

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re. Emergency Application of the Department of :
Transportation of the Commonwealth of Pennsylvania : A-2024-3048837
and the City of Pittsburgh for approval to abolish the :
public above grade crossing and remove the bridge : **Electronically Filed**
carrying the abandoned cartway of Pittsburgh & West :
Virginia Railway Company (and the West Side Belt :
Railroad Company) above S.R. 0051 in the :
City of Pittsburgh, Allegheny County :
and the allocation of costs incident thereto. :

**JOINT MOTION TO QUASH REQUEST OF WABASH PROPERTIES, LLC FOR
INTERLOCUTORY APPEAL, DETERMINATION OF FINAL ORDER,
AND STAY OF PROCEEDINGS**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (hereinafter “Department”), by and through Nicholas D. Mertens, Assistant Chief Counsel, the City of Pittsburgh (“City”), by and through Krysia M. Kubiak, Solicitor, John F. Doherty, Associate Solicitor, and Kevin T. Freyder, Assistant Solicitor, and files the within Joint Motion to Quash in response to the Motions, filed by Wabash Properties, LLC (“Wabash”) on July 8, 2024, seeking certification of an interlocutory order for appeal, a determination of finality pursuant to Pa. R.A.P. 341(c), and additionally a motion for stay (“Motion”), and avers as follows:

PROCEEDING BEFORE THE PA. PUBLIC UTILITY COMMISSION

1. The within proceeding involves a Joint Application submitted by the Department and City at the above referenced docket number.
2. The Joint Application requested the approval of the Pennsylvania Public Utility Commission (“PUC”), on an emergency basis, to alter a highway-rail crossing by the removal of the bridge which is utilized as an access drive and parking lot (“Bridge”) by the adjacent property owner, Wabash Properties, LLC (“Wabash”).

3. The Bridge sits above grade of State Route 51 (“SR 51”) located in the Mount Washington neighborhood in the City of Pittsburgh, Allegheny County.
4. The Bridge was initially approved, designed, and constructed pursuant to an Order of the Public Service Commission in 1929 upon application submitted by the County of Allegheny.
5. The Bridge is in poor condition and has been scheduled for removal, to begin on July 24, 2024 by the Department through a Local Project Sponsor Agreement with the City.
6. Following the original 1929 construction, the crossing above Saw Mill Boulevard (which eventually became SR 51) was utilized by the Pittsburgh & West Virginia Railway Company.
7. At some time on or before 1961, the Bridge was no longer utilized by the Pittsburgh & West Virginia Railway Company and, presumably, the tracks were removed.
8. Wabash is the present owner of the adjacent property on both ends of the Bridge.
9. On May 2, 2024, the Department and City jointly filed the aforementioned Application with the PUC at the above referenced docket number.
10. On May 7, 2024, a virtual field investigation was held by the PUC’s Rail Safety Division.
11. At the field investigation, Wabash raised an objection to the joint Application; as such, the proceeding was referred to the Office of Administrative Law Judge on an expediated basis.
12. On May 15, 2024, the City and Department jointly filed a Petition for Special Relief pursuant to Section 2702(f) of the Public Utility Code. 66 Pa.C.S. § 2702(f). The relief sought the alteration, by removal, of the highway-rail crossing Bridge because its condition poses an immediate danger to the safety and welfare of the traveling public.
13. An initial prehearing conference was held on May 22, 2024 before Deputy Chief Administrative Law Judge (“ALJ”) Christopher Pell.

14. Subsequent to the prehearing conference, on May 22, 2024, the City and Department jointly filed a Petition for Interim Emergency Order Under 52 Pa. Code § 3.6.
15. The matter was then reassigned to ALJ Mary D. Long.
16. On June 3 and 4, 2024, an emergency hearing was held before ALJ Long at the PUC's Pittsburgh offices.
17. On June 6, 2024, ALJ Long granted the Petition for Interim Emergency Order Under 52 Pa. Code §3.6 which authorized the Department to remove the Bridge and former highway-rail crossing. However, the crossing was not abolished as part of the Order.
18. The Order additionally certified the material question to the PUC as to whether the Bridge must be removed, on the proposed schedule, to protect the traveling public.
19. On July 1, 2024, the PUC issued an Opinion and Order affirming the ALJ's June 6, 2024 Order.
20. On July 8, 2024, Wabash filed a Motion seeking a request for certification of an interlocutory appeal of the PUC's Opinion and Order to the Commonwealth Court, a determination by the PUC that the July 1, 2024 Opinion and Order is a final order for purposes of Rule 341(c) of the Pennsylvania Rules of Appellate Procedure, and a stay of the subject proceedings.

PROCEEDING BEFORE THE COMMONWEALTH COURT

21. On March 1, 2023, Wabash filed a Complaint against the City of Pittsburgh ("City") in the Allegheny County Court of Common Pleas at Docket Number G.D. 23-002842 ("Initial Complaint").
22. The Initial Complaint alleges that the City owns what can be described as either a bridge or railroad viaduct that crosses above State Route 51 (a/k/a Saw Mill Run Boulevard) ("SR

51”) near the intersection with Woodruff Street in the City of Pittsburgh, Allegheny County (the “Bridge”).

23. On or about March 20, 2024, Wabash sought leave of Court to file a praecipe for a writ to join the Department as an additional defendant as to the Initial Complaint.
24. As part of that proceeding, after joinder, the Department was ordered to inform the PUC of the proceeding to obtain the PUC’s position given the Bridge was a former active railroad crossing.
25. After research by the Department in cooperation with the PUC’s engineers, it was discovered that the highway-rail crossing was never abolished pursuant to a PUC proceeding, nor does it appear that the impacted rail line was subject to a formal abandonment proceeding through the federal process before either the Interstate Commerce Commission or the Surface Transportation Board.
26. By letter from Paul Diskin, PUC’s Director of Technical Utility Services, the Petitioners were advised that an appropriate application would need to be submitted prior to alteration of the Bridge and abolishment of the crossing.
27. On April 25, 2024, the Allegheny County Court of Common Pleas issued an Order of Court sua sponte transferring the within proceeding to the Commonwealth Court given the joinder of the Department.
28. On May 22, 2024, this present matter was docketed in this Honorable Court and assigned the within docket number.
29. On May 22, 2024, Wabash filed its Amended Complaint alleging five separate claims against both the Department and City: (1) a breach of contract claim (against the City only); (2) a request seeking a writ of mandamus; (3) declaratory judgement to void the City’s decision to remove the Bridge; (4) claims of various constitutional violations; and (5)

request for injunctive relief seeking to permanently bar the defendants from removing the Bridge which is at the end of its useful life.

30. On June 12, 2024, the Department filed its Preliminary Objections in response to the Amended Complaint.
31. On June 19, 2024, Wabash filed an Application requesting a preliminary injunction seeking to enjoin the Department and City from proceeding with the proposed project despite the PUC proceeding
32. To that effect, on June 26, 2024, Wabash filed an Application requesting expedited relief regarding its preliminary injunction petition and an emergency hearing.
33. On June 27, 2024, the Commonwealth Court issued an Order scheduling an emergency hearing on July 10, 2024.
34. On July 1, 2024, Wabash filed an Amended Petition for Review in lieu of its amended complaint, thus rendering the Department's preliminary objections as moot.
35. On July 10-11, 2024, a two-day hearing was held on Wabash's request for preliminary injunction before the Honorable Judge Michael H. Wojcik of the Commonwealth Court, during which the Department and the City presented the same evidence as was presented to the ALJ regarding the serious condition of the Bridge and the emergent need for its removal.
36. Based on that evidence and the parties' filings, on July 12, 2024, Judge Wojcik issued an Order denying Wabash's preliminary injunction request. A true and accurate copy of the July 12, 2024 Order is attached hereto and marked as **Exhibit 1**.

MOTION TO QUASH INTERLOCUTORY APPEAL

37. The foregoing paragraphs are incorporated herein by reference as if set forth more fully herein.

38. The July 1, 2024 Opinion and Order is a not a final order but rather a granting of the interim emergency relief sought by the Department and City to effectuate a critical highway safety project.

39. An interlocutory appeal from a PUC Order is further governed by 52 Pa. Code 5.633, which states:

(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.

52 Pa. Code 5.633 (Emphasis added.)

40. Importantly, the PUC Order from which Wabash seeks certification of an interlocutory order for appeal does not involve a question of law. Rather, the Order involves a question of fact—whether the condition of the Bridge constitutes an immediate danger to the safety and welfare of the public under 66 Pa. C.S. § 2702(f) such that immediate removal is necessary.

41. As such, any appeal from this order is interlocutory and not as of right. 42 Pa.C.S. § 702; Pa. R.A.P. 1311.

42. Rule 702(b) states:

(b) Interlocutory appeals by permission.--When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S. § 702(b)

43. Findings of fact made by the commission which are supported by substantial evidence are conclusive and may not be disturbed on appeal. See *County of Chester v. Pa. PUC*, 408 A.2d 522 (Pa. Cmwlth. 1979); *Dep't of Transp. v. Pa. PUC*, 283 A.2d 313 (Pa. Cmwlth 1971).

44. Wabash's Motion sites several "differences of opinion" on legal questions, however, the Order addresses whether the ALJ properly granted the emergency relief requested. The ALJ's findings of fact relied upon to grant the emergency relief were supported by substantial evidence and ALJ's credibility determinations which cannot be disturbed on appeal.

45. Further, Pennsylvania appellate courts generally discourage interlocutory appeals. See *T.C.R. Realty, Inc. v. Cox*, 372 A.2d 721 (Pa. 1977) (holding that Pennsylvania appellate courts discourage interlocutory appeals to avoid protracted litigation).

46. The entire basis of Wabash's rationale for an interlocutory appeal is that the Commonwealth Court will ultimately resolve all issues raised in the matter *sub judice*—issues that are not controlling questions of law addressed in the Order from which Wabash seeks certification for appeal.

47. Since the July 8, 2024 filing of Wabash's Motion, the Commonwealth Court held a two-

day hearing which was essentially an attempt to re-litigate both the March 7, 2023 Hearing before Judge Mary McGinley of the Allegheny County Court of Common Pleas and the June 3-4, 2024 Hearing before ALJ Long.

48. Upon conclusion of that hearing, the Commonwealth Court denied Wabash's Motion for a preliminary injunction.
49. Wabash, once again, entirely ignores the rationale for the interim emergency motion—protection of the traveling public—in an attempt to stay a critically important highway safety project on the sole basis of their alleged economic harm.
50. The controlling issue in the PUC's July 1, 2024 Opinion and Order is ultimately a question of fact, as to whether an emergency situation exists, to which the PUC's decision is just and reasonable and further supported by substantial evidence.
51. Furthermore, an interlocutory appeal, as to the PUC's July 1, 2024 Opinion and Order, will be rendered moot on or shortly after August 10, 2024 when the highway safety project is complete.
52. As such, Wabash's request for certification of an interlocutory appeal cannot meet the plain language of Section 702(b) for the grant of an appeal by permission. 42 Pa.C.S. § 702(b).
53. Wabash also attempts to argue that its appeal is from a final order and thus proper under Rule 341(c) of the Appellate Rules. Pa. R.A.P. 341(c).
54. Wabash's request for a determination that the PUC's July 1, 2024 Opinion and Order is a final order is merely an attempt to delay the Department's highway safety project through the procedural rule set for in Rule 341(c)(1) which temporarily stays that action during the pendency of application for determination.

55. The various factors, relevant to whether a determination of finality should be granted is:

(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.

Pa. R.A.P. 341(c) (Comment to Rule).

56. The July 1, 2024 Opinion and Order adjudicated the question of whether or not the Bridge must be demolished in an expedited matter to, *inter alia*, protect the traveling public from the safety concerns regarding the Bridge and also to avoid the closure of SR 51.

57. The June 3-4, 2024 hearing sufficiently demonstrated that the Bridge must be removed during the 2024 construction season in order to protect the traveling public and further prevent the closure of SR 51 which would, in and of itself, cause a significant safety concern.

58. The relief granted was the alteration of the Bridge on an interim basis.

59. All other matters that are part of a PUC order approving an application for alteration of a crossing—such as allocation of costs, assignment of responsibility for work, and future maintenance—were remanded for further consideration.

60. As such, the July 1, 2024 Opinion and Order was not a final order.

61. Wabash argues that the demolition of the bridge is final order because it will extinguish their alleged contractual and real property rights—however, Wabash entirely ignores the fact that the PUC has remanded the matter back to ALJ Long for further proceedings.

62. While the removal of the Bridge is not a typical request for interim relief—it is not a final action which disposes of any claims or possible relief in the matter *sub judice*.

63. In fact, the status quo will be maintained for Wabash given that even post-demolition the footprint will remain substantially the same—thus permitting continued use of the property as it has been used since December 2023 when the Bridge was closed to traffic.
64. Additionally, Wabash alleged that because the Petitioners will not reconsider their positions as to demolition of the Bridge that the July 1, 2024 Opinion and Order should be considered final. Motion for Interlocutory Appeal, ¶¶ 70-76 (filed July 8, 2024)
65. Wabash misconstrues the comments to Rule 341(c)(1), as the element is whether the PUC will consider the issues a second time, not the Department and/or City.
66. The issue of the disposition of the Bridge will absolutely be considered by the PUC a second time—in fact, the July 1, 2024 Opinion and Order remands the matter back to the ALJ for disposition of the Bridge.
67. One potential course of action before the ALJ is a request, presumably by Wabash, for replacement and/or reestablishment of a Bridge.
68. The fourth factor to be considered under the Note to Pa. R.A.P. 341(c) is whether an immediate appeal will enhance the prospects for a settlement of the case.
69. At this point, an appeal would be unlikely to enhance the prospects for settlement given that Wabash was unsuccessful in its attempt to usurp the PUC’s jurisdiction over the Bridge through its request for a preliminary injunction in the parallel proceeding at the Commonwealth Court and the Commonwealth Court’s denial of the preliminary injunction after a full hearing.
70. Given that July 1, 2024 Opinion and Order is an interim emergency order based upon protection of the traveling public and that it does not foreclose the possibility of a new Bridge structure being ordered, a determination of finality under Rule 341(c) is wholly inappropriate.

71. Additionally, while not an enumerated factor listed in the Comment to Rule 341(c), but critical to note, Wabash has a sufficient avenue for relief in the present proceeding before the PUC, a contractual and real property claim against the Department and City, and a potential eminent domain claim.
72. Furthermore, Wabash selectively ignores the elements set for in *Pennsylvania Public Utility Com'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), *overturned on other grounds* by 511 A.2d 1315 (Pa. 1986).
73. The *Process Gas* elements, as to whether a stay should be granted, considers the following: (1) the petitioner is likely to prevail on the merits; (2) the petitioner will suffer irreparable injury without a stay; (3) the issuance of a stay will not substantially harm other interested parties in the proceedings; and (4) the issuance of a stay will not adversely affect the public interest. *Id.* at 808-09.
74. Wabash must prevail on all four elements in order to obtain a stay pending appeal.
75. As to the initial element, the Department and City both dispute the validity of Wabash's contractual and real property rights and there are no facts indicating that Wabash is likely to prevail on the merits, particularly in light of the Commonwealth Court's denial of its request for a preliminary injunction.
76. As to the question of irreparable injury without a stay, Wabash has remained in business over the past eight months since the closure of the Bridge, thus demonstrating that no irreparable injury will occur because this status quo will remain post-demolition.
77. Most importantly, in the present matter, the ALJ and PUC have already concluded that the Bridge constitutes an emergency situation to which the risk of harm to the traveling public far outweighs the potential risk of economic harm to the individual property owner—Wabash.

78. In fact, the PUC’s July 1, 2024 Opinion and Order, has already addressed this issue in which it was concluded that there was an “immediate need for relief and irreparable harm if relief is not granted.” Opinion and Order, pg. 26 (dated July 1, 2024).
79. As such, Wabash cannot meet its burden under *Process Gas*. 467 A.2d at 808-09.
80. Wabash has filed an application under Rule 341(c) in an procedural effort to delay a project which seeks to protect the traveling public as authorized by the July 1, 2024 Opinion and Order.
81. The question of the harm to the traveling public has now been litigated three separate times before three separate tribunals: (1) the Allegheny County Court of Common Pleas; (2) the PUC; and (3) the Commonwealth Court.
82. In all three proceedings, Wabash was unsuccessful given, *inter alia*, the risk to the traveling public posed by the Bridge.
83. Wabash now seeks a fourth bite of the apple, through a procedural argument which grants arguable, at least, an automatic and temporary stay of these proceedings.
84. Wabash has been unsuccessful on the merits of their claim and as such, their Motion seeking a declaration of a final order and motion for a stay should be denied.
85. As such, it is requested that Wabash’s interlocutory appeal is quashed, the motion seeking determination under Rule 341(c) is denied, and furthermore that the request for a stay pending appeal is denied in the interest of public safety in line with the PUC’s July 1, 2024 Opinion and Order.
86. In accordance with the PUC’s Order and the Commonwealth Court’s denial of Wabash’s request for a preliminary injunction, the Department intends to proceed with demolition of the Bridge as scheduled on July 24, 2024.

WHEREFORE, based on the foregoing, the Department respectfully requests that the *Joint Motion to Quash* is hereby granted as the July 1, 2024 Opinion and Order is not a final order to which Wabash is granted an automatic right to appeal pursuant to the Pennsylvania Rules of Appellate Practice nor is Wabash entitled to a stay of these proceedings.

Respectfully submitted,

CITY OF PITTSBURGH

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

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DATED: July 15, 2024

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wabash Properties, LLC,	:	
Petitioner	:	
	:	
v.	:	
	:	
City of Pittsburgh and	:	
Commonwealth of Pennsylvania,	:	
Pennsylvania Department	:	
of Transportation,	:	
Respondents	:	No. 279 M.D. 2024

ORDER

AND NOW, July 12, 2024, upon review of Wabash Properties, LLC’s (Petitioner) “Petition for Preliminary Injunction,” and “Application for Expedited Relief,” as well as Respondent, City of Pittsburgh’s Answer in opposition, Petitioner’s brief in support and Respondent, Commonwealth of Pennsylvania, Department of Transportation’s Brief in opposition, and following a hearing held before a single Judge of this Court on July 10-11, 2024, the Petition for Preliminary Injunction is hereby DENIED.

Opinion to follow.

Michael H. Wojcik

MICHAEL H. WOJCIK, Judge

Order Exit
07/12/2024

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within **JOINT**

MOTION TO QUASH upon the participants listed below on:

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DATED: July 15, 2024