



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

September 19, 2024

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement v.  
Buffalo & Pittsburgh Railroad, Inc.  
Docket No. C-2024-3050823  
**I&E Answer to Preliminary Objection**

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Answer to the Preliminary Objection of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced matter.

Copies are being served on the parties of record in accordance with the attached Certificate of Service.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'G. Rosul', written in a cursive style.

Grant Rosul  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 318204  
(717) 783-5243  
[grosul@pa.gov](mailto:grosul@pa.gov)

GR/ac  
Enclosures

cc: Michael L. Swindler, Deputy Chief Prosecutor, I&E-Enforcement (*via email*)  
As per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
Complainant	:	
	:	
v.	:	Docket No. C-2024-3050823
	:	
Buffalo & Pittsburgh Railroad, Inc.	:	
Respondent	:	

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**BUREAU OF INVESTIGATION AND ENFORCEMENT  
ANSWER TO THE PRELIMINARY OBJECTIONS OF  
BUFFALO & PITTSBURGH RAILROAD, INC.**

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NOW COMES the Pennsylvania Public Utility Commission’s (“Commission”), Bureau of Investigation and Enforcement (“I&E”), by its prosecuting attorney, and files this Answer to the Preliminary Objections of the Buffalo & Pittsburgh Railroad, Inc. (“Respondent”), pursuant to 52 Pa. Code § 5.101(f). In support thereof, I&E avers as follows:

**I. INTRODUCTION**

1. Admitted. This matter arises from the unauthorized closing of the at-grade road crossing of Etna Street in the City of Butler, Pennsylvania (DOT 149 041 V) by way of removal of the crossing surface and the placement improper barricades without appropriate signage where Respondent’s rail line intersects with Etna Street in Butler, Pennsylvania (“Etna Street Crossing”).

2. Admitted. I&E did file a Complaint against Respondent for altering the Etna St. Crossing without prior authorization from the Commission in violation of 66 Pa.C.S. § 2702. I&E is seeking a civil penalty in the amount of \$21,700 to be imposed upon Respondent.

3. Admitted. I&E is additionally seeking an order that the Etna St. Crossing be rehabilitated to its original condition within six months and at Respondent's sole expense.

4. Denied. I&E's Complaint is legally sufficient and should be sustained and Respondent's Preliminary Objections should be denied.

## **II. FACTUAL BACKGROUND**

5. Admitted. The Etna St. Crossing is the crossing at issue in this matter and is located on Etna Street in the City of Butler, Pennsylvania.

6. Admitted in part and Denied in part. It is admitted that Rail Safety Engineer William Sinick, P.E., visited the Etna St. Crossing in November 2023, as detailed in I&E's Complaint at Paragraph 16. Any inference to be drawn from Respondent's reference to Paragraph 16 of I&E's Complaint is denied, as the Complaint speaks for itself.

7. Admitted. In response to an I&E Data Request, on January 17, 2024, Respondent informed I&E that the Etna Street Crossing was closed in September 2021 as part of Respondent's project to rehabilitate the crossing.

8. Admitted. Respondent did not have prior authorization from the Commission to alter the Etna Street Crossing. By removing the asphalt from around the crossing and installing concrete barriers to prevent passage of motor vehicles over its tracks at the Etna Street Crossing altered the crossing and, because Respondent did so without the authorization of the Commission, violated 66 Pa.C.S. § 2702(a).

9. Denied. As detailed in I&E's Complaint, the alterations Respondent illegally made to the Etna Street Crossing are still present and the crossing has not been returned to its original condition as of the date of this filing.

10. Denied. The Commission's Technical Utility Services (TUS) Rail Safety Division ("Rail Safety") did not become aware of the alteration to the Etna Street Crossing until

October 2023. After serving a Data Request upon Respondent and receiving its response, I&E promptly filed its Complaint. Additionally, the speed at which I&E investigates and brings enforcement actions against regulated entities is irrelevant to determining whether a violation takes place at a singular instant or whether it is of a continuous nature. Respondent was in the best position to know the condition of the Etna Street Crossing. Respondent could have applied for abandonment of the Etna Street Crossing, yet it chose not to follow the Public Utility Code and now seeks to avoid I&E's enforcement action on the basis that it was able to keep its illegal actions from the Commission for roughly two years.

11. Denied. The statute prohibiting a railroad from altering a crossing without prior Commission approval, 66 Pa.C.S. § 2702(a), speaks for itself and its application to Respondent's action in closing the crossing should have been evident to Respondent. Any violation of the Public Utility Code or Commission regulations could subject a utility to enforcement action by I&E. Respondent should not need to be ordered to follow the Public Utility Code and Commission regulations and "should be aware of and knowledgeable of [their] requirements." Pa. Pub. Utility Comm'n v. Buffalo & Pittsburgh Railroad, Inc., 2024 WL 1195560 (Pa.P.U.C.) (March 13, 2024).

### **III. ARGUMENT**

#### **A. Each Day the Crossing Remains in its Altered State, Absent Commission Approval, is a Violation of 66 Pa.C.S. § 2702.**

12. I&E herein incorporates by reference its Answers in Paragraphs 1-11, as if fully set forth herein.

13. Admitted in part and Denied in part. It is admitted that Section 2702 of the Public Utility Code provides that no rail crossing may be altered or abolished "without prior order of the

commission.” By way of further response, Section 2702 of the Code speaks for itself and any interpretation, quotation, or characterization thereof is denied.

14. Admitted in part and Denied in part. It is admitted that a regulated utility’s violation of Section 2702 subjects the utility to the penalties prescribed in 66 Pa.C.S. § 3301(a)-(b). By way of further response, Section 3301 of the Code speaks for itself and any interpretation, quotation, or characterization thereof is denied.

15. Admitted in part and Denied in part. It is admitted that Section 3301 authorizes the Commission to impose a maximum penalty of \$1,000 per violation, or in the case where the violation is continuing, \$1,000 per day. 66 Pa.C.S. § 3301(a)-(b). By way of further response, Section 3301 of the Code speaks for itself and any interpretation, quotation, or characterization thereof is denied.

16. Admitted in part and Denied in part. It is admitted that Section 3301(b) is the subsection that permits the Commission to impose the penalty on a per-day basis for continuing violations. Pub. Serv. Water Co. v. Pa. Pub. Utility Comm’n, 645 A.2d 423, 478 (Pa. Cmwh. 1994).

17. Denied. By its own admission, Respondent closed the Etna Street Crossing in September 2021 without prior authorization from the Commission. It has remained closed every single day from that time until the present. Prior Commission orders have recognized that altering or abolishing a crossing by closing it to vehicular and pedestrian traffic without Commission authorization is a continuing violation. See In re Consolidated Rail Corp., 95 Pa.P.U.C. 24, 2001 WL 1542335 (Pa.P.U.C.) (Jan. 12, 2001) (adopting Recommended Decision of ALJ Fordham, which included a conclusion of law that “[e]ach day that a violation of the Public Utility Code continues is a separate and distinct offense.”).

18. Denied. The \$21,700 civil penalty sought by I&E is eminently fair and reasonable. I&E is seeking only a civil penalty of \$100 per day from the day Respondent was served I&E Data Request – Set I (January 17, 2024) to the day the Complaint was filed (totaling 217 days). Other cases where a railroad has altered or abolished a crossing without Commission authorization have imposed a civil penalty starting from the day the crossing was so altered or abolished by the regulated utility. See Id. (imposing a \$35,000 penalty for 350 days beginning on the day when Consolidated Rail began construction work to close the crossing at issue). See also Pa. Pub. Utility Comm’n v. Buffalo & Pittsburgh Railroad, Inc., 2024 WL 1195560 (Pa.P.U.C.) (March 13, 2024) (Commission order imposing a per-day fine for removal of steel superstructure at an above-grade rail crossing).

19. Denied. The Commission has entered orders in the past recognizing the continuing nature of a violation of Section 2702 where a rail crossing is altered or abolished without prior Commission approval.

20. Denied. Closing a rail crossing, or any alteration or abolishment of a rail crossing without prior approval of the Commission, is a violation that continues each day the closure is in effect. See Consolidated Rail Corp. and Buffalo & Pittsburgh Railroad, Inc., supra.

21. Denied. The cases cited in Respondent’s Paragraph 21 of its Preliminary Objections are inapposite. HIKO Energy LLC v. Pa. Pub. Utility Comm’n, 163 A.3d 1079, 1084-1085 (Pa. Cmwh. 2017) involved an electric generation supplier overbilling 5,708 customers on 14,689 separate invoices. Each improper invoice was a separate violation of the relevant section of the Code, and I&E sought the maximum civil penalty (\$1,000 for each of the 14,689 counts). Likewise, in Newcomer Trucking, Inc v. Pa. Pub. Utility Comm’n, 531 A.2d 85, 86, (Pa. Cmwh. 1987), the Respondent trucking company violated a restriction of its certificate

of public convenience on 184 occasions, and the Commission imposed a fine of \$100 for each of the 184 separate violations. Neither case involved a continuing violation.

22. Denied. Respondent apparently cites Pub. Serv. Water Co. v. Pa. Pub. Utility Comm'n., 645 A.2d 423, 430 (Pa. Cmwlth. 1994) and York Telephone & Telegraph Co. v. Pa. Pub. Utility Comm'n., 121 A.2d 605, 609 (Pa. Super. 1956) for the proposition that only violations of Commission *orders* may result in the imposition of per-day penalties. However, this proposition is belied by other Commission action as well as the rules of statutory construction. Limiting the imposition of per-day civil penalties for continuing violations under Section 3301(b) to only violations of Commission orders would “prohibit the Commission from assessing civil penalties for continuing violations of ... the Code and, consequently limit the Commission's authority over enforcement of the Code provisions.” Kathleen Jones v. Suez Water Pennsylvania, Inc., 2022 WL 4012031 (Pa.P.U.C.) at \*10, Docket No. C-2020-3022094.

The rules of statutory construction command that a statute is to be interpreted so as to avoid an absurd and unreasonable result. 1 Pa.C.S. § 1922(1). To interpret Section 3301 to bar continuing violations for violations of the Code would allow a regulated utility to skirt the requirements of and restrictions on its operation for a mere \$1,000 unless and until the Commission intervenes by ordering compliance with the Code. In the case at bar, it would allow the Respondent to close, alter, or abolish its rail crossings for only \$1,000 — the maximum penalty Respondent argues can be imposed for such a violation — a sum which is likely less than the cost to file a petition to obtain Commission approval to alter or abolish a crossing. Truly, this would be an absurd and unreasonable result.

23. Denied. The Commonwealth Court in Newcomer Trucking described a “continuing offense” as one which is not “repeated on more than one day” but “are proscribed activities that are of an ongoing nature and cannot be feasibly segregated into discrete violations

so as to impose separate penalties.” Newcomer Trucking, 531 A.2d at 345 (citing York Telephone & Telegraph, 121 A.2d at 617 (Rhoades, P.J, concurring and dissenting)).

24. Denied. The cases cited here by Respondent are again inapposite. Burkholder v. Department of Agriculture, 265 A.3d 863, 868 (Pa. Cmwlth. 2021), involved a violation of the Dog Law. In any event, it does not stand for the proposition that a “single act” cannot constitute a “continuous violation.” R.P.O. at Para. 24. In Burkholder, the Commonwealth Court held that the applicable provision of the Dog Law, 3 P.S. §§ 459-101 – 459-1201, penalized the *transfer*, rather than the *possession*, of an excess number of dogs beyond which a kennel was permitted to transfer under the particular class of its kennel license. The court noted “[e]ach unauthorized transfer of a single dog is a single violation of the Dog Law, not a continuing violation, because it is not ongoing in nature and such transfers can be feasibly segregated into discrete violations so as to impose separate penalties.” Burkholder, 265 A.3d at 869. The transfer of a dog is a singular, one-time, discrete event, similar to sending an improper invoice (as in HIKO) or transporting goods (as in Newcomer Trucking).

Likewise, Commonwealth v. Mikec, 206 A.3d 496 (Pa. Super. 2019), is inapplicable to the present case against Respondent. Mikec addressed the interpretation of 35 P.S. §§ 750.13 and 750.14, relating to the discharge of untreated sewage. The Superior Court ruled that the Defendant in that case could not receive more than one summary offense for his leaking septic tank, because the overflow was of a continuous nature and the statute which made such an occurrence a summary offense only specified a maximum penalty of \$5,000 or 90 days’ imprisonment. In other words, the statute implicitly did not allow per-day violations. In contrast, Section 3301(b) of the Code explicitly provides that “every day's continuance in the violation ... shall be a separate and distinct offense.”

25. Denied. Respondent’s closure of the Etna Street Crossing is ongoing, and it is a separate violation of Section 2702 for each day that the crossing remains in its altered state — blocked to vehicle and pedestrian traffic — without Commission authorization.

26. Denied. The continued and ongoing closure of the Etna Street Crossing is a continuing violation, as contemplated by Section 3301(b), and not “a one-time occurrence.”

27. Denied. Respondent’s closure of the Etna Street Crossing is an ongoing event and continuing offense because Respondent could have, at any time after September 2021 when it illegally altered the crossing, repaired the crossing to its original, authorized state or filed a petition to alter or abolish the crossing in accordance with the Code and Commission regulation.

#### **IV. CONCLUSION**

**WHEREFORE**, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that the Office of Administrative Law Judge and the Commission deny the Preliminary Objections raised by Buffalo & Pittsburgh Railroad, Inc. and sustain I&E’s Complaint.

Respectfully submitted,



Grant Rosul  
Prosecutor  
PA Attorney ID No. 318204

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Bureau of Investigation and Enforcement  
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400 North Street  
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Date: September 19, 2024

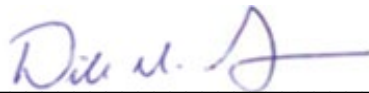
**BEFORE THE  
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v.	:	Docket No. C-2024-3050823
	:	
Buffalo & Pittsburgh Railroad, Inc.	:	
Respondent	:	

**VERIFICATION**

I, William Sinick, P.E., hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and that I expect that the Bureau of Investigation and Enforcement will be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: September 19, 2024



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William Sinick, P.E.  
Pennsylvania Public Utility Commission  
Bureau of Technical Services  
Rail Safety Division  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

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	:	
Buffalo & Pittsburgh Railroad, Inc.	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**Service by Electronic Mail**

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Dated: September 19, 2024