

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Norfolk Southern Railway Company : A-2018-3001039
For Approval of the Rehabilitation of the :
Below-Grade Crossing (DOT #507446L) where :
Merchant Street passes under the tracks of :
Norfolk Southern Railway Company in the :
City of Pittsburgh, Allegheny County, Pennsylvania :

Application of Norfolk Southern Railway Company : A-2018-3006432
For Approval to Reconstruct the crossing of the :
North Avenue/Brighton Road bridge crossing Above :
its tracks in the City of Pittsburgh, Allegheny County :
(DOT No. 507 450 B), and for An exemption :
from the Commission's Overhead Clearance :
Regulations :

**RP3'S MOTION TO AMEND SECOND INTERIM ORDER DATED MARCH 8, 2019,
TO CERTIFY INTERLOCUTORY ORDER FOR APPEAL
BY PERMISSION PURSUANT TO 42 Pa. C.S. 702(b)**

AND NOW, pursuant to 42 Pa. C.S. 702(b), Rail Pollution Protection Pittsburgh ("RP3"), by and through undersigned counsel, hereby submits this Motion for the Public Utility Commission ("PUC" or "Commission") to Amend its Second Interim Order in the above-captioned consolidated matters dated March 8, 2019 ("Second Interim Order") denying RP3's Petition to Intervene, so that an appeal may be taken by permission, pursuant to 42 Pa. Const. Stat. Ann. §702(b) and Rule 312 and 1311 of the Pennsylvania Rules of Appellate Procedure, and that all further proceedings before the Commission be stayed pending final disposition of the appeal, and in support states the following:

1. Section 702(b) authorizes appeals by permission when the final order would be within the jurisdiction of an appellate court, and 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.

2. On March 8, 2019, the Administrative Law Judge (“ALJ”) issued an order denying the Petition to Intervene filed by RP3 (the “Order”). The procedural background related to RP3’s February 7, 2019 Petition to Intervene is contained in the March 8, 2019, Second Interim Order denying Intervention at Docket No. A-2018-3006432.
3. On March 21, 2019, RP3 filed a Petition for Interlocutory Review and Answer to Material Question (“Petition”) in the above captioned consolidated matters respectfully requesting that the Commission grant review and answer the following question in the affirmative:

Whether RP3 should be permitted to intervene under 52 Pa. Code § 5.72(a)(2) because RP3 represents the interests of individual members of the public who may be directly and substantially affected by reconstruction of the W. North Avenue bridge Crossing and the City of Pittsburgh is not adequately representing the interests of those members; and under § 5.72(a)(3) because RP3 has another interest of such nature that participation may be in the public interest.

4. On April 10, 2019, Secretary Chiavatta issued a letter advising all Parties that the Commission “waive[s] the thirty-day period for consideration [of the Petition for Interlocutory Review] set forth in 52 Pa. Code § 5.303 and, thereby, extend our consideration beyond the thirty days provided for in said Regulation.”
5. To date, 118 days after RP3 submitted their Petition, the Commission has not taken action to issue a decision on RP3’s Petition, a delay which adversely affects the substantive rights of RP3.
6. Section 1.2(c) cited as support in the April 10, 2019 letter provides that... “The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.” 52 Pa. Code § 1.2. For example, the

Commonwealth Court has determined that an administrative law judge's consideration of a party's initial brief, even though it was filed in violation of the briefing order, was not an abuse of discretion. *Springfield Township v. Pennsylvania Public Utility Commission*, 676 A.2d 304 (Pa. Cmwlth. Ct. 1996). In a similar decision, the Commonwealth also found that the Commission does have authority to waive procedural defects when they do not affect the substantive rights of the parties. *Info Connections, Inc. v. Pennsylvania Public Utility Commission*, 630 A.2d 498 (Pa. Cmwlth. Ct. 1993).

7. In this instance, however, the Commission is clearly abusing their discretion and not only waiving procedural defects, but allegedly waiving their own procedural requirements altogether. Further, the *Warthman Funeral Home* case cited by the Commission in support of this waiver clearly does not apply here.
8. In *Warthman Funeral Home*, the Commission provided justification for waiving the 30-day rule claiming that 1) "the suspension of our 30-day rule provided indispensable parties with additional time to present argument on these material questions" and 2) the "extension allowed the parties to file a Reply Brief." In that case the Commission reasoned that "we simply postponed our decision until a proper disposition based on all the facts could be made."
9. Given the facts here, however, the Commission is unable to provide any such justification. There is no such reason to hold the record open since Norfolk Southern has filed an Answer in Opposition to RP3's Petition to Intervene on March 4, 2019. RP3 filed a Brief in Support of Petition for Interlocutory Review on March 29, 2019. Norfolk Southern filed a Brief in Reply to RP3's Petition for Interlocutory Review and Answer to

a Material Question on April 2, 2019. The remaining Parties have had more than sufficient time to file any additional briefing on this issue.

10. Rather, the Commission's extension in the instant case has effectively prohibited RP3 from participating in the proceedings which are pending in these matters including, but not limited to, being excluded by ALJ Dunderdale from stating our position on the issues and Applications during the March 27, 2019 Prehearing Conference, ensuing discovery, motion practice and therefore RP3 is unable to meaningfully participate in the evidentiary hearing scheduled for October 2019. RP3 was already further estopped from participating in discussions related to the proposed settlement of the Merchant Street Application. This inability to participate clearly affects the substantive rights of RP3 as the Commission has further delayed a decision on RP3's Petition for Interlocutory Review and Answer to Material Question.
11. An immediate appeal from the Second Interim Order will substantially advance the termination of this case, in that an order of the Commonwealth Court reversing the Second Interim Order would ultimately strike the denial of RP3's right to intervene as an abuse of discretion or error of law.
12. Pursuant to PA.R.A.P. 1311, RP3 may file a motion with the Commission seeking permission to appeal the Second Interim Order dated March 8, 2018, which denied RP3's Petition to Intervene only if the Commission amends its Second Interim Order to include the statement, as specified in 42 PA. C.S. § 702(b), which provides 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 may materially advance the ultimate termination of the matter."

13. For purposes of judicial economy, all proceedings before the Commission should be stayed pending the outcome of any final disposition of the within Motion to Amend Order of Court to Certify Interlocutory Order for Appeal by Permission pursuant to 42 Pa. C.S. § 702(b).

WHEREFORE, RP3 respectfully requests the Commission amend the Second Interim Order dated March 8, 2018 denying RP3's Petition to Intervene, by amending the Order to include language that it involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter, that all proceedings be stayed pending final disposition of the within Motion and grant such other relief as the Commission deems just and appropriate. Alternatively, RP3 requests that the Commission take action on the Petition for Interlocutory Review and grant RP3 status an intervenor.

Respectfully Submitted,

/s/ Ryan Hamilton
Ryan E. Hamilton, Esq.
PA 318844
Fair Shake Environmental Legal Services
5614 Elgin Street
Pittsburgh, PA 15206
rhamilton@fairshake-els.org
(412) 742-4615

Glenn Olcerst, Esq.
PA 25241
In House Counsel RP3
1200 Resaca Pl.
Pittsburgh, PA 15212
glennolcerst@gmail.com
(412) 999-2539

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Norfolk Southern Railway Company : A-2018-3001039
For Approval of the Rehabilitation of the :
Below-Grade Crossing (DOT #507446L) where :
Merchant Street passes under the tracks of :
Norfolk Southern Railway Company in the :
City of Pittsburgh, Allegheny County, Pennsylvania :

Application of Norfolk Southern Railway Company : A-2018-3006432
For Approval to Reconstruct the crossing of the :
North Avenue/Brighton Road bridge crossing Above :
its tracks in the City of Pittsburgh, Allegheny County :
(DOT No. 507 450 B), and for An exemption :
from the Commission's Overhead Clearance :
Regulations :

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2019, one (1) copy of the foregoing RP3'S MOTION TO AMEND SECOND INTERIM ORDER DATED MARCH 8, 2019, TO CERTIFY INTERLOCUTORY ORDER FOR APPEAL BY PERMISSION PURSUANT TO 42 Pa. C.S. 702(b) was served by US First Class U.S. Mail, Postage Pre-Paid, addressed as follows:

The Honorable Katrina Dunderdale
Pennsylvania P.U.C.
Office of Administrative Law Judge
301 5th Ave, Suite 220,
Pittsburgh PA 15222

David A. Wolf, Esq.
Debra R. Erbestein, Esq.
Goldberg, Kamin, Garvin, LLP
1806 Frick Bldg.
437 Grant Street
Pittsburgh, PA 15219

Mark Chappell, P.E.
Chief Right-of-Way and Utilities
Division Bureau of Design, Penn
DOT
P.O. Box 3362
Harrisburg, PA 17105-3362

Allegheny County
Solicitor
Dept. Of Law
445 Fort Pitt Blvd.
Pittsburgh, PA 15219

Engineering District 11-0
Pennsylvania Dept. of Transportation
Attn: Cheryl Moon-Sirianni, P.E.
45 Thomas Run Road
Bridgeville, PA 15017

Verizon Pennsylvania LLC
Attn: Deborah Barum
1026 Hay Street
Pittsburgh, PA 15221

Community College of Allegheny County
Facilities Management Division
Attn: Rich Schlegel
800 Allegheny Ave.
Pittsburgh, PA 15233

Windstream
Attn: Locate Desk Personnel
929 Marthas Way
Hiawatha, IA 52233

NRG Energy Center Pittsburgh
Attn: Bryan Sarti
111 S. Commons Ave.
Pittsburgh, PA 15212

Comcast Cablevision
Attn: Joseph Bechtold
1530 Chartiers Ave.
Pittsburgh, PA 15204

Level 3 Communications LLC
Attn: Level 3 Operator
1025 Eldorado Blvd
Broomfield, CO 80021

Century Link f/k/a Embarq
Attn: George McElvain
Grid No. UTOO-D27.34
700 W. Mineral Ave.
Littleton, CO 80120

Duquesne Light Company Attn: Shane
Thieret PA-TD
2645 New Beaver Ave
Pittsburgh, PA 15233

Crown Castle
Attn: Rebecca Caldwell
2000 Corporate Drive
Canonsburg, PA 15317

Gina M. D'Alfonso, Esquire
Office of Chief Counsel - PennDOT
P. O. Box 8212
Harrisburg, PA 17105-8212

City of Pittsburgh Solicitor's Office
Dept. Of Law
313 City-County Building
414 Grant Street
Pittsburgh, PA 15219

Peoples Gas Company LLC
Attn: Debbie Ross
375 North Shore Drive
Pittsburgh, PA 15212

Pittsburgh Water & Sewer Authority
Attn: Rick Obermeier
1200 Penn Avenue
Pittsburgh, PA 15222

City of Pittsburgh
Dept. of Mobility &
Infrastructure
Attn: Karina Ricks
611 Second Ave.
Pittsburgh, PA 15219

Benjamin C. Dunlap, Jr., Esquire
Nauman Smith
Attorneys At Law
PO Box 840
Harrisburg, PA 17108-0840

RICH SCHLEGEL
COMMUNITY COLLEGE OF ALLEGHENY COUNTY
800 ALLEGHENY AVENUE
FACILITIES MANAGEMENT DIVISION
PITTSBURGH PA 15233

SHAWN BLANNER
DQE COMMUNICATIONS
424 SOUTH 27TH STREET SUITE 220
PITTSBURGH PA 15203

NANCY SPENCE
AT&T
AT&T LOCAL SERVICES
360 GEES MILL BUSINESS PKWY NE
CONYERS GA 30013

ANTHONY BILAN ESQUIRE
CITY OF PITTSBURGH
313 CITY COUNTY BUILDING
414 GRANT STREET
PITTSBURGH PA 15219

MICHAEL SWINDLER ESQUIRE
PA PUC BUREAU OF INVESTIGATION AND ENFORCEMENT
PO BOX 3265
HARRISBURG PA 17105-3265

/s/ Ryan Hamilton
Ryan E. Hamilton, Esq.
Counsel for Petitioner,
Rail Pollution Protection Pittsburgh (RP3)