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June 23, 2017

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

**RE: National Railroad Passenger Corporation v. PPL Electric Utilities Corporation;
Docket No. C-2016-2580526**

**PPL Electric Utilities Corporation Supplement No. 213 to Tariff Electric Pa. P.U.C.
No. 201 for Rate Schedule LPEP; Docket No. R-2016-2569975**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") is the Brief of National Railroad Passenger Corporation ("Amtrak") in Support of its Petition for Interlocutory Review of Material Questions. As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By


Pamela C. Polacek

Counsel to National Railroad Passenger Corporation

Enclosure

c: Administrative Law Judge David Salapa (via E-mail and First-Class Mail)
Certificate of Service

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CERTIFICATE OF SERVICE

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

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Dated this 23rd day of June, 2017, at Harrisburg, Pennsylvania.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NATIONAL RAILROAD PASSENGER
CORPORATION,

COMPLAINANT

v.

PPL ELECTRIC UTILITIES
CORPORATION,

RESPONDENT

Docket No. C-2016-2580526

Docket No. R-2016-2569975

PPL ELECTRIC UTILITIES
CORPORATION SUPPLEMENT NO. 213 TO
TARIFF ELECTRIC PA PUC NO. 201 FOR
RATE SCHEDULE LPEP

BRIEF OF THE
NATIONAL RAILROAD PASSENGER CORPORATION IN SUPPORT OF ITS PETITION FOR
INTERLOCUTORY REVIEW OF MATERIAL QUESTIONS

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Dated: June 23, 2017

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I. INTRODUCTION

National Railroad Passenger Corporation ("Amtrak") hereby files this Brief with the Pennsylvania Public Utility Commission ("PUC" or "Commission") in support of the Petition for Interlocutory Review of Material Questions ("Petition") filed on June 13, 2017. In its Petition, Amtrak asked the Commission to review the following Material Questions that have arisen in the above captioned proceeding:

Material Question #1: Whether the Administrative Law Judge's ("ALJ") June 7, 2017, Order dismissing Amtrak's May 11, 2017, Motion to Dismiss erred by allowing the continuation of a proceeding addressing issues that are moot or unripe for review due to the uncertainty that PPL Electric Utilities Corporation ("PPL") will upgrade the Conestoga Substation?¹

*Proposed Answer: Yes. Because Amtrak has lawful title to the property and equipment at the Conestoga Substation by operation of federal law, the sole basis for PPL's proposed Supplement No. 213 is gone; the Petition is now moot, and no case or controversy exists. At minimum, PPL's tariff change is not ripe for review, and further proceedings by PPL on its tariff change would violate the federal court order preventing PPL from making any alterations at the Conestoga Substation.*²

Material Question #2: Whether the ALJ's June 7, 2017, Order erred by concluding that the Commission's consideration of compensation due by Amtrak to PPL after April 18, 2017, is not preempted by 49 U.S.C. § 24311(b), Fed. R. Civ. P. 71.1 and the federal court order?

Proposed Answer: Yes. The plain language of 49 U.S.C. §24311 and Fed. R. Civ. P. 71.1 indicates that all outstanding charges related to the property are within the exclusive jurisdiction of the federal court. The Commission's continuation of the review of a hypothetical rate that would apply based on PPL's original (and now invalid) schedule and costs for the Conestoga Substation conflicts with the district court's jurisdiction and is preempted.

Once Amtrak filed its Motion to Dismiss, Amtrak's participation in the above-captioned proceeding was limited to preservation of its federal court claims in *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752 (E.D. Pa.). Pursuant to *England v. La. State Bd. Of Med. Exam'rs*, 375 U.S. 411 (1964), *Instructional Sys., Inc. v.*

¹ The "Conestoga Substation" is the substation that connects Amtrak to the Safe Harbor Power Corporation's ("Safe Harbor") hydroelectric generation facility. As noted later herein, Amtrak acquired the Conestoga Substation and certain facilities and equipment that are used to provide power to Amtrak. A complete description of the acquired property can be found in Paragraphs 7-8 of Amtrak's Complaint for Condemnation (dated Apr. 17, 2017), Paragraphs 3-4 of Amtrak's Notice of Condemnation (dated Apr. 18, 2017), and Paragraphs 2-3 of Amtrak's Declaration of Taking (dated Apr. 17, 2017), filed under *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corporation* at Docket No. 17-CV-1752 at the United States District Court for the Eastern District of Pennsylvania. For ease of reference, throughout this Petition Amtrak will refer to the acquired property collectively as the "Conestoga Substation."

² See Appendix A to Amtrak's Petition for a copy of the federal court order preventing PPL from making any alterations to the Conestoga Substation.

Computer Curriculum Corp., 35 F.3d 813, 820-21 (3d Cir. 1994), and *Bradley v. Pittsburg Bd. of Educ.*, 913 F. 2d 1064, 1071 (3d Cir. 1990), Amtrak reserved its statutory right to adjudicate issues related to the acquisition, transfer of possession, and disposition of outstanding charges related to the Conestoga Substation at the United States District Court for the Eastern District of Pennsylvania ("District Court"). Through this Petition and Brief, Amtrak provides the PUC with the opportunity to correct the ALJ's errors in law and fact without the need for intervention by the federal courts. See e.g., *Nat'l. R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n.*, 342 F.3d 242 (3d Cir. 2003) ("*Lloyd Street Bridge*") (enjoining the PUC and other litigants in matters that conflict with federal court jurisdiction). Timely review of the errors of fact and law contained in the June 7, 2017, Order is essential in order to prevent: the Commission from violating the Supremacy Clause of the U.S. Constitution; a violation of a federal court order; an intrusion on the exclusive jurisdiction of the federal court; substantial prejudice and the prospect of judicial waste; the creation of conflicting fact records; and collateral estoppel, or res judicata disputes regarding the outstanding charges related to the Conestoga Substation.

II. PROCEDURAL HISTORY

On October 5, 2016, PPL filed Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201 ("Supplement No. 213") for Rate Schedule LPEP under Docket No. R-2016-2569975. On December 19, 2016, Amtrak filed a Complaint and New Matter under Docket No. C-2016-2580526 opposing Supplement No. 213.³ On April 17, 2017, Amtrak filed a Complaint for Condemnation and Declaration of Taking, along with other supporting documentation, with the District Court pursuant to Amtrak's federal eminent domain authority under 49 U.S.C. § 24311 and Fed. R. Civ. P. 71.1.⁴ On April 18, 2017, Amtrak submitted to the District Court a Notice of Condemnation and a deposit in the amount of Amtrak's estimated just compensation for the property and equipment determined by a certified appraiser. By operation of 49 U.S.C. § 24311 on April 18, 2017, fee title to the Conestoga Substation transferred to Amtrak.

³ Amtrak's Complaint addressed the propriety of Supplement No. 213, while Amtrak's New Matter asserted PPL improperly charged Amtrak for service rendered as of September 1, 2016, and requested a refund and/or credit for Amtrak's overpayments after September 1, 2016. In an Order issued by the PUC on January 19, 2017, ALJ David Salapa denied Amtrak's New Matter. As a result, the proceeding carried forward and solely focused on Supplement No. 213. Amtrak continued to pay PPL at the rate in the current tariff through April 18, 2017.

⁴ Pursuant to 52 Pa. Code §§ 1.31(b) and 1.33, Amtrak incorporates by reference its eminent domain pleadings at the District Court, which include: the Complaint for Condemnation, Declaration of Taking, Notice of Condemnation, deposit, and all supporting documentation. Copies of these eminent domain filings were attached as Appendix A to Amtrak's Motion to Dismiss filed under the above-captioned proceeding. Amtrak also attached a copy of the District Court's May 23, 2017 Stipulation and Order to its Petition as "Appendix A."

Accordingly, PPL provides no electric distribution service to Amtrak.⁵ The Declaration of Taking preserved a floating easement for PPL to ensure PPL's continued ability to perform PPL's obligations to parties other than Amtrak under (1) the Transmission Contract ("TC") between PPL, Safe Harbor, and Baltimore Gas and Electric Company and (2) the Interconnection Service Agreement ("ISA") among PJM Interconnection, L.L.C. and Safe Harbor and PPL.⁶ Supplement No. 213's proposed tariff changes addressed only charges to Amtrak, not charges under the TC or ISA.

On May 11, 2017, Amtrak filed a Motion to Dismiss the above-captioned rate proceeding with the PUC. On June 7, 2017, ALJ David Salapa issued an Order denying Amtrak's Motion to Dismiss. On June 13, 2017, Amtrak filed the above-referenced Petition to give the Commission the opportunity to correct the errors of fact and law without further intervention by the federal court. As set forth herein, a review of the errors of fact and law contained in the June 7, 2017, Order is essential in order to prevent: the Commission from violating the Supremacy Clause of the U.S. Constitution; a violation of a federal court order; an intrusion on the exclusive jurisdiction of the federal court; substantial prejudice and the prospect of judicial waste; the creation of conflicting fact records; and collateral estoppel, or res judicata disputes regarding the outstanding charges related to the Conestoga Substation.

III. ARGUMENT

Section 5.302(a) of the Commission's regulations authorize the Commission to review the ruling of an ALJ where such review will prevent substantial prejudice or expedite the conduct of the proceeding. 52 Pa. Code §

⁵ Amtrak paid PPL under the settlement rate approved in Opinion and Order, *Pa. PUC v. PPL Elec. Utils. Corp.*, Docket No. R-2015-2469275 (entered Nov. 19, 2015) until Amtrak obtained title to the Conestoga Substation on April 18, 2017.

⁶ A floating easement is "An easement that, when created, is not limited to any specific part of the servient estate." Black's Law Dictionary (7th ed. 1999). Because a floating easement is not fixed to any particular part of the servient estate, it is impossible to provide a metes and bounds description of the floating easement. *See id.*

Whereas ALL of the 25 Hertz output from Safe Harbor comes into Conestoga Substation, (1) some of that 25 Hertz power is transmitted to Amtrak-owned transmission lines to be used by Amtrak at other locations, (2) some 25 Hertz power is transmitted to PPL-owned transmission lines to be used by Amtrak at other locations, and (3) some that is not needed by Amtrak for the first two uses can flow back to a rotary frequency converter at Safe Harbor's facility to be converted to 60 Hertz power to feed the 60 Hertz network at PPL's Manor Substation. Because the Conestoga Substation contains multiple transformers, it is not possible to track the precise paths of the specific electrons that enter the Substation from Safe Harbor and exit the Substation to the frequency converter or the transmission lines. In general, electrical current will flow from "source," along the path of least resistance to "sink" (i.e. wherever load needs to be served). This means that the Safe Harbor 25 Hertz electrons could go through any of the seven transformers in the Conestoga Substation depending on the location of the "sink". As a result, the easement reserved for PPL to take advantage of 25 Hertz electrical current not needed by Amtrak must be a "floating easement" to reflect the fact that the electrons may take multiple paths through the Substation before the 25 Hertz electrical current not used by Amtrak flows back to a rotary frequency converter at Safe Harbor's facility to be converted to 60 Hertz power to feed the 60 Hertz network at PPL's Manor Substation.

5.302(a). The Commission has also granted interlocutory review "to obviate the need for additional time and expense." See *Philadelphia Gas Works Universal Service and Energy Conservation Plan; Joint Petition for Interlocutory Review, Answer to a Material Question and Approval of a Settlement*, 2009 Pa. PUC LEXIS 2238 (January 1, 2001), at *5. Through its May 11, 2017, Motion to Dismiss and its June 13, 2017, Petition, Amtrak indicated that in light of the doctrines of mootness and ripeness, as well as principles of federal preemption, this proceeding cannot continue at the PUC. Despite Amtrak's efforts, the ALJ denied Amtrak's Motion to Dismiss without giving full consideration to present facts and applicable law. In order to avoid duplicative and expensive litigation efforts, resolution of the Material Questions below must be granted. For the reasons noted below, the PUC should dismiss or at a minimum order an indefinite stay of Supplement No. 213.

A. Interlocutory Review of Material Question #1 is Necessary to Terminate a Proceeding Addressing Issues that are Moot or Not Ripe for Review due to the Uncertainty that PPL will Upgrade the Conestoga Substation.

The Commission only possesses the ability to address actual "cases and controversies." Because Amtrak has obtained fee title to the Conestoga Substation and equipment there is no justiciable basis for the PUC to review Supplement No. 213. Supplement No. 213 addresses a purely hypothetical rate that would apply only if PPL were to succeed in challenging Amtrak's exercise of federal eminent domain authority and only if PPL were to perform equipment upgrades at the Conestoga Substation. Amtrak, not PPL, plans to perform any necessary upgrades to the Conestoga Substation. As a result, the case is moot or, at a minimum, not ripe for review because of the uncertainty that the rate would ever apply to Amtrak.

1. Mootness Doctrine in Pennsylvania.

The PUC was created by a Commonwealth statute, 66 Pa. C.S. § 301 *et seq.*, and must comply with Commonwealth law. 66 Pa. C.S. § 501(b) provides, "The commission shall have general administrative power and authority to supervise and regulate all public utilities . . . within this Commonwealth. The Commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties." The Supreme Court of Pennsylvania has provided that "a case is moot if there is no actual case or controversy in existence at all stages of the controversy." *Phila. Pub. Sch. Notebook v. Sch. Dist. Of Phila.*, 49 A.3d 445, 448 (Pa. Commw. Ct. 2012) ("*Phila.*") (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591, 600 (2002) ("an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed")). The requirements for a case or controversy have been interpreted to mean the following: "(1) a legal controversy that is

real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for a reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution." *Phila.* 49 A.3d at 448. (quoting *Mistich v. Pa. Bd. of Probation and Parole*, 863 A.2d 116, 119 (Pa. Commw. Ct. 2004)). The chief inquiry in determining whether an issue is moot is "whether the court or agency will be able to grant effective relief." *Consol Pa. Coal Co., L.L.C. v. Dep't of Env'tl. Protection*, 129 A.3d 28, 39 (Pa. Commw. Ct. 2015). Put another way, the issue in dispute is moot "if in ruling upon the issue the court cannot enter an order that has any legal force or effect." *In re D.A.*, 801 A.2d 614, 616 (Pa. Super. 2002) (quoting *Johnson v. Martofel*, 797 A.2d 943, 946 (Pa. Super. 2002)); *accord Lyft, Inc. v. Pa. PUC*, 145 A.3d 1235, 1247-48 (Pa. Commw. Ct. 2016).

Pennsylvania courts will not decide moot questions, with exceptions. *See e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591, 599-600 (2002). A court may hear an otherwise moot issue when "(1) the conduct complained of is capable of repetition yet evading review, or (2) involves questions important to the public interest, or (3) will cause one party to suffer some detriment without the Court's decision." *Phila.*, 49 A.3d at 448-49 (Pa. Commw. Ct. 2012) (quoting *Cytemp Specialty Steel Div., Cyclops Corp. v. Pa. PUC*, 563 A.2d 593, 596 (Pa. Commw. Ct. 1989)); *accord Utility Workers Union, Local 69 v. Pa. PUC*, 859 A.2d 847, 850 (Pa. Commw. Ct. 2004); *Sierra Club v. Pa. PUC*, 702 A.2d 1131, 1134 (Pa. Commw. Ct. 1997).⁷

Pennsylvania courts have employed the mootness doctrine when changes in facts or legal circumstances operate to remove the controversy at issue. For example, in *Consol. Pa. Coal Co., L.L.C. v. Dept. of Env'tl. Protection*, 129 A.3d 28, 41 (Pa. Commw. Ct. 2015), a permittee appealed the Pennsylvania Department of Environmental Protection's ("DEP") imposition of a special condition on its mining permit. During the appeal to DEP's Environmental Hearing Board ("EHB"), DEP removed the special condition and the EHB ruled the issues surrounding the special condition to be moot. *Id.* at 35. The permittee further appealed the EHB's decision, indicating that DEP's special condition imposed future obligations upon the permittee. *Id.* at 38. Upon review, the Pennsylvania Commonwealth Court affirmed the EHB's ruling and noted that permittee's argument regarding potential future harm

⁷ "The first exception to mootness – that the conduct complained of is capable of repetition yet likely to evade judicial review – involves two elements: (1) that the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) that there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Phila.*, 49 A.3d at 448-49 (Pa. Commw. Ct. 2012) (citing *Commw. v. Buehl*, 462 A.2d 1316, 1319 (Pa. Super. Ct. 1983)). Neither exception applies here because Amtrak has already taken fee title to the Conestoga Substation, and as a result has eliminated the need for this rate proceeding regarding Supplement No. 213.

required the court "to engage in pure conjecture." *Id.* at 41. Likewise, in *Utility Workers Union, Local 69 v. Pa. PUC*, 859 A.2d 847, 849 (Pa. Commw. Ct. 2004), the court held that a party's complaint is rendered moot when the controversy of the challenged action is removed by factual challenges.

Here, as noted below, the PUC has no jurisdiction to decide Supplement No. 213. Supplement No. 213 is moot because the condition precedent to its effectiveness (*e.g.*, PPL's ownership of and improvements to the Conestoga Substation) will not occur or, at a minimum, is "speculative."

2. Ripeness Doctrine in Pennsylvania.

As noted earlier, the PUC is a creation of Commonwealth statute, 66 Pa. C.S. § 301 *et seq.*, and is subject to Commonwealth law. The ripeness doctrine in Pennsylvania generally operates in similar fashion to the mootness doctrine. While the mootness doctrine applies when a case or controversy ceases to exist, the ripeness doctrine prevents parties from taking legal action before a case or controversy exists in order to prevent premature adjudications. *Treski v. Kemper Nat'l Ins. Cos.*, 674 A.2d 1106, 1113 (Pa. Super. 1996). Although the Pennsylvania Constitution does not impose a case or controversy requirement, Pennsylvania courts have cited to federal court decisions in formulating Pennsylvania's ripeness doctrine. The ripeness doctrine instructs Pennsylvania courts to refrain from giving "answers to academic questions or render advisory opinions or make decisions based on assertions as to hypothetical events that might occur in the future." *Phila. Entm't & Dev. Partners., L.P. v. City of Philadelphia*, 937 A.2d 385, 392 (2007); *accord Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 932 A.2d 56, 57-58 (2007). Additionally, the ripeness doctrine "reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Yocum v. Commonwealth*, No. 74 MM 2015, 2017 Pa. LEXIS 1208, *9 (May 25, 2017). A court faced with a ripeness question will "generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.3d 866, 874 (2010) (quoting *Twp. of Derry v. Pa. Dep't of Labor & Indus.*, 932 A.2d 56, 60 (2007)). As applied to administrative law, "the basic rationale of ripeness is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.3d 866, 874 (2010); *accord Gardner v. Dep't Envtl. Res.*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49, (1967)).

The PUC has previously declined to review unripe matters because taking any decisive action would be acting upon hypothesis and speculation. *See, e.g., In Application of Exelon Corp.*, 2009 Pa. PUC LEXIS 1533, *21 ("We do not believe the Parties and the ALJ should be required to spend scarce public and private resources litigating hypothetical scenarios."). On this basis, as noted below, the PUC has no jurisdiction to decide PPL's Supplement No. 213 because that rate filing is not ripe for PUC review. It is unknown whether PPL will succeed in overturning Amtrak's eminent domain authority or whether in the future PPL may upgrade the Conestoga Substation.

3. Supplement No. 213 is Moot, or, at a Minimum, Not Ripe for Review Due to the Uncertainty That PPL will Upgrade the Conestoga Substation.

The basis for the above-captioned rate proceeding is cost recovery for upgrades to the Conestoga Substation *if PPL completes those upgrades*. At the time PPL filed Supplement No. 213, PPL still owned portions of the equipment and property at the Conestoga Substation and alleged that it needed the \$2.32 million rate increase in order to recoup costs associated with upgrades to the Conestoga Substation. Supplement No. 213, Twenty-Sixth Revised Page No. 29. As of April 18, 2017, Amtrak took title to all the property and equipment at the Conestoga Substation. As owner of that property, Amtrak, not PPL, will perform any future upgrades associated therewith.

By Stipulation and Order signed on May 23, 2017, the District Court specifically prohibited PPL from making "any capital improvements, upgrades, or alterations of the physical conditions at the Conestoga Substation including to the real property or to any equipment located thereon without the prior approval of Amtrak's Assistant Division Engineer, Electric Traction Maintenance, Mid-Atlantic Division North, currently Frank Morris." Stipulation and Order, *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752, p. 1 (E.D. Pa. 2017) (attached to Amtrak's Petition as "Appendix A"). Neither Amtrak nor the District Court has given PPL permission to make "any capital improvements, upgrades, or alterations of the physical conditions at the Conestoga Substation."

Here, Amtrak has taken title to the Conestoga Substation and, by order of the District Court, PPL cannot make any upgrades to the Conestoga Substation. PPL can regain title only if PPL can establish that the property is not "necessary for intercity rail passenger transportation," 49 U.S.C. § 24311(a)(1)(A), and courts are very deferential to Amtrak's determinations in this regard. *See, e.g., National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992) (indicating Amtrak can take property and re-sell it to another entity and still be within its authorized taking authority); *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2nd Cir.

1987) (indicating (1) Amtrak can take property because it was unquestionably required for intercity rail passenger service, and (2) condemnation of appellant landowner's property was within Amtrak's authority when Amtrak intended to reconvey the property to a city as part of a cooperative agreement to construct new track and a bridge); and *Union Center Redevelopment Corp. v. National Railroad Passenger Corp.*, 103 F.3d 62 (8th Cir. 1998) (holding that Amtrak can take and hold and lease property to another entity and still be within authorized taking authority).

PPL admitted in its May 17, 2017, letter at this docket "[t]he outcome of the federal condemnation proceeding is entirely unknown and speculative at this time." As a result, Supplement No. 213 is moot because the condition precedent to its effectiveness (*e.g.*, PPL's ownership of and improvements to the Conestoga Substation) will not occur or, at a minimum, as PPL admits, is "speculative." Supplement No. 213 is now purely a hypothetical filing. The proceeding has no practical effect on Amtrak because, as of April 18, 2017, PPL does not own the Conestoga Substation and does not provide electric distribution service to Amtrak.

Furthermore, even if this proceeding were not moot, it would still be impermissible for the PUC to adjudicate it because this case is not ripe for a decision by the PUC on PPL's Supplement No. 213. In this case, continuing to adjudicate Supplement No. 213 would place the PUC squarely in the position of speculation, making assertions based solely on a hypothetical successful challenge to Amtrak's exercise of federal eminent domain authority.

Pursuant to the doctrines of mootness and ripeness, there is no case or controversy in this proceeding and the PUC has no jurisdiction over Supplement No. 213. As of April 18, 2017, Amtrak has taken fee title to the Conestoga Substation and, accordingly, the basis for Supplement No. 213 no longer exists. Even if PPL were to regain title from Amtrak at the conclusion of the District Court proceeding, it will have the ability to refile an updated tariff supplement to Rate LPEP with this Commission based on the costs and timeline at that time. Until then, Supplement No. 213, and any arguments in support of its relevance, are purely conjectural and cannot be properly disposed of at this time.

4. The ALJ Erred in Suggesting that the Continuation of this Proceeding is Appropriate because Supplement No. 213 addresses Operation and Maintenance Expense ("O&M Expense") while PPL Continues to have Possession of the Conestoga Substation, and that PPL will Perform the O&M Function Throughout the Federal Court Litigation.

In addition to the doctrines of mootness and ripeness, this proceeding also cannot continue at the Commission because the June 7, 2017, Order contains misstatements of law and fact. First, the June 7, 2017, Order correctly noted "the Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction." June 7, 2017, Order, p. 14. However, the Order

then states "PPL's proposed rate is based on the costs of owning and operating the Conestoga Substation." *Id.* PPL no longer owns the Conestoga Substation because Amtrak completed its taking of the property pursuant to 49 U.S.C. § 24311(b) on April 18, 2017.

Furthermore, the ALJ's June 7, 2017, Order mistakenly categorizes Supplement No. 213 as addressing costs that PPL incurs to provide ongoing operation and maintenance functions at the Conestoga Substation. June 7, 2017, Order, p. 15. However, Supplement No. 213 addresses the O&M Expense that PPL proposed to allocate to Rate Schedule LPEP *only after* the upgrade to the Conestoga Substation was accomplished; Supplement No. 213 does not address the compensation for ongoing O&M Expense. As of April 18, 2017, PPL is no longer Amtrak's distribution provider. Amtrak owns the Conestoga Substation and is distributing the power from Safe Harbor to itself. Pursuant to the District Court's May 23, 2017, Stipulation and Order, PPL has a limited role of performing limited "operational and/or maintenance functions at the Conestoga Substation." Stipulation and Order, *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752, p. 2 (E.D. Pa. 2017). Pursuant to 49 U.S.C. § 24311(b)(2)(B) and Fed. R. Civ. P. 71.1(h), any PPL claims for compensation for PPL's limited role in providing operation and maintenance services for Amtrak until Amtrak takes full possession must be addressed by the District Court proceeding. In addition, Amtrak has the ability to request that the District Court transfer possession of the Conestoga Substation while the federal court litigation is pending. *See* 49 USC 24311(b)(2)(A); *see also National R. Passenger Corp. v. Penn Cent. Corp.*, No 89-C-1631, 1989 WL 51406, 1989 U.S. Dist. LEXIS 5210, at * 6 (N.D. Ill. May 10, 1989) (granting Amtrak's motion for possession of condemned property so that phased construction project could begin). Thus, the ALJ was incorrect in concluding that PPL will retain possession of the Conestoga Substation indefinitely. June 7, 2017, Order, pp. 10-16.

B. Interlocutory Review of Material Question #2 is Necessary to Recognize the Preemptive Effect of 49 U.S.C. § 24311(b)(2)(B) on the Commission's Consideration of Rates and Compensation Due by Amtrak to PPL after April 18, 2017.

The plain language of 49 U.S.C. § 24311(b)(2)(B) indicates that all outstanding charges *related* to the Conestoga Substation after its acquisition are subject to the District Court's jurisdiction:

When the declaration is filed and the deposit is made under paragraph (1) of this subsection, title to the property vests in Amtrak in fee simple absolute or in the lesser interest shown in the declaration, and the right to the money vests in the person entitled to the money. When the declaration is filed, the court may decide—

(B) the disposition of outstanding charges related to the property.

However, in his June 7, 2017, Order, the ALJ mistakenly asserts that the charges the District Court may address must be "attached to the property at the time Amtrak initiated its eminent domain action and continue to be attached to the property after Amtrak takes title to the property.... such as a lien or mortgage." June 7, 2017, Order, p. 14. The ALJ impermissibly substituted the phrase "related to" with "attached to" in the language of Section 24311(b)(2)(B) and, as a result, adopted an extremely narrow and unsupported interpretation of that statute. Without citing to statutory or case precedent as a rationale for this narrow interpretation, the ALJ presupposes, "it seems logical to infer that these outstanding charges encompass charges that were attached to the property at the time Amtrak initiated its eminent domain action and continue to be attached to the property after Amtrak takes title to the property." June 7, 2017, Order, p. 14. As demonstrated below, the ALJ's interpretation conflicts with guiding principles of federal and state statutory interpretation and acts contrary to the doctrine of federal preemption. As a result, the Commission should reverse the ALJ's June 7, 2017, Order. Statutory language, case precedent, and legislative history make clear that only the District Court retains exclusive jurisdiction to review issues outstanding charges relating to the Conestoga Substation and other matters relating to Amtrak's acquisition thereof.

The U.S. Supreme Court has stated that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[C]ourts must presume that a legislature says what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (citation omitted).

Here, 49 U.S.C. 24311(b)(2)(B) expressly says the district court retains authority over "outstanding charges related to the property." *Id.* (emphasis added). The ALJ's interpretation of this statute conflicts with the plain language of the statute and substitutes a definition that effectively undermines the District Court's express authority to decide "outstanding charges related to the property" under 49 U.S.C. § 24311(b)(2)(B).

Courts examine legislative history when the text of the statute is facially unclear or ambiguous. *In Re Phila. Newspapers, LLC*, 599 F.3d 298, 317 (3d Cir. 2010). In particular, courts have looked to prior versions of the United States Code and relevant legislative history in order to resolve questions regarding the meaning of a statute. *See Aaron v. SEC*, 446 U.S. 680, 700-701 (1980); *Strick Corp. v. United States*, 714 F.2d 1194, 1197 (3d Cir. 1983) ("Based

upon a careful review of the prior versions of section 4216(b), the relevant legislative history, and the relevant case law, we conclude that the promulgation of the cost-floor alternative was a valid exercise of the Commissioner's discretionary authority under the statute"); *United States v. Sanders*, 165 F.3d 248, 252 (3d Cir. 1999) ("If there is any ambiguity in the language of [18 U.S.C.] § 922(j), however, we think it is resolved by reference to the legislative history. It is instructive to note the prior version of § 922(j) which, until its amendment in 1990, stated . . .").

Here, the ALJ's interpretation conflicts with substantial legislative history demonstrating that Congress intended for "outstanding charges related to the property" to be broadly interpreted. First, in considering other federal government condemnation statutes aside from 49 U.S.C. § 24311, federal courts have specifically considered ongoing maintenance costs when deciding just compensation owed to condemnees, indicating that such charges are not for state administrative agencies such as the PUC to decide. *See, e.g., United States v. Certain Land in Paterson*, 322 F.2d 866, 870 (3d Cir. 1963) ("The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.' The statute therefore confers broad discretion on a United States district court in the situation at bar. We need not define the exact bounds of this discretion.") *John Hancock Mut. Life Ins. Co. v. Casey*, 147 F.2d 762, 766 (5th Cir. 1945) (noting "the District Court in condemnation proceedings is given 'power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable'" and the District Court is not "obliged to follow the local law in construing a federal statute which provides the distribution in respect to encumbrances 'shall be just and equitable.'"); *Foster v. Detroit*, 254 F. Supp. 655, 666 (E.D. Mich. 1966); *Marseilles v. Hydro Power LLC v. Marseilles Land & Water Corp.*, No. 06-C-1427, 2004 U.S. Dist. LEXIS 25276, * 8 (N.D. Ill., Dec. 10, 2004).

Moreover, prior iterations of 49 U.S.C. § 24311 also demonstrate Congress intended for "outstanding charges related to the property" to be broadly interpreted. In 1994, 45 U.S.C. § 545 was recodified as 49 U.S.C. § 24311. The 1976 and 1988 versions of 45 U.S.C. § 545(d)(5) served as predecessors to 49 U.S.C. § 24311(b)(2)(B) and both noted: "Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable." When 45 U.S.C. § 545 was recodified as 49 U.S.C. § 24311, subsection 24311(b)(2)(B) was rephrased to indicate a federal district court may decide "disposition of outstanding charges related to the property." 49 U.S.C. §

24311(b)(2)(B). Congress's decision to move from more specific to more general language on this provision demonstrates that they desired a broader interpretation of "outstanding charges related to the property."

Because federal law provides the District Court with authority to determine just compensation for the acquired property, the PUC does not have jurisdiction over charges relating to that property arising after Amtrak obtained title to the Conestoga Substation April 18, 2017. The basis for this jurisdictional change lies in the doctrine of federal preemption. The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, c. 2. Federal law preempts state law in three scenarios: (1) express preemption; (2) field preemption; and (3) conflict preemption. *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 222 (3d Cir. 2001) (citing *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 381-82 (3d Cir. 1999) (*en banc*)). Conflict preemption exists when "'it is impossible for a private party to comply with both state and federal requirements' . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("*Freightliner*") (citations omitted).

An extensive record of prior litigation between Amtrak and the PUC demonstrates that "state laws [may not] 'stand' as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *UGI Utils. v. Nat'l. R.R. Passenger Corp.*, 2004 U.S. Dist. LEXIS 29305, *8-9 (M.D. Pa. 2004) ("*UGI*"). In *Lloyd Street Bridge*, 342 F.3d 242 (3d Cir. 2003), litigation ensued regarding the PUC's ability to assess costs and responsibilities for bridge maintenance against Amtrak. Amtrak had indicated it enjoys exemption from "a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority...." under 49 U.S.C. § 24301(l)(1). *Lloyd Street Bridge*, 342 F.3d at 246-47. Ultimately, the District Court entered an order preliminarily enjoining the PUC from (1) assessing to Amtrak costs and responsibilities for Lloyd Street Bridge maintenance and from relitigating in state court the extent of Amtrak's exemption; and (2) preliminarily enjoining any attempts from parties to the PUC proceedings from enforcing or seeking to enforce any judicial or administrative order that would assess costs against Amtrak with regard to the Lloyd Street Bridge improvement project. *Id.* at 251. Also, in *UGI*, the court determined that a Pennsylvania public utility cannot rely upon its limited power of eminent domain under Pennsylvania statutory law to secure underground utility rights-of-way below property owned by Amtrak because such condemnation conflicts with superior federal authority (the Regional Rail Reorganization Act, 45 U.S.C. § 701 *et seq.*, and the Rail Passenger Service Act, 49 U.S.C. §§ 24101 *et seq.*). *Id.* at *2-10.

Continuing the evaluation of the proposed rate in Supplement No. 213 is inconsistent with the District Court having jurisdiction over "outstanding charges related to the property." Because Amtrak serves an important public purpose in facilitating economical and efficient intercity rail passenger service, Congress intended for Amtrak to have a streamlined process to invoke its eminent domain rights with the activity being undertaken at the federal district court. Continuing the evaluation of the proposed rate in Supplement No. 213 requires the Amtrak to continue litigation in two fora, which is an inefficient use of Amtrak's resources. Continuing this proceeding also impinges on the district court's jurisdiction and could result in conflicting factual records, jurisdictional disputes, and possible collateral estoppel or res judicata arguments regarding outstanding charges related to the Conestoga Substation. In fact, as explained *supra*, the ALJ made multiple assumptions in the June 7, 2017, Order that conflict with the proper procedures that the District Court will follow. The chances of additional conflicts with the District Court increase if this matter is allowed to proceed to briefing.

V. REQUESTED RELIEF

As explained above, the Commission should dismiss this proceeding as moot, unripe, and preempted by 49 U.S.C. § 24311(b)(2)(B). On June 16, 2017, the Commission issued a Secretarial Letter extending indefinitely the 30-day consideration period for this Petition for Interlocutory Review and Answer to Material Questions. Main Briefs in this matter are due on July 18, 2017, and Reply Briefs on August 8, 2017. Amtrak respectfully submits that the continuation of the litigation activities while the PUC considers this Petition would be wasteful and could result in determinations that conflict with the ongoing district court matter. As a result, if the Commission is not prepared to grant this Petition and dismiss the proceedings on the merits at the July 13, 2017, Public Meeting, then the Commission should use its power under the regulations to stay the proceeding pending review of the Material Questions on the merits. 52 Pa. Code § 5.302(b) (indicating that a party's brief in support or opposition of a petition for interlocutory PUC review of material questions may request a stay of proceedings to protect the party's substantial rights); 52 Pa. Code § 5.303(a) (noting that, in the context of a petition for interlocutory review and answer, the Commission can grant a stay of proceedings if necessary to protect the substantial rights of the parties). The Commission can conserve resources and minimize the creation of factual and legal conflicts with the District Court by issuing a stay at its Public Meeting on July 13, 2017.

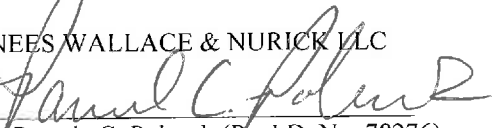
VI. CONCLUSION

WHEREFORE, for all the foregoing reasons, Amtrak respectfully requests that Your Honor grant its Petition for Interlocutory Review allowing for the Pennsylvania Public Utility Commission to review the Material Questions discussed herein.

Respectfully submitted,

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