*** prospect for a resolution between the parties that involves repair to the Bridge.

79. In short, the parties cannot reach a settlement regarding the City and PennDOT's obligations to repair the Bridge, and supply vertical and horizontal support of Wabash's property, if the Bridge is demolished.

80. Further, the looming demolition schedule affords Wabash no leverage with which to negotiate any kind of resolution with the City and PennDOT, who have demonstrated that they will proceed with the demolition until an order of court compels them not to.

81. Accordingly, all four factors presented in the Comments to Rule 341(c) weigh in favor of immediate appeal to the Commonwealth Court, where the controversy between the parties is destined to arrive regardless of the path taken.

III. The Commission Proceedings Must be Stayed While This Motion is Pending Under Pa.R.A.P. 341(c)(1)

82. Rule 341(c)(1) states, “During the time an application for determination of finality is pending, the action is stayed.”¹

83. The use of the word “stay” in Rule 341(c) indicates that all proceedings in a matter *must* be halted or postponed while an application for determination of finality is pending before the trial court. *Roth Cash Register Company, Inc. v. Micro Systems Inc.*, 868 A.2d 1222, 1227 (Pa. Super 2005).

84. A “stay” is defined as the “postponement or halting of a proceeding, judgment or the like.” *Id.*, at 1226 (quoting Black’s Law Dictionary, Seventh Edition, 1999).

85. The stay mandated by Rule 341(c)(1) is therefore nondiscretionary, and requires the Commission to stay the order authorizing the removal and/or demolition of the Bridge while the instant Motions are pending.

WHEREFORE, Wabash respectfully requests that the Commission grant Wabash’s Motions and amend its July 1, 2024, *Opinion and Order* as follows:

1. An immediate appeal of the Commission’s *Opinion and Order* entered July 1, 2024, would facilitate resolution of the entire case pursuant to Pa.R.A.P. 341(c) and the Comments thereto; and

¹ Rule 102 of the Pennsylvania Rules of Appellate Procedure defines an “application” to include “a petition or motion.”

2. The Commission's *Opinion and Order* entered July 1, 2024, involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal to the Commonwealth Court from the *Opinion and Order* may materially advance the ultimate termination of the matter pursuant to 52 Pa. Code §5.633;
3. The removal and/or demolition of the Bridge authorized by Administrative Law Judge Mary D. Long's June 6, 2024, *Order Granting Interim Emergency Relief and Certifying Material Question* and the Commission's July 1, 2024, *Opinion and Order* is **STAYED** while Wabash's *Motion for Determination of Finality Pursuant to Pa.R.A.P. 341(c)* is pending.

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 8th day of July, 2024, on the following:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,

NO. 279 MD 24

Petitioner,

vs.

**AMENDED PETITION FOR
REVIEW**

**CITY OF PITTSBURGH and
COMMONWEALTH OF
PENNSYLVANIA,
DEPARTMENT OF
TRANSPORTATION,**

**FILED ON BEHALF OF:
Wabash Properties, LLC, Petitioner**

COUNSEL OF RECORD:

Respondents.

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JURY TRIAL DEMANDED

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(412) 281-1119**



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,)	
)	
Petitioner,)	
)	
vs.)	NO. 279 MD 24
)	
CITY OF PITTSBURGH and)	AMENDED PETITION FOR
COMMONWEALTH OF)	REVIEW
PENNSYLVANIA, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondents.)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Amended Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the Petitioner. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE(S) SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

**Central Pennsylvania Legal Services,
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

WABASH PROPERTIES LLC,)
)
Petitioner,)
)
vs.) NO. 279 MD 24
)
CITY OF PITTSBURGH and) **AMENDED PETITION FOR**
COMMONWEALTH OF) **REVIEW**
PENNSYLVANIA, DEPARTMENT)
OF TRANSPORTATION,)
)
Respondents.)

AMENDED PETITION FOR REVIEW

AND NOW, comes the Petitioner, Wabash Properties LLC (“Wabash”), by and through its counsel of record, Jenna R. DiFrancesco, Esquire, Jonathan M. Kamin, Esquire, and Jonathan G. Preston, Esquire, and files the within Amended Petition for Review, averring as follows:

INTRODUCTION

1. On May 22, 2024, Wabash filed an Amended Complaint at this Docket Number, asserting claims for Breach of Contract, Declaratory Judgment, Mandamus, Violation of Due Process and an Injunction.
2. On May 28, 2024, the Court issued a *per curiam* Order declaring that the Amended Complaint shall be treated as a Petition for Review addressed to the

Commonwealth Court's original jurisdiction and governed by Chapter 15 of the Pennsylvania Rules of Appellate Procedure.

3. On June 12, 2024, Defendant the Pennsylvania Department of Transportation ("PennDOT") filed Preliminary Objections to the Amended Complaint.

4. Wabash now files this amended pleading, which will be styled an *Amended Petition for Review* so to be consistent with the Court's May 28, 2024 Order.

5. The dispute between the parties arises from the joint plan of the City of Pittsburgh ("the City") and PennDOT to demolish the Wabash Bridge ("the Bridge"), which demolition is presently scheduled to begin on or about July 24, 2024.

6. The Bridge is a City-owned redundant bridge that was constructed nearly a century ago to serve as a railway crossing. It was engineered to carry freight locomotives, which average approximately two hundred (200) tons.

7. That railway crossing was abandoned long ago and now serves as a critical means of access and horizontal and vertical support for the current owner of the property above and surrounding the Bridge, Petitioner Wabash.

8. As depicted in the first aerial image below, the Bridge spans across Saw Mill Run Boulevard/State Route 51, which runs under the Bridge and traverses

Wabash's property. In the second aerial image, the approximate location of the Bridge is outlined in yellow:



9. To fully comprehend the legal dispute between Wabash and the City and PennDOT one must understand the Bridge's history, the express duties that were a condition of its construction, and the events that lead us to the present day.

10. 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").

11. Presently, the surface of the Bridge, which is owned in *fee* by Wabash, 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.

12. When the Railroad contracted with the City to build Saw Mill Run Boulevard through the Railroad's property, the Railroad received consideration in return including, *inter alia*, an absolute right of horizontal and lateral support of its land atop and on either side of the Bridge, a right of way across the Bridge and, *importantly*, the City's agreement to maintain the Bridge in perpetuity.

13. Wabash purchased the land above and on both sides of the Bridge in 2004. Therefore, it is a successor in interest to the Railroad and all of the benefits the Railroad received from the City pursuant to the agreement to build Saw Mill Run Boulevard and the Bridge.

14. A Wabash affiliate currently operates an automobile parts distribution center in the entire building, identified as "Rohrich GM Parts Center" in the aerial view above.

15. For decades, the City has intentionally and willfully neglected its duties to maintain the Bridge for decades, despite ample notice from Wabash and other interested parties, including PennDOT itself, that the Bridge required necessary and routine maintenance.

16. Wabash, as the owner of the land that sits atop, and adjacent to, the Bridge, relies on the Bridge as the critical means of horizontal and vertical support of its property as well as ingress, egress and regress to its property.

17. Without the Bridge and the right of way across it, the automobile parts distribution warehouse cannot operate as desired, nor can the tractor trailer trucks that utilize the warehouse appropriately access the same.

18. In October of 2022, the City informed Wabash of its intent to close and then raze the Bridge because the Bridge's allegedly deteriorated condition supposedly rendered it unsafe to motorists traveling below on Saw Mill Run Boulevard.

19. 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 can be repaired at a cost that is less than the proposed cost to demolish it.

20. Nevertheless, the City and PennDOT remain adamant in their purely economic decision to demolish the Bridge, despite the reasonable alternatives laid before them that would allow them to comply with their contractual obligations.

21. Faced with this existential threat to its property rights, contractual rights and business operations, Wabash must now seek Court intervention to protect its rights of horizontal and vertical support, rights of access across the Bridge and force the City and PennDOT to comply with their legal duties and obligations to maintain the Bridge.

THE PARTIES, JURISDICTION AND VENUE

22. Wabash is a Pennsylvania limited liability company having an address of 2020 West Liberty Avenue, Pittsburgh, Pennsylvania 15226.

23. The City is a municipality classified as a Second-Class City with its municipal offices at the City-County Building, 414 Grant Street, City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania 15219.

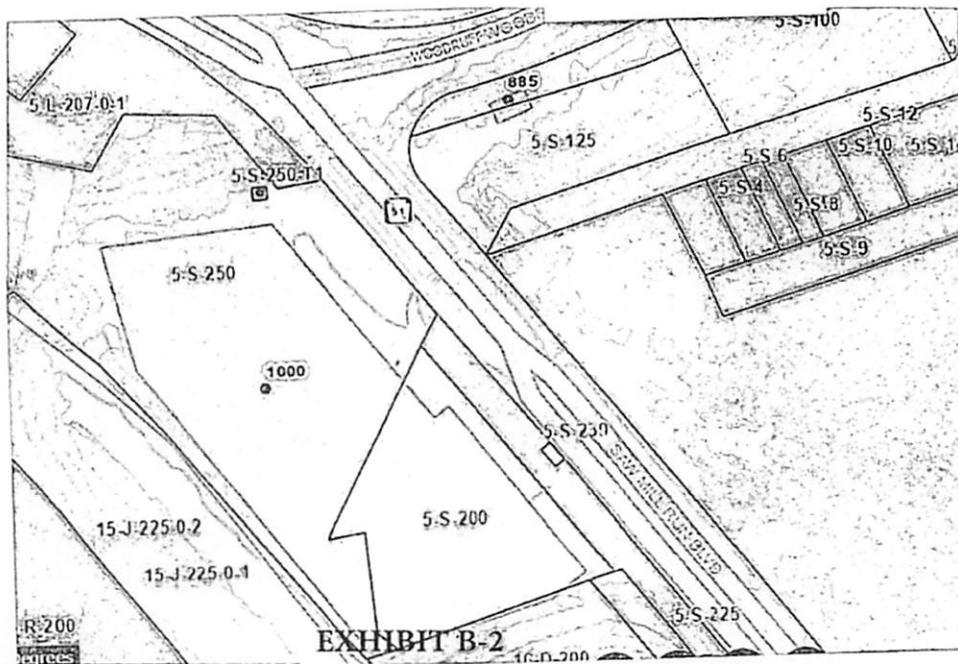
24. PennDOT is a governmental entity that oversees transportation issues throughout the Commonwealth of Pennsylvania pursuant to powers vested by the Pennsylvania Administrative Code, with a principal office located at Exit 247 of the Pennsylvania Turnpike System, in Lower Swatara Township, Dauphin County, Pennsylvania.

25. Jurisdiction and venue are proper with the Commonwealth Court pursuant to 42 Pa.C.S. 761 because PennDOT, an agency of the Commonwealth, is a party.

FACTUAL BACKGROUND

History of Property and the Bridge

26. Wabash is the record title owner of three parcels of land situate in the 19th Ward of the City of Pittsburgh, Allegheny County, Pennsylvania: 5-S-125; 5-S-200; 5-S-250 (collectively “the Property”), the plot map for which is below and the vesting deed for the Property is attached hereto as **Exhibit “A”**.



27. The relevant history of those parcels begins more than a century ago, at a time when the Railroad owned the entirety of the Property in *fee*.

28. At that time, the City expressed a desire to extend Saw Mill Run Boulevard in a manner that would run through the Railroad's property.

29. The Railroad and the City entered into an agreement wherein the Railroad would allow the City to excavate a large portion of a rocky hillside for the construction of Saw Mill Run Boulevard, as depicted below:



30. In exchange for this access and the rights associated therewith, the City agreed to construct the Bridge to support the Railroad's property above and on either side of the Bridge, and connect the Railroad's property adjacent to the excavated area.

31. Before the Bridge was constructed the City enacted Ordinance No. 72, 1925 ("1925 Ordinance") and Ordinance No. 247, 1929 ("1925 Ordinance", "the 1929 Ordinance" and collectively "the Ordinances"), which codified the City's contractual obligations. The Ordinances are attached to the Amended Complaint as **Exhibit "B"**.

32. The Ordinances provide: "[t]he cost of construction, maintenance of the tunnel and sewer provided herein shall be *forever* at the expense of the City" and "the said City of Pittsburgh *shall be responsible for the support of the tracks and roadbed of the Railway Company during such construction and shall be responsible at all times thereafter for any insufficiency or failure of the subway structures erected by the City to furnish adequate support*" (emphasis added).¹

¹ At various times the recorded instruments identify the Bridge as a "viaduct," a "subway" or a "tunnel." The recorded instruments indicate the Bridge was originally planned to be a tunnel under the Railroad's property. Those plans were changed to the Bridge which exists today, presumably due to the difficulty and/or cost of constructing a tunnel at this location. Regardless, the recorded instruments are referring to the same structure, which the City, PennDOT, Wabash and other stakeholders call "the Bridge."

33. In addition to the obligations contained in the City Ordinances, the City also entered into a contract with Allegheny County (“the City-County Contract”) dated April 2, 1929, which required the City to:

maintain and keep the Saw Mill Run Boulevard, including all structures incidental to the improvement...in good repair. [To] assume and become liable for all damages occasioned by reason of this improvement by the opening, locating, relocating, widening, establishing or re-establishing of grades required for the aforesaid improvement of the Saw Mill Run Boulevard [and to] assume and become liable for all damages to property, including surface and sub-surface structures, caused by said improvement of the Saw Mill Run Boulevard, including damages to person or property occasion from any obstruction on said roadway or part thereof.

34. The City-County Contract, ratified by the PUC and a 1929 Order authorizing construction of the Bridge, are attached hereto as **Exhibits “C” and “J”**.

35. By 1961 the Railroad had ceased usage of the tracks on the Bridge. The Railroad and the City—which had acquired a portion of the Property in 1927 in consideration and contemplation of the construction of the Bridge—sought to divest themselves of ownership of their respective portions of the current-day Property.

36. The parcels that now constitute the Property were unified in 1961 by two separate deeds: the first from the City to Hahn Furniture-Company and the second from the Railroad to Hahn Furniture-Company (“Hahn”). Those deeds are attached hereto as **Exhibit “D”**.

37. Critically, the recorded instruments and title reports reveal that the conveyances to Hahn included not only a fee interest in the land on either side of the

Bridge, but also the land that sits *atop* the Bridge, as highlighted in blue in the survey below:



That survey is attached hereto as **Exhibit “E”**.

38. The metes and bounds of the Property are consistent with the express intent of the agreement between the Railroad, the City and the County to preserve the Railroad’s “*land*” above the Bridge, which runs “under the tracks and *property*” of the Railroad:

near W. LEMUS MONROE STREET to a point near
Vale street shall be in a permanent
tunnel or subway under the tracks
and property of the said Railroad
Companies at such an elevation as
not to interfere with the main-
tenance of the tracks of the
Railroad Companies on their land.
Plans of the tunnel and sewer

39. Additionally, the City granted Hahn an express 35' easement (highlighted in yellow in the survey above) over certain land it retained adjacent to Saw Mill Run Boulevard, so that Hahn could access Saw Mill Run Boulevard from the entirety of the now-consolidated parcels it had purchased from the City and the Railroad.

40. That easement was appurtenant to the land which was simultaneously being conveyed from the Railroad to Hahn, so that the unified parcels could all access Saw Mill Run Boulevard:

TOGETHER with an easement or right-of-way for ingress, egress and regress only over a strip of land, 35 feet wide, bounded and described as follows:

BEGINNING at a point at the southeasterly corner of the land above described; thence along said land, North 39° 10' 35" West, 35.00 feet to a point; thence North 72° 25' 45" East, 37.64 feet to a point on the southwesterly side of Saw Mill Run Boulevard; thence along said side of Saw Mill Run Boulevard, South 39° 10' 35" East 35.00 feet to a point; thence by other land of the City of Pittsburgh, South 72° 25' 45" West, 37.64 feet to the place of beginning.

THE ABOVE EASEMENT OR RIGHT-OF-WAY, shall be appurtenant to the land above described and also appurtenant to the land conveyed by The Pittsburgh & West Virginia Railway Company to Hahn Furniture Company, the Grantee herein, by Deed dated August 25, 1961, and to be recorded.

41. Relying upon its contractual and property rights of horizontal and vertical support and access across the unified parcels, Hahn then built the 2.3-acre under-roof warehouse facility ("Facility") from which Wabash currently operates its automobile parts distribution business.

42. The Facility, the Property and the Bridge have therefore been continuously used for commercial purposes to transport goods for sale to and from the Facility since the Facility was constructed in the 1960's.

43. Wabash purchased the Property in 2004. The vesting deed for the Property contains the following language regarding the right of way over the Bridge, which the deed refers to as a "viaduct":

TOGETHER WITH a right of way over the aforesaid viaduct for ingress, egress, and regress, for pedestrian and vehicular traffic to the Grantee herein, its successors and assigns.

44. Wabash is therefore successor in interest and title to all prior owners of the Property, as well as beneficiary of those rights and obligations imposed upon the City through the Ordinances and City-County Contract.

45. The recorded instruments expressly and unambiguously demonstrate that Wabash, as the successor to Hahn, has a fee simple interest in the land above and surrounding the Bridge.

46. Wabash therefore enjoys the benefit of all rights associated with *fee* ownership under Pennsylvania law, including an absolute right of support from the Bridge below as well as access across it.

Wabash's Operations and Reliance on the Bridge

47. The Property is zoned for commercial use and is currently being used to operate an automobile parts wholesale distribution business at the Facility.

48. The Facility employs approximately 60 employees and facilitates the distribution of automobiles and automobile parts to 1,000 dealerships, auto body and repair shops.

49. For twenty years the Bridge is and has remained the critical means of ingress, egress and regress for large delivery vehicles to access the Property and the only location for Wabash's employees and customers to park their vehicles while working at or visiting the Facility, all of which are necessary for the operation of Wabash's business.

50. Every day, over 350 daily local deliveries, 20 wholesale deliveries, 6 straight truck deliveries and 5 daily tractor-trailers access the Facility using the Bridge for ingress, egress and regress to and from the Property.

51. Not only is the location of the Property integral for the business operation located at the Facility, but Wabash also leases the Facility to various entities associated with Rohrich Automotive.

52. Moving the location of the Facility would have far-reaching impacts to the South Hills Rohrich dealerships and repair shops, as well as multiple other South Hills' automobile dealers and repair shops.

53. Additionally, Wabash is subject to various other agreements with car manufacturers like GM and Toyota that will not permit Wabash to relocate the Facility to another location.

54. In sum, the Property is the only feasible location for Wabash to operate its business from the Facility, and it can only operate the Property with the horizontal and vertical support and access provided by the Bridge.

Controversy Giving Rise to this Action

55. After purchasing the Property in 2004, Wabash operated the Facility from the Property for the next fourteen years without ever receiving notice from either the City or PennDOT that the Bridge's condition was of concern.

56. Then, on September 14, 2018, Wabash received correspondence from PennDOT requesting copies of the Bridge's most recent National Bridge Inspection Standards ("NBIS") report, apparently upon the mistaken belief that Wabash owned the Bridge and had been obtaining NBIS reports since it purchased the Property. That letter is attached hereto as "Exhibit H."

57. These federally-prescribed NBIS reports are used to identify necessary repairs to a bridge and the appropriate timeframe within which those repairs should be made.

58. Wabash had not obtained any NBIS reports because it did not own the Bridge, so the City and PennDOT engaged a consultant to perform the requisite inspections and author NBIS reports with their findings.

59. Between April 2019 and April 2024, eleven (11) NBIS inspections were performed at the Bridge which identified numerous deficiencies with the Bridge needing immediate attention by the City.² Certain of the priority deficiency letters sent for each aforementioned NBIS inspection were obtained through a Right-to-Know request and are attached to the Amended Complaint as **Exhibit “F.”**

60. A review of the NBIS inspection reports reveals that the same or similar maintenance and repair recommendations were consistently made in the NBIS reports.

61. However, the City continued to willfully neglect the Bridge for several years, allowing it to deteriorate further despite modest and inexpensive repairs which

²The Bridge should have received two (2) NBIS inspections during this time period—the increased frequency and cost of the inspections are due to the City’s failure to repair and maintain the Bridge, as the NBIS requires the performance of an inspection every two (2) years if the bridge is maintained in a safe condition by its owner.

would have prolonged the Bridge's life considerably and obviated the need for demolition.

62. On October 26, 2022, the City informed Wabash of its intent to shut down the Bridge. The October 26, 2022, letter from the City is attached hereto as **Exhibit "G."**

63. On December 5, 2023, following ongoing negotiations between Wabash and the City—during which the only resolution offered by the City was Wabash taking ownership of the Bridge and repairing it itself—the City informed Wabash that PennDOT would be immediately closing the Bridge to all vehicular and pedestrian traffic across it.

64. This decision was made unilaterally and without any consideration given to Wabash's property rights as recorded owner of the land atop the Bridge or its recorded right to cross it. Additionally, the City willfully ignored its contractual obligations in favor of its own economic interests.

65. Presently, access across the top of Bridge is blocked entirely by concrete barriers installed across the Bridge by the City and PennDOT. State Route 51 remains open to traffic below the Bridge.

66. The Bridge closure has dramatically reduced the ability of vehicles to deliver and transport materials to and from the Facility.

67. The concrete barriers have forced vehicles to access the property from southbound Saw Mill Run Boulevard rather than utilize the Bridge from the entrance adjacent to the Wabash Tunnel and Woodruff Street.

68. This configuration forces delivery vehicles to either (1) make a wide right turn across two lanes of southbound Saw Mill Run Boulevard or (2) reverse up the inclined driveway that connects the Property to Saw Mill Run Boulevard, pictured below:



69. Once at the top of the inclined driveway, the vehicles must then make a difficult series of “K” turns to position themselves for delivery or acceptance of goods and then return to State Route 51.

70. Notwithstanding the logistical nightmare it poses for Wabash, this sole means of access is a threat to public safety: should a delivery vehicle, such as a semi-

truck, become disabled while undertaking the arduous task of climbing or reversing up such a steep driveway, emergency vehicles would have no means to access the Facility.

71. Finally, and most critically, the proposed demolition plans submitted by the City and Wabash will decrease that surface area where delivery vehicles currently perform the difficult “K” turn described above.

72. Should the demolition occur, commercial vehicles will no longer be able to deliver or accept goods at the Facility, an outcome that will effectively close the Facility.

73. In addition, Wabash will lose total access to that portion of the property adjacent to the Bridge and the Wabash Tunnel (Parcel Number 5-S-125) and dozens of parking spaces with detrimental impacts its operations.

The Current State of the Bridge

74. The City and PennDOT allege that the Bridge’s deteriorated condition constitutes an emergency that requires its immediate demolition.

75. However, testimony given at a Public Utility Commission (“PUC”) proceeding³ that is occurring simultaneous with, and parallel to, this Commonwealth

³In those PUC proceedings (PUC Docket No. A-2024-3048837) the City and PennDOT petitioned for emergency authorization to demolish the Bridge pursuant to 66 Pa.C.S. §2702(f) and 51 Pa.Code §3.6, which vest the PUC with jurisdiction over railway crossings and authorize the PUC to issue emergency relief. The emergency relief sought was the emergency demolition of the Bridge.

Court litigation, revealed the following undisputed facts about the Bridge's present condition:

- a. it is closed to all surface traffic while State Route 51 underneath the Bridge is open; it can bear its own weight, or "dead load," and is stable;
- b. the Bridge's condition has not worsened since January of 2024;
- c. its overall condition can be addressed in conjunction with major projects on a four-year or twelve-year schedule;
- d. and *critically*, minimal repairs—essentially identical to those PennDOT recently made to this Bridge in July of 2022 and May of 2023—would stabilize the Bridge and prolong its life.

76. Further, the Bridge's current condition does not warrant demolition by NBIS standards, and the City and PennDOT's consultant have never recommended that the Bridge be demolished in the NBIS reports.

77. In fact, Wabash's engineers have determined that repairing the Bridge is not only feasible, but the cost of repairing it is comparable to, or less than, the cost of demolishing it.

78. Those repairs could be conducted as part of programming for major projects on a four-year or twelve-year schedule.

79. Wabash obtained multiple bids from reputable construction companies that regularly do work for PennDOT and the City, which project the cost to repair the Bridge is approximately \$3.1 million.

80. This is not only significantly less than the money currently budgeted to rehabilitate the Structure, but well below the amount of funding being provided by the state and federal governments to repair the Bridge.

81. Repairing the Bridge in this manner would be consistent with the City's publicly-available 2023 and 2024 approved Capital Budgets, which allocate \$5,550,000 for "the *rehabilitation* of a bridge which carries a parking lot over Route 51 near Woodruff Street in Mount Washington and Duquesne Heights [...] with the vast majority of the funding coming in the form of federal and state funding." A copy of the City of Pittsburgh 2023 and 2024 Capital Budget is attached hereto as **Exhibit I**.

82. Despite the existence of the financial information above, the City has chosen to rely on PennDOT to perform this demolition work in order to take advantage of various federal and state funding which will obviate their need to spend the critical maintenance dollars.

83. Therefore, should the City and PennDOT be ordered to abide by their contractual obligations to repair the Bridge, they would not be asked to do anything

other than what the City intended to do with capital bond funds and surface block grant construction dollars as allocated.

84. For no reason other than economic and political ones, the City and PennDOT have never secured an expert engineering opinion regarding the measures necessary to repair the Bridge.

85. Instead, the City and PennDOT have rushed to let a contract for the Bridge's demolition, which is scheduled to begin shortly.

COUNT I – BREACH OF CONTRACT

Wabash v. the City

86. Plaintiff incorporates by reference herein the foregoing paragraphs.

87. The City and Wabash's predecessor in interest, the Railroad, entered into a contract wherein, *inter alia*, the City agreed to construct and then maintain the Bridge and provide the Railroad with horizontal and vertical support of its land atop the Bridge and a right of way across it.

88. In exchange, the Railroad allowed the City to excavate a large portion of a rocky hillside for the construction of Saw Mill Run Boulevard.

89. The construction and maintenance of the Bridge, and the rights of horizontal support, vertical support and access across the Bridge, were *essential* terms of the contract between the City and the Railroad.

90. In short, the Railroad would not have agreed to allow the City to excavate significant portions of its property if the City had not agreed to (1) build the Bridge, (2) provide horizontal and vertical support for the Railroad's land atop the Bridge and (3) ensure the Railroads access the Bridge.

91. As a successor to the Railroad, Wabash benefits from those same contractual obligations, which were similarly a condition of Wabash's decision to purchase the Property and operate a sophisticated automobile parts distribution enterprise from the Facility.

92. When it purchased the Property, Wabash reasonably expected that the City would fulfill its contractual obligations and maintain the Bridge.

93. Wabash would not have purchased the Property, and spent the next two decades developing a successful automobile parts distribution facility thereon, absent the necessary support of its land and ingress, egress and regress over the Bridge.

94. The City has breached the contract by its decades-long failure to maintain the Bridge, purportedly rendering it a candidate for demolition.

95. As a result of the actions and/or inactions of the City and PennDOT, Wabash's property is continuing to suffer damages.

96. The *only* remedy that sufficiently cures the City's breach of contract is specific performance of its maintenance obligations.

WHEREFORE, Wabash respectfully requests that this Court enter an order compelling the City to fulfill its contractual maintenance obligations and repair the Bridge, along with other such relief and/or damages as the Court deems appropriate.

COUNT II – MANDAMUS
Wabash v. the City and PennDOT

97. Wabash incorporates by reference herein the foregoing paragraphs.

98. A mandamus action is the proper remedy used to compel performance of a ministerial act or a mandatory duty. *Borough of Plum v. Tresco*, 606 A.2d 951, 953 (Pa. Cmwlth. 1992).

99. To succeed in a mandamus action, the Plaintiff must demonstrate a clear legal right, that the Defendant has a corresponding duty, and finally that the Plaintiff is without any other appropriate or adequate remedy. *Timothy F. Pasch, Inc. v. Springettsbury Twp. Bd. of Sup'rs*, 825 A.2d 719, 723 (Pa. Cmwlth. 2003).

100. Wabash, as the successor in interest to the Railroad, possesses clear legal rights of (1) access across the Bridge and (2) horizontal/vertical support from the Bridge, which rights the City is obligated to fulfill.

101. Likewise, Wabash possesses clear legal rights of (1) access across the Bridge and (2) horizontal/vertical support from PennDOT's highway easement for Saw Mill Run Boulevard/State Route 51, as expressly set forth in the instruments of record.

102. Wabash possesses a right of way over the Bridge, as granted by that

certain deed from the City of Pittsburgh, dated August 16, 1961, and recorded September 1, 1961 at Deed Book Volume 3923.

103. PennDOT and the City have acknowledged this obligation by spending funds over the years to maintain the Bridge and by including forecasted repairs for the same in its adopted Capital Budgets.

104. The City has a corresponding duty to maintain the Bridge and provide support and access to Wabash across the Bridge, which duty is likewise set forth in the instruments of record.

105. PennDOT has a corresponding duty to provide support for Wabash's property atop and on either side of the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

106. Wabash will lose horizontal and vertical support of its Property atop and on either side of the Bridge unless the City fulfills its obligations to repair and maintain the Bridge and PennDOT fulfills its obligation to provide support to the Property.

107. Wabash will lose access to certain portions of the Property, and the ability to make reasonable use of the Facility housed thereon, unless the City fulfills its obligations to repair and maintain the Bridge and PennDOT fulfills its obligation to provide support to the Property.

108. Further, when it purchased the Property and began operating its business thereon, Wabash reasonably expected that the City and PennDOT would fulfill their legal obligations to maintain and repair the Bridge and ensure access and support of the Property.

109. In so doing, Wabash entered into numerous contracts and other agreements with a wide range of automobile dealerships and repair facilities, which contracts and agreements were conditioned upon Wabash operating its business from the Facility located on the Property.

110. The City's failure to maintain and repair the Bridge, and PennDOT's failure to provide support to the Property, now threaten the economic viability of Wabash's operations at the Property.

111. The City and PennDOT are further obligated to comply with their own rules and regulations, as well as the state and federal agencies discussed above.

112. The City has neglected the legal duties imposed by the City Ordinances, the City-County Contract and the relevant local, state and federal regulations governing the Bridge.

113. PennDOT has neglected its legal duties imposed by its ownership of the easement for Saw Mill Run Boulevard/State Route 51, as well as its legal duties to ensure the safety of all state-controlled highways and relevant local, state and federal regulations governing the Bridge.

114. Unless compelled by this Court to fulfill those duties to repair and maintain the Bridge, the City and PennDOT will simply continue to ignore those duties and ultimately demolish the Bridge.

115. This is so despite the fact that Wabash has offered reasonable, economically viable, and safe alternatives to demolishing the Bridge.

116. But for the Mandamus sought here, Plaintiff is without any other appropriate or adequate remedy at law and will sustain irreparable harm.

WHEREFORE, Wabash respectfully requests that this Court enter an order compelling the City and PennDOT to fulfill their maintenance obligations and repair the Bridge, along with other such relief and/or damages as the Court deems appropriate.

COUNT III – DECLARATORY JUDGMENT
Wabash v. the City and PennDOT

117. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

118. As set forth above, the contracts and instruments of record create an express duty upon the City, as owner of the Bridge, to maintain and repair it.

119. The City is obligated by the terms of the City Ordinances and City-County Contract to construct, maintain, renew and keep in good repair the Bridge forever at the City's sole expense.

120. For many years the City has failed to fulfill those obligations, which

has allowed the condition of the Bridge to deteriorate significantly. The City neglected those duties despite ample notice from Wabash and other interested parties of the Bridge's worsening state.

121. The City, under the terms of the City Ordinances, is responsible for the support of the Wabash's Property atop and adjacent to the Bridge, and is accountable at all times for any insufficiency or failure of the structures erected by the City to furnish adequate support for the Property.

122. By failing to maintain and then closing the Bridge, the City has violated the terms of the Ordinances and City-County Contract and failed to perform its obligations thereunder.

123. After years of neglect the City has now stated its intent to demolish the Bridge while simultaneously denying that it has any duty to repair it, despite the express duties contained in the City Ordinances, the City-County Contract and other instruments of record.

124. A declaration is warranted that the terms of the unrepealed City Ordinances are binding obligations upon the City and require the City to forever maintain the Bridge.

125. A declaration is warranted that the ongoing failure of the City to repair or maintain the Bridge, and the City's continued efforts to demolish the Bridge violate the terms of the City Ordinances.

126. Wabash, as a successor-in-title to the Railroad and the property owner vested with the servient estate to the City's easement for the Bridge, and whose business relies upon ingress, egress and regress over the Bridge, has the beneficial right to effectuate the intention of the parties to the City-County Contract pursuant to the herein stated compelling circumstances, which indicate that the City intended to give Wabash the benefit of the promises and obligations made by the City in the City-County Contract.

127. In closing and demolishing the Bridge, the City and PennDOT will violate the terms of the Ordinances, the contract between the City and Wabash's predecessor in interest and the City-County Contract.

128. Wabash, as a third-party beneficiary having a direct, substantial and present interest in and to the City-County Contract, is engaged in an actual controversy with the City regarding the City's current and future breaches of the terms of the City-County Contract.

129. PennDOT has a corresponding duty to provide support for Wabash over the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

130. A justiciable controversy exists between Wabash and the City concerning the City's obligations to repair and maintain the Bridge pursuant to the Ordinances, contracts and other instruments of record.

131. A justiciable controversy therefore exists between Wabash and PennDOT concerning PennDOT's obligations imposed by its ownership of the easement for Route 51, as well as its legal duties for safety of all state-controlled highways and relevant local, state and federal regulations governing the Bridge.

132. A justiciable controversy exists between Wabash and the City and PennDOT concerning the legality of their proposed demolition of the Bridge.

133. A justiciable controversy exists between Wabash and the City and PennDOT concerning the threat to Wabash's rights of horizontal and vertical support from the Bridge and its right of access across the Bridge, which rights will be eviscerated if the City and PennDOT demolish the Bridge.

134. For the reasons set forth above, Wabash is entitled to a judgment declaring that the City and PennDOT must repair and maintain the Bridge, so to ensure that Wabash's rights of support and access are fulfilled in a manner consistent with the City and PennDOT's obligations contained in the instruments of record and duties imposed by state and federal law.

WHEREFORE, Wabash requests a declaratory judgment in their favor and against the City and PennDOT, in the following form:

- a. declaring and adjudging the City's rights and obligations under the Ordinances, the City-County Contract and the instruments of record with respect to the maintenance and repair of the Bridge;

- b. granting Wabash specific performance of those repair and maintenance obligations set forth in the City Ordinances and the City-County Contract;**
- c. declaring and adjudging the City's and PennDOT's proposed demolition of the Bridge is prohibited;**
- d. declaring that the City, as owner of the Bridge, owes Wabash an obligation to provide horizontal and vertical support of Wabash's property atop and on either side of the Bridge;**
- e. declaring that the City, as owner of the Bridge, owes Wabash an obligation to provide access across the Bridge;**
- f. declaring that the City, as owner of the Bridge, owes Wabash an obligation to keep the Bridge in a safe and proper condition;**
- g. declaring that PennDOT, as holder of a dominant easement estate for State Route 51, owes Wabash an obligation to provide horizontal and vertical support of Wabash's property atop and on either side of the Bridge;**
- h. declaring that PennDOT, as holder of a dominant easement estate for State Route 51, owes Wabash an obligation to provide access across the Bridge;**

- i. declaring that PennDOT, as holder of a dominant easement estate for State Route 51, owes Wabash an obligation to keep the Bridge in a safe and proper condition;
- j. awarding money damages in an amount to be determined at trial, together with pre-judgment and post-judgment interest;
- k. awarding the costs of suit; and
- l. any such other and further relief as the Court deems just and necessary.

**COUNT IV – VIOLATION OF DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION (42 U.S.C. §
1983) AND THE PENNSYLVANIA CONSTITUTION (ARTICLE 1 §§ 1, 26)**

Wabash v. the City and PennDOT

135. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

136. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that the government shall not “deprive any person of life, liberty, or property without due process of law.” U.S. Const. Amend. XIV.

137. The corresponding portions of the Pennsylvania Constitution provide, “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. Const. Art. I, § 1.

138. The fundamental components of procedural due process are notice and the opportunity to be heard.

139. The key factor in determining whether procedural due process is denied is whether the party asserting the denial of due process suffered demonstrable prejudice.

140. There can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or a property right.

141. At all times relevant hereto Wabash possessed a vested property right of horizontal and vertical support from the Bridge and access across the Bridge.

142. The Bridge, and Wabash's rights of access and support associated with it, are critical to the operations at the Facility for the numerous reasons set forth at length above.

143. Without those rights of access and support Wabash has been, and will continue to be, deprived of its freedom and liberty to conduct its business at the Facility in the manner it has for decades.

144. Those vested property rights have been denied without due process by the City and PennDOT, acting under the color of state law, in their concerted efforts to close the Bridge to all vehicular traffic and then schedule its demolition.

145. The decision to close and demolish the Bridge comes after the City and PennDOT have violated or ignored numerous state and federal laws governing the maintenance and repair of the Bridge, as well as the measures necessary to close it.

146. The City and PennDOT did not afford Wabash adequate notice of their intent to close the Bridge, which prevented Wabash from taking appropriate measures to protect its property rights and freedom to operate its business at the Facility.

147. The prompt closure of the Bridge occurred without proper notice to Wabash, in the middle of the night and without an opportunity to be heard by a neutral decision maker.

148. The City and PennDOT have deprived Wabash of its vested property rights and freedom to operate its business by failing to provide Wabash with proper notice of their intent to close and demolish the Bridge.

149. For the aforesaid reasons, as a matter of law, the City's and PennDOT's actions denied Wabash due process protection of the law, in violation of the United States Constitution, Amendment XIV and the Pennsylvania Constitution.

WHEREFORE, Wabash requests a judgment in their favor and against the City and PennDOT, in the following form:

- a. the Respondents' closure of the Bridge is a violation of Wabash's constitutional rights of due process;

- b. the Respondents' planned demolition of the Bridge is a violation of the Wabash's constitutional rights of due process;
- c. the Respondents are restrained from taking any further action in violation of Wabash's constitutional rights of due process;
- d. the Respondents must specifically perform those repair and maintenance obligations required by the Ordinances, the City-County Contract and Pennsylvania and Federal law, so to preserve Wabash's constitutional rights;
- e. the Respondents are liable to Wabash for costs associated with this action, including attorney fees;
- f. the Respondents are liable to Wabash for money damages in an amount to be determined at trial, together with pre-judgment and post-judgment interest;
- g. for such other and further relief as the Court deems just and necessary.

COUNT V – INJUNCTION
Wabash v. the City and PennDOT

150. Wabash incorporates the averments of the preceding paragraphs as if set forth at length herein.

151. The instruments of record, including the Ordinances and City-County Contract, establish that the City, as owner of the Bridge, has a duty to repair and

maintain the Bridge while preserving Wabash's access across it.

152. PennDOT has a corresponding duty to provide support for Wabash over the Bridge, which duty is imposed upon PennDOT as the dominant estate holder of the easement through Wabash' Property for Route 51.

153. Wabash has a direct, substantial and present interest in and to the Bridge, as it is the only means of horizontal and vertical support for Wabash's Property that sits atop and on either side of the Bridge.

154. Wabash has a direct, substantial and present interest in and to the Bridge, as it is the only means of crossing Wabash's Property and is crucial for its business at the Facility.

155. As such, the demolition of the Bridge will result in irreparable harm to Wabash.

156. On the other hand, enjoining the City and PennDOT from demolishing the Bridge and compelling them to repair it would merely oblige the City and PennDOT to do something they should have done years ago.

157. Such an outcome would restore the parties to the status that existed before the City and PennDOT threatened the demolition of the Bridge, namely affording Wabash its right to operate its business while exploring means to repair the Bridge.

158. Wabash is likely to prevail in its claim to enforce the City's and

PennDOT's duties to repair the Bridge, given the unambiguous nature of the obligations set forth in the Ordinances, City-County Contract, the 1929 PUC Order, the instruments of record and Pennsylvania law.

159. Further, the provisions of the NBIS require the City and PennDOT to repair and maintain the Bridge in compliance with the Bridge Safety Inspection Reports.

160. The City and PennDOT have known, or should have known, for many years that the Bridge was deteriorating, yet failed to maintain the Bridge despite ample notice.

161. Wabash has suffered and will continue to suffer irreparable harm by the City's and PennDOT's refusal to comply with their maintenance obligations, as well as the City's and PennDOT's planned demolition of the Bridge.

162. Wabash has no adequate remedy at law, or otherwise, for the harm and damage being done, because access across the Bridge is a condition of its business operations at the Property.

163. Further, Wabash has no adequate remedy at law, or otherwise, because the demolition of the Bridge will eviscerate its property rights as fee owner of the land above and on either side of the Bridge.

164. Irreparable harm, damage, and injury will follow and be done to Wabash unless the acts and conduct of the City and PennDOT are enjoined.

WHEREFORE, Plaintiff respectfully requests that this Court enter an order compelling the City and PennDOT to comply with their duties to repair the Bridge and enjoining them from demolishing the Bridge, and other such relief and/or damages as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

BY: 

JENNA R. DIFRANCESCO, ESQUIRE
JONATHAN M. KAMIN, ESQUIRE
JONATHAN G. PRESTON, ESQUIRE
Counsel for Plaintiff Wabash Properties, LLC

VERIFICATION

I, JONATHAN G. PRESTON, Attorney-at-Law, counsel of record for Plaintiff in the within matter, hereby certify that the averments set forth in the foregoing AMENDED PETITION FOR REVIEW are true and correct to the best of my knowledge, information and belief. I am authorized to make this verification on behalf of the Plaintiff by virtue of my position as counsel of record.

I understand that this Verification is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn fabrication to authorities, which provides that if I knowingly make false averments, I may be subject to criminal penalties.



JONATHAN G. PRESTON, ESQUIRE

Date: 7-1-2024

PROOF OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing AMENDED PETITION FOR REVIEW was served upon counsel via email and/or U.S. Regular Mail, this 1st day of July, 2024, addressed as follows:

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

SUBMITTED BY: COUNSEL



SIGNATURE: _____

NAME: JONATHAN G. PRESTON

ATTORNEY NO.: 209493



Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
 Harrisburg, PA 17105-3265
EFILING - FILING DETAIL

Date Created	Filing Number
7/8/2024	2614832

Your filing has been electronically received. Upon review of the filing for conformity with the Commission's filing requirements, a notice will be issued acknowledging acceptance or rejection (with reason) of the filing. The matter will receive the attention of the Commission and you will be advised if any further action is required on your part.

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Docket Number: A-2024-3048837

Case Description:

Transmission Date: 7/8/2024 3:09 PM

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eFiling Confirmation Number: 2614832

File Name	Document Type	Upload Date
Motion for Determination of Finality Stay Certification.pdf	Motion	7/8/2024 3:08:25 PM
Exhibit 1 to Motion for Determination.pdf	Exhibit	7/8/2024 3:08:42 PM

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