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August 8, 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:

Please be advised that National Railroad Passenger Corporation ("Amtrak") will not be filing a Reply Brief with the Pennsylvania Public Utility Commission ("PUC" or "Commission") in the above-captioned proceeding. In lieu of filing a Reply Brief, and in support of Amtrak's Petition for Interlocutory Review of Material Questions filed on June 13, 2017, Amtrak submits the enclosed Notice of Additional Activities in Federal Court in the above-referenced proceeding. Please note that Amtrak's decision not to file a Reply Brief in this proceeding should not be interpreted as Amtrak's acceptance of the assertions, contentions, or arguments made in any Main Briefs submitted under the above-captioned proceeding; rather, it is a reflection of Amtrak's reservation of rights as previously indicated in the Notice of Reservation Pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), *et al.* filed on July 18, 2017.

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   
Alessandra L. Hylander

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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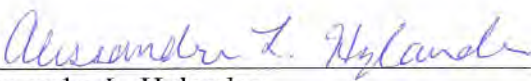
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Counsel to National Railroad Passenger  
Corporation

Dated this 8<sup>th</sup> day of August 2017, at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>NATIONAL RAILROAD PASSENGER CORPORATION,</b>	:	
	:	<b>Docket No. C-2016-2580526</b>
<b>COMPLAINANT</b>	:	
<b>v.</b>	:	
<b>PPL ELECTRIC UTILITIES CORPORATION,</b>	:	
	:	<b>Docket No. R-2016-2569975</b>
<b>RESPONDENT</b>	:	
<b>PPL ELECTRIC UTILITIES CORPORATION SUPPLEMENT NO. 213 TO TARIFF ELECTRIC PA PUC NO. 201 FOR RATE SCHEDULE LPEP</b>	:	

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**NOTICE OF ADDITIONAL ACTIVITIES IN FEDERAL COURT**

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On June 13, 2017, National Railroad Passenger Corporation ("AMTRAK") submitted a Petition for Interlocutory Review of Material Questions seeking the Pennsylvania Public Utility Commission's ("PUC" or "Commission") dismissal of the above referenced proceedings as moot and otherwise preempted by the proceeding in *National Railroad Passenger Service Corporation v. 4,0446 Acres More or Less of Land and Fixtures & PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752, which is pending before United States District Court for the Eastern District of Pennsylvania ("District Court" or "federal court"). AMTRAK expressly reserved its statutory right to adjudicate in federal court any issues related to the condemnation, the transfer of possession, and the disposition of outstanding charges related to the Conestoga Substation (such reservation is hereinafter referred to as the "England Reservation"). The precedent supporting AMTRAK's England Reservation includes: *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, decided by the United States Supreme Court in 1964; *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, decided by the Third Circuit in 1994;

and *Bradley v. Pittsburgh Board of Education*, 913 F. 2d 1064, decided by the Third Circuit in 1990.

Subsequently, on July 19, 2017, AMTRAK filed a Motion for Immediate Possession and supporting documentation with the District Court (attached hereto as "Appendix A"). On August 2, 2017, PPL Electric Utilities Corporation ("PPL") filed a Brief in Opposition to AMTRAK's Motion for Immediate Possession ("Brief in Opposition") (attached hereto as "Appendix B"). Under AMTRAK's condemnation statute, 49 U.S.C. § 24311, AMTRAK obtained title to the Conestoga Substation property and equipment once AMTRAK filed its Declaration of Taking and deposited estimated just compensation with the court. Accordingly, by operation of law, fee title to the Conestoga Substation and related equipment transferred to AMTRAK on April 18, 2017. PPL's Brief in Opposition concedes that AMTRAK possesses title to the Conestoga Substation and related equipment. PPL Brief in Opposition, p. 7, *National Railroad Passenger Service Corporation v. 4.0446 Acres More or Less of Land and Fixtures & PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752 (E.D. Pa. Aug. 2, 2017) ("Under Amtrak's condemnation statute, 49 U.S.C. § 24311, title to the property automatically passed to Amtrak on the date that Amtrak filed the Declaration of Taking and deposited estimated just compensation with the [District] Court").

AMTRAK submits these documents to update the Commission regarding the status of the District Court's activities and to resolve any doubt that may exist in this proceeding regarding the current ownership of the land and equipment at the Conestoga Substation.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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Counsel to National Railroad Passenger Corporation

Dated: August 8, 2017

# APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK)	:	NO. 17-CV-1752
60 Massachusetts Avenue, NE	:	
Washington, DC 20020	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF	:	
LAND AND FIXTURES located at	:	
Powerhouse Road, Manor Township	:	
Lancaster County, PA 17516	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Two North Ninth Street	:	
Allentown, PA 18101	:	
	:	
Defendant	:	

**PLAINTIFF NATIONAL RAILROAD PASSENGER CORPORATION’S  
MOTION FOR IMMEDIATE POSSESSION**

Plaintiff National Railroad Passenger Corporation (“Amtrak”), by and through its undersigned counsel, submits this Motion for Possession, and in support thereof avers as follows:

1. Amtrak initiated this action by filing a Complaint in Condemnation and a Declaration of Taking on April 17, 2017.
2. On April 18, 2017, Amtrak filed a Notice of Condemnation and

deposited into the Court the estimated just compensation owed to Defendant PPL Electric Utilities Corp. (“PPL”).

3. The statute granting Amtrak the authority to condemn property provides that, upon filing of a complaint in condemnation and the deposit of funds into the Court, “title to the property vests in Amtrak in fee simple absolute ...” 49 U.S.C. § 24311(b)(2).

4. Amtrak has fulfilled the requirements of 49 U.S.C. § 24311(b)(2) by filing the Complaint in Condemnation and depositing funds into Court, and thus, title to the condemned property is vested in Amtrak.

5. Although Amtrak is now the owner of the condemned property, it is the Court that determines “the time by which, and the terms under which, possession of the property is given to Amtrak.” 49 U.S.C. § 24311(b)(2)(A).

6. Amtrak is prepared to take, and fully capable of taking, complete control of the condemned property and the electric substation thereon.

7. Amtrak’s possession of the property is necessary to preserve Amtrak’s rights in the condemned property and its interests in this proceeding.

8. As more fully explained in Amtrak’s Brief in Support of this Motion, Amtrak now requests possession of the condemned property pursuant to its statutory authority.



WHEREFORE, Plaintiff National Railroad Passenger Corporation respectfully requests that this Court grant its Motion and direct Defendant PPL Electric Utilities Corp. to deliver possession of the condemned property to Plaintiff.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By /s/ Kandice K. Hull

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Dated: July 19, 2017

*Attorneys for Plaintiff National Railroad  
Passenger Corporation (“Amtrak”)*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2017, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system:

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	:	
Plaintiff	:	NO. 17-CV-1752
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF LAND AND FIXTURES	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Defendant	:	

**PLAINTIFF NATIONAL RAILROAD PASSENGER CORPORATION’S  
BRIEF IN SUPPORT OF MOTION FOR IMMEDIATE POSSESSION**

Plaintiff National Railroad Passenger Corporation (“Amtrak”), by and through its undersigned counsel, submits this Brief in Support of its Motion for Immediate Possession. In support of its Motion, Amtrak states as follows:

**I. INTRODUCTION**

Amtrak has taken by eminent domain an electric power substation consisting of land and fixtures located in Manor Township, Lancaster County, Pennsylvania, and known as the Conestoga Substation. Defendant PPL Electric Utilities Corp. (“PPL”) was the owner of the Conestoga Substation prior to the condemnation. Amtrak acquired the property because it is necessary for the provision of intercity rail passenger transportation.

Pursuant to the statute granting Amtrak its condemnation power, upon the filing of a complaint in condemnation and the deposit of funds owed to the landowner into the Court, “title to the [condemned] property vests in Amtrak in fee simple absolute or in the lesser interest shown in the declaration.” 49 U.S.C. § 24311(b)(2). Because Amtrak has fulfilled these requirements, Amtrak now holds title to the Conestoga Substation. *See* Docs. 1, 13. Amtrak has the experience and ability to assume immediate possession and operation of the Conestoga Substation. *See* Declaration of Eric Hornung, attached as Exhibit A. Amtrak seeks possession of the condemned property so that it may operate the Substation and make necessary upgrades to ensure that the Substation provides reliable power to Amtrak’s system. Amtrak also requests immediate possession to prevent PPL from taking action prejudicial to Amtrak’s interests. The legal merits, the public interest, and the balance of the equities favor granting possession to Amtrak.

## **II. FACTUAL BACKGROUND**

### **A. The Conestoga Substation Is Necessary For Intercity Rail Passenger Transportation.**

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Amtrak is the sole recipient of 25 Hertz electricity from the transformers at the Conestoga Substation, which it uses to power rail lines on the Northeast Corridor (“NEC”) and its Harrisburg line. Acquisition of the Substation, including associated improvements and fixtures held by PPL, was necessary because Amtrak powers the NEC rail artery, the busiest passenger rail line in the United States as

measured by its ridership and service frequency, and the Harrisburg line, through a traction power network using 25 Hertz power. The sole purpose of the electric transformers located at the Conestoga Substation is to change the voltage of the 25 Hertz electric power for Amtrak's use. The acquisition has no impact on any other purchaser of electricity from PPL because Amtrak is the only user of the 25 Hertz power transmitted through the Conestoga Substation.<sup>1</sup>

A large percentage of Amtrak's total installed power capacity for the southern portion of the NEC comes from the Safe Harbor Water Power Station via the Conestoga Substation. The Conestoga Substation is strategically located to transform the power produced by Safe Harbor at 25 Hertz that is used for Amtrak's rail lines and, thus, to supply power to three different areas of Amtrak's traction power network. Amtrak's control of the operation and maintenance of the Conestoga Substation is necessary because of the critical strategic importance of the power source to the operation of the NEC.

Amtrak owns and serves as the infrastructure manager for the majority of the NEC, providing dispatching services and electric propulsion power and

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<sup>1</sup> The 1930s-era electrical system that powers the NEC "uses unusual 25 Hz current; most modern electrical components are designed for 60 Hz current, thus limiting the ability to easily substitute electrical components or bring in alternate power sources." News Release, "Amtrak to Re-Open Three Tunnels to Penn Station New York By Late Friday, Nov. 9", (Nov. 7, 2012), *available at*: <https://www.amtrak.com/ccurl/10/874/Amtrak-to-Re-open-Three-NYC-Tunnels-ATK-12-104.pdf>.

maintaining and improving infrastructure and facilities used not only by Amtrak, but also by commuter rail carriers. Amtrak owns and operates several electric substations that help to power the NEC. In fact, prior to the condemnation, Amtrak was the owner of three of the seven transformers at the Conestoga Substation. *See* Doc. 1, Exhibit C (Diagram of ownership of fixtures and equipment at the Conestoga Substation); *see also* Exhibit A (Declaration of Eric Hornung).

**B. Amtrak’s Operation of the Conestoga Substation Fulfills Its Statutory Responsibility To Minimize Public Funding Of Its Operations.**

Prior to the filing of this action, PPL informed Amtrak that it intended to increase, by more than 750%, the rate it would charge Amtrak for the distribution of the Safe Harbor electricity through the Conestoga Substation, and sought approval of that increased charge before the Pennsylvania Public Utility Commission (“PUC”).<sup>2</sup> If the proposed rate increase were approved by the PUC, it would have a negative effect on Amtrak’s ability to operate the NEC. Amtrak initiated this condemnation to protect its ability to operate the NEC efficiently.<sup>3</sup>

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<sup>2</sup> For details on the PUC proceedings in which PPL sought approval of the rate increase, *see* Amtrak’s Brief in Support of its Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 5-1).

<sup>3</sup> Since title to the Substation has already passed to Amtrak by virtue of this condemnation action, the proceedings at the PUC are now moot. Amtrak filed a motion to dismiss those proceedings, but a PUC Administrative Law Judge denied the motion. Amtrak then filed a Petition for Interlocutory Appeal to the full Commission. Amtrak’s Petition and Supporting Brief, PPL’s responsive brief, and

Amtrak is capable of operating the Conestoga Substation, as Amtrak owns and operates other electric substations serving the NEC. Operation by Amtrak will be much less expensive than paying the increased rate proposed by PPL and, therefore, consistent with the goals Congress established for Amtrak to make efficient use of the NEC and to limit the federal subsidies it receives. *See* 49 U.S.C. § 24101;<sup>4</sup> *see also* Amtrak Board of Directors Resolution and Meeting Book, attached as Exhibit C.

PPL proposed selling the Conestoga Substation to Amtrak as early as 2010. *See* Proposal from PPL to Amtrak, attached as Exhibit D. However, no sale occurred at that time. In September 2015, Amtrak, PPL and other parties executed

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Amtrak's Notice of Reservation of its rights to proceed in this forum are attached as Exhibit B.

<sup>4</sup> The statute states, in relevant part:

(c) Goals. Amtrak shall--

(1) use its best business judgment in acting to minimize United States Government subsidies,

\* \* \*

(2) minimize Government subsidies by encouraging State, regional, and local governments and the private sector, separately or in combination, to share the cost of providing rail passenger transportation, including the cost of operating facilities;

(3) carry out strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient transportation;

\* \* \*

(12) maximize the use of its resources, including the most cost-effective use of employees, facilities, and real property.

an interim settlement to resolve PPL's request to increase the rate charged to Amtrak. *See* Settlement Petition before the PUC.<sup>5</sup> Subsequently, Amtrak and PPL continued to discuss the disposition of the Conestoga Substation. By August 2016, Amtrak notified PPL of its desire to acquire the Substation by condemnation if the parties could not reach an agreement. On March 3, 2017, Amtrak made PPL a good faith fair market offer to purchase the Substation. *See* Doc. 5-2, Exhibit A (Amtrak Offer Letter to PPL). PPL rejected the offer, but proposed that Amtrak refrain from filing a condemnation action and that the parties request to stay the PUC proceedings to engage in meaningful settlement negotiations.<sup>6</sup> Amtrak agreed to this approach. PPL promised Amtrak that a settlement proposal was forthcoming. Amtrak never received such a proposal.

**C. PPL's On-Site Activities Threatened Amtrak's Interests.**

Instead of preserving the status quo and transmitting a settlement proposal to

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<sup>5</sup> The Settlement Petition is available at: <http://www.puc.pa.gov/pcdocs/1380667.pdf>. Amtrak expressly reserved its rights to all legal remedies concerning the proposed rate increase. *See* Settlement Petition ¶ 63. The petition was adopted by the PUC on November 19, 2015.

<sup>6</sup> Due to intricacies in PUC procedure this occurred through a suspension of the effective date of PPL's proposed tariff until 2018. On March 28, 2017, PPL filed Supplement No. 226 to Tariff Electric Pa. P.U.C. No. 201 which further suspends the effectiveness date of Supplement No. 213 to January 1, 2018. *PPL Electric Utilities Corporation Supplement No. 226 to Tariff Electric PA. P.U.C. No. 201 for Rate Schedule LPEP*, Docket No. R-2016-2569975 (Mar. 28, 2017).



Amtrak as promised, on or about April 12, 2017, PPL began construction activities on the Conestoga Substation. These activities included removal of electrical equipment, the deposit of construction and utility materials on the site, and markings on the ground that appear to indicate areas to be excavated. *See* Doc. 5-2, Exhibit B (Declaration of Galen D. Mull).

Upon information and belief, PPL sought to move earth on the Conestoga Substation on or before April 19, 2017. *See id.* Even before Amtrak took title to the Substation, Amtrak should have been consulted about any physical alterations to the site or equipment thereon because Amtrak already owned several transformers at the Substation, Amtrak is the sole user of 25 Hertz electricity from those transformers, and construction on site without notification poses potential danger to life, property, and Amtrak's operation. PPL did not consult Amtrak, even though that was the parties' previous practice. PPL's alteration of the equipment and planned excavation would result in permanent changes to the Conestoga Substation. On May 23, 2017, this Court entered a stipulated order (Doc. 21) directing PPL not to make any alterations at the Conestoga Substation without Amtrak's prior approval. Upon entry of this Order, Amtrak withdrew its Motion for Temporary Restraining Order and Preliminary Injunction.

In spite of this Court's Order, PPL also continues to assert at the PUC its plans to perform upgrades at the Conestoga Substation for property it no longer

owns, and has opposed Amtrak's efforts to dismiss the PUC proceedings as moot. *See* PPL's Brief in Opposition to Amtrak's Petition for Interlocutory Review.<sup>7</sup>

### III. ARGUMENT

Amtrak is authorized by federal statute to acquire through eminent domain interests in property necessary for intercity rail passenger transportation.<sup>8</sup> *See* 49 U.S.C. § 24311. The statute specifically empowers this Court to decide "the time by which, and the terms under which, possession of the property is given to Amtrak." 49 U.S.C. § 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).

Amtrak case law is scant (indeed, nonexistent) regarding the standard to be applied when determining when to grant possession. Nevertheless, the standard applicable in other federal condemnation proceedings is clear: the condemnor is entitled to possession of the property if it has satisfied the elements for a preliminary injunction. *See, e.g., East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 825 (4th Cir. 2004) (to gain immediate possession, condemnor must

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<sup>7</sup> The Brief is available at: <http://www.puc.pa.gov/pcdocs/1526066.pdf>

<sup>8</sup> The power to take utility facilities by eminent domain is clearly established. *See, e.g., Int'l Paper Co v. United States*, 282 U.S. 399, 407 (1931).

satisfy standards for preliminary injunction).<sup>9</sup>

Immediate possession of the Substation should be given to Amtrak because Amtrak can demonstrate: (a) a reasonable probability of success on the merits; (b) a risk of irreparable harm to Amtrak absent the requested relief; (c) the balance of harms resulting from denial of the requested relief favors Amtrak; and, (d) the public interest, as expressed by Congress, favors Amtrak.

**A. Amtrak Will Succeed On The Merits Of Its Claims.**

**1. Amtrak has validly exercised its condemnation authority and the federal court's scope of review is extremely limited.**

Amtrak is likely to succeed on the merits of this condemnation claim. Its eminent domain authority is clear and was validly exercised here. *See* 49 U.S.C. § 24311. Title passed to Amtrak Tuesday morning, April 18, 2017, when Amtrak's estimated just compensation of \$2 million was deposited with the Court.

Courts reviewing the exercise of Amtrak's eminent domain power apply a limited scope of review. In *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 409, (1992), Amtrak acquired a line of another railroad company and then conveyed the line to a third railroad company. *Id.* at

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<sup>9</sup> *See also Steckman Ridge GP, LLC v. Exclusive National Gas Storage Easement Beneath 11.078 Acres*, 2008 WL 43346405, 2008 U.S. Dist. LEXIS 71302 at \*27-36 (W.D. Pa. Sept. 19, 2008) (adopting reasoning of *Sage*); *Guardian Pipeline, LLC v. 295.49 Acres of Land, more or less*, 2008 U.S. Dist. LEXIS 35818, at \*70 (E.D. Wisc. Apr. 11, 2008) (same).

412. The statutory standard for the taking – “required for intercity rail passenger service” – was and is the same for any property Amtrak acquires by eminent domain. As noted by the Court, Amtrak’s eminent domain power was granted by Congress, and the statute “creates a presumption in favor of conveyance to Amtrak.” The Court further noted that “determination of need is delegated to Amtrak, unless the statutory presumption is rebutted; and it is not rebutted here[,]” even where Amtrak transferred to another railroad the rail line over which it would operate. *Id.* at 421. The Court specifically rejected the interpretation that the statutory term “required” meant “indispensable.” *Id.* at 418. The Court stated: “[w]e think that as a matter of definition and interpretation in the context of this statute it is plausible, if not preferable, to say that Amtrak can find that an acquisition is required when it is a useful and appropriate way to accomplish its goals.” *Id.* at 419.

The Supreme Court’s decision in *Boston and Maine* is binding on this Court. Indeed, the “useful and appropriate” standard employed by that Court is supported by and is comparable to the “used and useful” standard enacted by Congress in the Regional Rail Reorganization Act of 1973 (“Rail Act”). *See* 45 U.S.C. § 702(14) (utilizing federal eminent domain power to acquire assets of bankrupt railroads and to convey some of those used and useful rail assets to Amtrak); *Norwich & Worcester R.R. Co. v. United States*, 408 F. Supp. 1398, 1404-05 (Reg’l Rail

Reorg. Ct. 1976).<sup>10</sup>

This Court's scope of review of Amtrak's decision to take the Conestoga Substation is thus extremely limited. Every exercise of Amtrak's federal eminent domain authority has been upheld by the federal courts. *See, e.g., National Railroad Passenger Corp. v. Two Parcels of Land One 1691 Sq. Foot More or Less Parcel of Land in the Town of New London, Cty. of New London and State of Conn.*, 822 F.2d 1261, 1265 (2d Cir. 1987); *Union Center Redevelopment Corp. v. Nat'l R.R. Passenger Corp.*, 103 F.3d 62, 67 (8th Cir. 1997).

**2. PPL's challenges to the condemnation are without merit.**

PPL asserted a number of objections and defenses to this taking in its Answer to Amtrak's Complaint. These objections and defenses lack merit, and should be disregarded.

**a. The Conestoga Substation is necessary for intercity rail passenger transportation.**

PPL claims that "Amtrak's acquisition of a fee interest in the [Substation] is [not] necessary for intercity rail passenger transportation" because "PPL is [already] providing Amtrak a PUC-regulated public utility service . . . and Amtrak

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<sup>10</sup> The Supreme Court considered Amtrak's status as a federal actor for constitutional purposes on two occasions since *Boston and Maine*. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 394 (1995) and *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S.Ct. 1225, 1233 (2015). Both cases held that Amtrak is a federal actor for purposes of determining constitutional issues.

does not need to condemn the [Substation] to obtain this service.” *See* Doc. 19 at ¶ 14. As explained above, the applicable standard is whether Amtrak’s taking of the Substation is a “useful and appropriate way to accomplish its goals.” *Boston and Maine Corp.*, 503 U.S. at 419.

Acquiring the Substation is a useful and appropriate way for Amtrak to continue providing safe, affordable, and reliable 25 Hertz electric power to operate rail service on the NEC and Harrisburg lines. Congress has recognized the importance of the NEC and has anticipated Amtrak’s need to make improvements to its infrastructure by directing Amtrak to develop a “Northeast Corridor Capital Investment Plan.” *See* 49 U.S.C. § 24101(a)(7); § 24904 (enacted Dec. 4, 2015). This legislation specifically requires Amtrak to consider “benefits and costs” of capital investments. *See* 49 U.S.C. § 24904(a)(2)(D)(i).

PPL admits that the power supplied by the Substation is essential for Amtrak’s operation of the NEC. *See* Doc. 19, ¶ 3.a. Acquisition of the Substation is thus necessary because Amtrak can make the infrastructure improvements in the NEC more cost effectively than PPL. *See* Exhibit C (Board Resolution). Moreover, as explained above, Amtrak already owns and operates other electric substations that power the NEC, and, prior to this condemnation, Amtrak owned three of the seven transformers at the Conestoga Substation. Demonstrably, Amtrak’s ownership and operation of electric substations, including the Conestoga

Substation, is useful and appropriate, and thus is “necessary for intercity rail passenger transportation” under the standard set forth by Congress and the Supreme Court.

**b. The taking is for a public purpose.**

Amtrak operates the nation’s only intercity passenger railroad. It is funded, in part, by taxpayer money.<sup>11</sup> PPL asserts that Amtrak’s true goal in these condemnation proceedings is to avoid paying increased tariffs to PPL to fund the improvements—PPL is right about this. *See* Doc. 19, ¶ 3.d. Amtrak acquired the Substation so that it can make the improvements at a significantly lower cost and in a manner most beneficial to Amtrak. This is the most economical way for Amtrak to serve the public, and thus, it is a wholly appropriate public purpose. The condemnation is consistent with Amtrak’s statutory directives to “carry out strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient transportation[,]” and to “maximize the use of its resources, including the most cost-effective use of employees, facilities, and real property.” 49 U.S.C. § 24101(c)(3), (12).<sup>12</sup>

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<sup>11</sup> See Amtrak Consolidated Financial Statement for Fiscal Year 2016, <https://www.amtrak.com/ccurl/736/320/Audited-Consolidated-Financial-Statements-FY2016.pdf>, at n.2.

<sup>12</sup> PPL’s objection that the taking is pretextual overlaps with its claim that the taking is not for a proper public purpose. For the reasons explained here, the taking is not pretextual.

**c. Amtrak has exercised reasonable business judgment.**

The condemnation of a power substation from which Amtrak is the sole consumer of 25 Hertz energy, and which Amtrak already has the capacity to operate, and which Amtrak can upgrade at a significantly reduced cost, is most certainly an exercise of reasonable business judgment. Indeed, PPL's prior offer to sell the Conestoga Substation to Amtrak appears to concede that ownership and operation of the Substation by Amtrak is reasonable. Amtrak has not abused its discretion in taking the Substation.

**d. The taking will not increase Amtrak's need for federal subsidies or impede its ability to maximize the use of its resources.**

Even if Amtrak is required to enter into interconnection agreements as PPL contends (which Amtrak denies) (Doc. 19, ¶ 3.e.), the savings and efficiencies that Amtrak will realize as a result of owning and upgrading the Substation itself will far outweigh any potential new interconnection obligations. *See* Exhibit C (Board Resolution) and Exhibit A (Declaration of Eric Hornung). Further, Amtrak has the capability to operate the Substation because it already maintains and operates three transformers at the Conestoga Substation, plus other substations in the NEC. Any additional burden on Amtrak from the acquisition of this property is small. The taking does not conflict with Amtrak's goals and objectives established by Congress.



**e. Amtrak has not breached a settlement agreement.**

PPL inaccurately asserts that Amtrak breached a settlement agreement, because Amtrak allegedly agreed that, in the event the parties could not reach an agreement during the settlement negotiations that occurred in 2015-2016, PPL could proceed with the necessary upgrades. *See* Doc. 19, ¶ 3.f. Contrary to PPL’s assertions, Amtrak reserved all its rights if those negotiations were unsuccessful. *See* PUC Settlement Petition ¶ 63 <http://www.puc.pa.gov/pcdocs/1380667.pdf>).

In any event, PPL’s assertion would amount to a waiver by Amtrak of its federal eminent domain authority. Federal eminent domain authority cannot be waived:

The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State. *It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.*

*Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) (emphasis added). Because Amtrak cannot and did not contract away its eminent domain authority, it has not breached any alleged settlement agreement with PPL.

**f. FERC does not have jurisdiction over the Substation.**

Pursuant to the Federal Power Act (“FPA”), FERC is authorized to regulate interstate aspects of the nation’s electric power system. *See New York v. FERC*, 783 F.3d 946, 949-50 (2d Cir. 2015) (citing 16 U.S.C. § 824(b)). FERC cannot

regulate facilities used in local jurisdiction; such regulatory authority is reserved to the states. *Id.* at 949-50.

For the duration of its ownership and operation of the Conestoga Substation, PPL included the Substation in its state-regulated rate base, not its FERC-regulated rate base.<sup>13</sup> The Substation operates at the non-standard voltage of 25 Hertz, while the bulk electrical system subject to FERC regulation operates at 60 Hertz.

Amtrak is (was) the Substation's only customer for the 25 Hertz power, and it consumes the power exclusively in the NEC and Harrisburg line. Moreover, the Substation was omitted from PJM Interconnection, LLC's ("PJM") list of "transmission facilities," which is consistent with the notion that the Substation is not a "transmission" facility subject to FERC jurisdiction. Thus, when owned by PPL, the Substation was not subject to FERC regulation. Nothing has changed in this regard since Amtrak acquired the Substation. The Substation is a local distribution facility; it is not subject to FERC jurisdiction.

Even if FERC had jurisdiction over the Substation (which Amtrak denies), the FPA directs that prior approval from FERC for asset transfer is only required when a utility is seeking to "sell, lease, or otherwise dispose" of its facilities valued

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<sup>13</sup> The "rate base" is the value of property on which a public utility is permitted to earn a specified rate of return. FERC defers to facility classifications supported by state regulatory authorities. Order on Rehearing, Order No. 888-A, 78 FERC ¶ 61,220 at p. 178 (1997).

in excess of \$10,000,000. *See* 16 U.S.C. § 824b(a)(1)(A). The Conestoga Substation is valued well below \$10,000,000. In fact, during PPL's 2015 base rate case, PPL itself estimated the net book value of the Substation at approximately \$1.02-\$1.23 million. *See* PPL's Discovery Responses, attached as Exhibit E. PPL's assertion of a valuation exceeding \$10,000,000 is unsupported. *See* Doc. 19, ¶ 3.o.

Moreover, PPL is not seeking to sell, lease, or otherwise dispose of the Conestoga Substation. FERC does not now, nor did it ever, have jurisdiction over the transfer of the Substation to Amtrak. Amtrak acquired the Substation through the valid exercise of its federal eminent domain power.

**g. Amtrak's federal condemnation action preempts and displaces PPL's rate proceedings at the PUC.**

PPL asserts that the PUC has exclusive jurisdiction to determine the reasonableness of the rates it proposed to charge Amtrak. *See* Doc. 19, ¶ 3.g. However, the PUC no longer has jurisdiction over the Conestoga Substation. 49 U.S.C. § 24311(b)(1) vests the "district court of the United States for the judicial district in which the property is located" with jurisdiction over all matters relating to the condemned property. Because the Substation is no longer owned by PPL, Amtrak is seeking dismissal of the PUC proceedings as moot. *See* Exhibit B (Amtrak PUC filings). Amtrak's federal condemnation authority preempts any review by the PUC. *See* U.S. Const. art. VI, § 2; *see also UGI Utils. v. Nat'l R.R.*

*Passenger Corp.*, No. 1:CV-02-1230, 2004 U.S. Dist. LEXIS 29305, at \*8-9 (M.D. Pa. July 2, 2004) (“state laws [may not] stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

PPL also incorrectly claims that the PUC must approve this condemnation. *See* Doc. 19, ¶ 3.i.; 66 Pa.C.S. § 1102(a). As explained above, the PUC no longer has jurisdiction over the Substation. Moreover, Amtrak’s federal condemnation authority gives this Court exclusive jurisdiction over Amtrak’s taking of the Conestoga Substation. The doctrine of federal preemption precludes PUC review here. *See* U.S. Const. art. VI, § 2; 49 U.S.C. §24902(j) (Amtrak’s property is a federal enclave exempt from state regulation).

**h. Amtrak did not improperly take possession of the Substation after filing this condemnation action.**

Contrary to PPL’s allegations (Doc. 19, ¶ 3.h.), Amtrak did not seize possession of the Substation. Rather, Amtrak merely prevented PPL from altering property at the site after title had already passed to Amtrak—which Amtrak was fully within its rights to do.<sup>14</sup> Amtrak has never prohibited PPL from accessing the site. Both PPL and Amtrak had access prior to the condemnation, and both parties continue to have access now. Further, because Amtrak preserved a floating

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<sup>14</sup> *See* 18 Pa.C.S. § 3503(b)(1) (criminal trespass) and § 3304(a)(5) (criminal mischief).

easement for PPL, Amtrak will continue to give PPL access to the Conestoga Substation after transfer of possession to Amtrak.<sup>15</sup>

**i. Amtrak acted in good faith**

PPL's contention that Amtrak did not negotiate in good faith should be rejected outright. *See* Doc. 19, ¶ 3.k. PPL offered to sell the Conestoga Substation to Amtrak in 2010. Beginning in 2015 and pursuant to a settlement agreement that expired on September 1, 2016, Amtrak attempted to negotiate with PPL for a more effective and economical plan for the upgrades at the Substation. In March 2017, Amtrak made a good faith offer to purchase the Substation for \$2 million, an amount estimated by a certified real estate appraiser to be the fair market value.<sup>16</sup> Amtrak's long course of negotiations with PPL contradicts any allegation that

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<sup>15</sup> A floating easement is “[a]n 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.* All of the 25 Hertz output from Safe Harbor comes into the Substation. Because the 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. The Safe Harbor 25 Hertz electrons could go through any of the seven transformers in the Substation. As a result, the easement reserved for PPL to take advantage of electrical current not needed by Amtrak must be a “floating easement” to reflect the fact that the electrons may take multiple paths.

<sup>16</sup> Compare PPL’s 2015 estimated net book value for the Substation of \$1.02 to \$1.23 million. *See* Exhibit E.

Amtrak lacked good faith. Nor does the fact that PPL rejected Amtrak's offer mean that Amtrak did not act in good faith. Furthermore, the mere fact that Amtrak has federal condemnation authority cannot be deemed to be "coercive."<sup>17</sup>

**j. The condemnation does not hamper PPL's ability to provide electrical service to others.**

PPL inaccurately avers that Amtrak's ownership of the Substation "threatens" its ability to furnish proper electrical service and facilities because PPL will no longer be directly connected to the Safe Harbor hydroelectric power generation plant. *See* Doc. 19, ¶ 3.1. This allegation is false. Amtrak's Declaration of Taking expressly reserved a floating easement to maintain PPL's connection to the Safe Harbor hydroelectric facility and to transmission lines. *See* Doc. 4, Declaration of Taking ¶¶ 4-5. PPL fails to describe how or why the easement it retains is insufficient for that purpose.

PPL also claims that Amtrak "may" be required to enter into interconnection agreements with third parties that "may" be subject to FERC and PUC approval. *See* Doc. 19, ¶ 3.1. PPL does not state how or why those agreements are required. Even if such agreements were necessary (which Amtrak denies), PPL

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<sup>17</sup> Indeed, PPL itself possesses eminent domain authority under Pennsylvania law. *See* 15 Pa.C.S. § 1511 (granting the power of eminent domain to public utility corporations). However, PPL's state eminent domain authority is preempted by Amtrak's federal eminent domain authority. *See, e.g., Union Center*, 103 F.3d at 67 and *UGI Utils.*, 2004 U.S. Dist. LEXIS 29305, at \*8-9.

did not and cannot explain how the need for such agreements defeats Amtrak's eminent domain authority.

**k. Amtrak has adequately described the property.**

PPL's claim that Amtrak has not properly described the property condemned (Doc. 19, ¶ 3.m.), can be disregarded upon review of the Complaint in Condemnation. Paragraphs 7 and 8 of the Complaint provide a detailed description of the condemned real property. Furthermore, Exhibits B and C to the Complaint are comprehensive diagrams of the real property and its features. As explained above, the two floating easements enable PPL to maintain its connection to the Safe Harbor hydroelectric facility and transmission lines. It would be impossible to provide a metes and bounds description for a floating easement, because a floating easement is not fixed to any particular part of the servient estate. *See* Footnote 15, *supra*. Amtrak has adequately described the property in accordance with Federal Rule 71.1(c)(2).

**l. Because PPL was the only fee owner of the Substation, it is the only necessary party.**

PPL vaguely alleges that additional parties are "affected by" this condemnation and should have been joined. *See* Doc. 19, ¶ 3.n. PPL was the sole fee simple owner of the Substation, and as such, it is the only party with a property interest affected by these proceedings. *See Cadorette v. United States*, 988 F.2d 215, 222 (1st Cir. 1993) (a condemnation action "proceeds in rem against the

property itself.”). Federal Rule 71.1 requires that only parties with a *property interest* be joined. *See* Fed. R. Civ. P. 71.1(c)(3).

**m. The amount of just compensation will be determined later in these proceedings.**

PPL’s final objection is that \$2,000,000 is inadequate just compensation for the Substation. *See* Doc. 19, ¶ 3.o. The sufficiency of estimated just compensation is not a proper objection at this stage of the condemnation proceedings. *See Calf Island Cmty. Trust, Inc. v. YMCA*, 392 F. Supp. 2d 241, 251 (D. Conn. 2005) (“courts are not permitted to inquire into the sufficiency of the amount estimated in good faith. . . . Any claimant with a compensable interest in the condemned property may present evidence at the compensation hearing . . .”). The amount of compensation owed to PPL will be decided at a hearing on this matter, and PPL may present its arguments at that time. *See* 49 U.S.C. § 24311(b)(3). The proper value is “as is” on the date of the taking; the value of any planned but non-existent improvements are not part of the just compensation. *Id.*

**B. Amtrak Faces Irreparable Harm If It Is Not Granted Possession.**

Amtrak is fully capable of operating the Conestoga Substation. The NEC, which is a critical part of Amtrak’s operations, depend upon the Conestoga Substation. Granting Amtrak possession of the substation ensures the reliable operation of the Conestoga Substation on which the Harrisburg Line and NEC operations depend. It is essential for Amtrak to have control of this important



asset. Absent the grant of the requested relief, Amtrak cannot be certain that the Conestoga Substation will operate reliably. A loss of operation of the Conestoga Substation could result power interruptions resulting in reduced rail passenger transportation services. Indeed, PPL continues to assert in the PUC proceedings that it intends to perform upgrades to the facilities at the Substation, as that is the basis for its continued pursuit of the case in that forum seeking a rate increase. Given PPL's continuing assertions of its intent to continue to make alterations to the property contrary to Amtrak's ownership and permission, Amtrak needs possession to control the facility.

Further, injury to real property creates a presumption of irreparable harm. *See, e.g., Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 256 (3d Cir. 2011) ("where interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest"); *O'Hagan v. U.S.*, 86 F.3d 776, 783 (8th Cir. 1996); *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989); *7-Eleven, Inc. v. Upadhyaya*, 926 F. Supp. 2d 614, 630-31 (E.D. Pa. 2013) ("Interference with the real property of another may constitute irreparable harm due to the unique opportunities offered by certain real property.").

**C. The Balance Of The Harms Favors Amtrak.**

Greater injury will be inflicted upon Amtrak by the denial of possession than

would be inflicted upon PPL by the granting of such relief. The Conestoga Substation, now owned by Amtrak, will be permanently altered by PPL's actions absent such relief. PPL will not be injured by granting possession to Amtrak. There is no immediate need for PPL to maintain, operate, or perform construction activities on property it no longer owns. PPL's service will not be disrupted. In any event, since Amtrak is the only customer served by the Substation, any disruption would only affect Amtrak. Granting possession to Amtrak will ensure that PPL cannot make changes to the site, and Amtrak can begin operating the Substation and planning for the necessary upgrades at a significantly reduced cost.

The disposition of any post-condemnation cost claims by PPL is exclusively for this Court to decide. *See* 49 U.S.C. § 24311(b)(2)(B) and F.R.C.P. 71.1(h)(1). Granting Amtrak possession of the Substation would benefit PPL by cutting off any further maintenance obligation by PPL and reducing its post-condemnation cost claims.

**D. The Public Interest Favors Granting Possession To Amtrak.**

Amtrak has been specifically tasked by Congress to upgrade and improve the infrastructure serving the NEC. *See* 49 U.S.C. §§ 24101, 24904. Amtrak is required to manage costs, and to use its resources efficiently to minimize the need for federal subsidies. *See id.* at 24101(c)-(d); *see also id.* at § 24902 (directing Amtrak to manage its resources such that yearly revenues from the NEC equal

operating costs). Amtrak can save millions of dollars by completing the upgrades to the Conestoga Substation itself—savings that will be passed along to its riders and to the taxpayers of the United States. *See* Exhibit C (Board Resolution).

Granting possession to Amtrak will preserve Amtrak’s control over its electric infrastructure and power supply, and will prevent PPL from imposing costs upon Amtrak (and consequently, the public) for alterations Amtrak may not need, or to remedy physical alterations to the property Amtrak did not want. It will also enable Amtrak to begin prioritizing the necessary upgrades. *See* 49 U.S.C. § 24902(b). The public interest is best served by granting Amtrak possession.

#### **IV. CONCLUSION**

This Court has the authority to decide when and how possession of the condemned property is given to Amtrak. Amtrak should be granted immediate possession of the Conestoga Substation.

McNEES WALLACE & NURICK LLC

By /s/ Kandice K. Hull

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Dated: July 19, 2017

*Attorneys for Plaintiff National Railroad  
Passenger Corporation (“Amtrak”)*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 19, 2017, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system:

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George J. Kroculik, Esquire  
Meredith Carpenter, Esquire  
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# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK)	:	NO. 17-CV-1752
60 Massachusetts Avenue, NE	:	
Washington, DC 20020	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF	:	
LAND AND FIXTURES located at	:	
Powerhouse Road, Manor Township	:	
Lancaster County, PA 17516	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Two North Ninth Street	:	
Allentown, PA 18101	:	

**DECLARATION OF ERIC HORNING**

Comes now Eric Hornung, pursuant to 28 U.S.C. §1746, and declares  
as follows:

1. I am employed by the National Railroad Passenger Corporation  
("Amtrak"). I have been employed by Amtrak since 1989. I currently serve  
as Amtrak's Deputy Chief Engineer Electric Traction.

2. My office is located at 30<sup>th</sup> Street Station, Philadelphia, PA.
3. As part of my duties with Amtrak's Engineering Department, I am responsible for overseeing the electric traction system that powers the Northeast Corridor ("NEC") and the Harrisburg Line, including the Conestoga Substation.
4. The sole purpose of the Conestoga Substation is to transmit power at 25 Hertz to operate Amtrak's intercity rail passenger transportation service and commuter rail services that operate on rail lines owned by Amtrak.
5. Amtrak owns and serves as the infrastructure manager for the Harrisburg Line and the majority of the NEC.
6. Amtrak owns outright several other electric substations that transmit 25 Hertz to power the NEC.
7. Amtrak maintains, improves, and upgrades the electric substations that serve the Harrisburg Line and NEC.
8. Amtrak has numerous employees who are trained to and capable of operating, maintaining and improving the NEC power network, including electric transformers at substations like the Conestoga Substation.
9. Prior to Amtrak's condemnation of a fee interest in the Conestoga Substation, Amtrak owned and maintained three of the seven

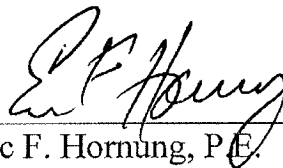
transformers at the Conestoga Substation. All of the transformers at the Conestoga Substation are essentially identical and serve the same function – to transmit electricity at 25 Hertz to Amtrak to power Amtrak’s electrified intercity rail passenger railroad lines.

10. Amtrak has the experience and knowledge to operate, maintain and upgrade the transformers at Conestoga Substation right now.

11. Operation of the Conestoga Substation will result in both financial and operational efficiencies for Amtrak.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of July, 2017 in Lancaster, Pennsylvania.



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Eric F. Hornung, P.E.  
Deputy Chief Engineer  
Electric Traction  
Amtrak Engineering Department



# **EXHIBIT B**

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NATIONAL RAILROAD PASSENGER CORPORATION,	:	
	:	Docket No. C-2016-2580526
COMPLAINANT	:	
v.	:	
PPL ELECTRIC UTILITIES CORPORATION,	:	
	:	Docket No. R-2016-2569975
RESPONDENT	:	
PPL ELECTRIC UTILITIES CORPORATION SUPPLEMENT NO. 213 TO TARIFF ELECTRIC PA PUC NO. 201 FOR RATE SCHEDULE LPEP	:	

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PETITION OF NATIONAL RAILROAD PASSENGER CORPORATION FOR INTERLOCUTORY REVIEW OF MATERIAL QUESTIONS

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TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

1. National Railroad Passenger Corporation ("Amtrak"), by undersigned counsel and pursuant to 52 Pa. Code § 5.302, respectfully submits this Petition for Interlocutory Review of Material Questions ("Petition") requesting that the Pennsylvania Public Utility Commission ("PUC" or "Commission") answer 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?<sup>1</sup>

*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.*<sup>2</sup>

**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,

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<sup>1</sup> 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."

<sup>2</sup> See Appendix A hereto for a copy of the federal court order preventing PPL from making any alterations to the Conestoga Substation.

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.*

2. 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.

3. 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.<sup>3</sup> On April 17, 2017, Amtrak filed a Complaint for Condemnation and Declaration of Taking, along with other supporting documentation, with the United States District Court for the Eastern District of Pennsylvania ("District Court") pursuant to Amtrak's federal eminent domain authority under 49 U.S.C. § 24311 and Fed. R. Civ. P. 71.1.<sup>4</sup> On April 18, 2017, Amtrak submitted to the District Court a Notice of Condemnation and a deposit in the amount of Amtrak's estimate of the just compensation for the property and equipment that was specified in the Declaration of Taking. By operation of law on April 18, 2017, fee title to the Conestoga Substation transferred to Amtrak. Accordingly, PPL provides no electric distribution service to Amtrak. 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. On May 11, 2017, Amtrak filed a Motion to Dismiss the above-captioned proceeding with the PUC. On June 7, 2017, ALJ David Salapa issued an Order denying Amtrak's Motion to Dismiss.<sup>5</sup>

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<sup>3</sup> 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, 2012.

<sup>4</sup> 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.

<sup>5</sup> PPL's tariff changes addressed only charges to Amtrak, not charges under the TC or ISA. 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

4. Assuming, *arguendo*, that PPL is successful in federal court challenging Amtrak's exercise of federal eminent domain authority and returning title to the Conestoga Substation to PPL, PPL could file a new Tariff Supplement at that time reflecting the new construction schedule and updated costs.

5. **WHEREFORE**, Amtrak requests that the Commission grant this Petition for Interlocutory Review and answer the Material Questions in the affirmative.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: 

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Dated: June 13, 2017

Counsel to National Railroad Passenger Corporation

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*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 (United States District Court for the Eastern District of Pennsylvania). Pursuant to *England v. La. State Bd. Of Med. Exam'rs*, 375 U.S. 411 (1964), *Instructional Sys., Inc. v. 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 District Court.

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK)	:	NO. 17-CV-1752
60 Massachusetts Avenue, NE	:	
Washington, DC 20020	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF	:	
LAND AND FIXTURES located at	:	
Powerhouse Road, Manor Township	:	
Lancaster County, PA 17516	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Two North Ninth Street	:	
Allentown, PA 18101	:	
	:	
Defendants	:	

**STIPULATION AND [PROPOSED] ORDER**

On May 22, 2017, Plaintiff National Railroad Passenger Corporation (“Amtrak”) and Defendant PPL Electric Utilities Corp. (“PPL”) reached the following stipulation:

1. PPL will not make 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.

2. PPL will continue to perform normal operational and/or maintenance functions at the Conestoga Substation but will provide telephonic notice to Amtrak prior to performing these functions as per past practice.

3. The agreements set forth above shall remain in effect until further order of the Court. The parties will submit a proposed scheduling order regarding PPL's defenses to the Complaint in Condemnation in accordance with the Federal Rules of Civil Procedure and the local rules of court.

4. The Court will consider Amtrak's Motion for Temporary Restraining Order and Preliminary Injunction withdrawn upon the Court's approval of this Stipulation.

IT IS SO STIPULATED AND ORDERED.

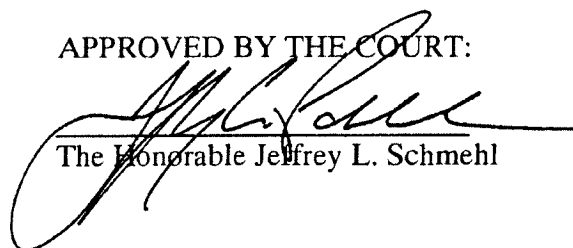
Dated: May 22, 2017

Respectfully Submitted,

<p>McNees Wallace &amp; Nurick LLC</p> <p><u>/s/ Kandice K. Hull</u> Kandice K. Hull, Esquire 100 Pine Street, P.O. Box 1166 Harrisburg, PA 17108</p> <p><i>Counsel for National Railroad Passenger Corporation</i></p>	<p>Duane Morris LLP</p> <p><u>/s/ Patrick Loftus</u> Patrick Loftus, Esquire George J. Kroclic, Esquire Meredith E. Carpenter, Esquire Sean P. McConnell, Esquire 30 South 17<sup>th</sup> Street Philadelphia, PA 19103</p> <p><i>Counsel for PPL Electric Utilities Corp.</i></p>
---	---

Date: *MAY 23, 2017*

APPROVED BY THE COURT:



The Honorable Jeffrey L. Schmehl



**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2017, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system:

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

NATIONAL RAILROAD PASSENGER  
CORPORATION,  
COMPLAINANT  
v.

Docket No. C-2016-2580526

PPL ELECTRIC UTILITIES  
CORPORATION,  
RESPONDENT

Docket No. R-2016-2569975

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

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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?<sup>1</sup>

*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.*<sup>2</sup>

**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.*

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<sup>1</sup> 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."

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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 §

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<sup>5</sup> 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.

<sup>6</sup> 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.

**I. 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).<sup>7</sup>

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

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<sup>7</sup> "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 unsupportable 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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Counsel to National Railroad Passenger Corporation

Dated: June 23, 2017

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<p><b>NATIONAL RAILROAD PASSENGER CORPORATION,</b></p> <p style="text-align: center;"><b>COMPLAINANT</b></p> <p style="text-align: center;"><b>v.</b></p> <p><b>PPL ELECTRIC UTILITIES CORPORATION,</b></p> <p style="text-align: center;"><b>RESPONDENT</b></p> <p><b>PPL ELECTRIC UTILITIES CORPORATION SUPPLEMENT NO. 213 TO TARIFF ELECTRIC PA PUC NO. 201 FOR RATE SCHEDULE LPEP</b></p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p><b>Docket No. C-2016-2580526</b></p> <p><b>Docket No. R-2016-2569975</b></p>
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**NOTICE OF RESERVATION PURSUANT TO *ENGLAND V. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS*, 375 U.S. 411 (1964), ET AL.**

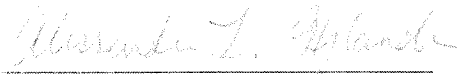
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In lieu of filing a Main Brief, National Railroad Passenger Corporation ("AMTRAK") submits this Notice that, as of May 11, 2017, when it filed its Motion to Dismiss, AMTRAK's participation in this proceeding is for the limited purpose of pursuing its Motion to Dismiss and preserving its federal court claims in *National Railroad Passenger Service Corporation v. 4.0446 Acres More or Less of Land and Fixtures & PPL Electric Utilities Corporation*, Civil Action-Law No. 17-CV-1752, which is pending before United States District Court for the Eastern District of Pennsylvania. AMTRAK expressly reserves its statutory right to adjudicate in federal court any issues related to the condemnation, the transfer of possession, and the disposition of outstanding charges related to the Conestoga Substation. The precedent supporting this reservation include *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, decided by the United States Supreme Court in 1964; *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, decided by the Third Circuit in 1994; and *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, decided by the Third Circuit in 1990.

Pursuant to 52 Pa. Code §§ 1.31(b) and 1.33, AMTRAK incorporates, by reference, the "Petition of National Railroad Passenger Corporation for Interlocutory Review of Material Questions" and the "Brief of the National Railroad Passenger Corporation in Support of its Petition for Interlocutory Review of Material Questions," which were filed with the Pennsylvania Public Utility Commission at Docket Nos. R-2016-2569975 and C-2016-2580526 on June 13, 2017, and June 23, 2017, respectively.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By:   
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Adeolu A. Bakare (Pa. I.D. No. 208541)  
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Counsel to National Railroad Passenger Corporation

Dated: July 18, 2017

**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).

**VIA E-MAIL AND FIRST CLASS MAIL**

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\_\_\_\_\_  
Alessandra L. Hylander

Counsel to National Railroad Passenger  
Corporation

Dated this 18<sup>th</sup> day of July 2017, at Harrisburg, Pennsylvania.

# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK)	:	NO. 17-CV-1752
60 Massachusetts Avenue, NE	:	
Washington, DC 20020	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF	:	
LAND AND FIXTURES located at	:	
Powerhouse Road, Manor Township	:	
Lancaster County, PA 17516	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Two North Ninth Street	:	
Allentown, PA 18101	:	

**DECLARATION OF PAULA BENJAMIN**

Comes now Paula Benjamin, pursuant to 28 U.S.C. §1746, and declares as follows:

1. I am employed by the National Railroad Passenger Corporation (“Amtrak”) as its Assistant Corporate Secretary.
2. My office is located at 60 Massachusetts Avenue, NW, Washington, DC 20002.
3. As part of my duties as Amtrak’s Assistant Corporate Secretary I assist with the keeping of the records of the Amtrak Board of Directors in

the regular course of its business, and I have access to the resolutions adopted by Amtrak's Board of Directors from those records.

4. As a part of my regular duties for Amtrak, I was asked by legal counsel for Amtrak to provide a copy of a resolution of the Amtrak Board of Directors, adopted on January 17, 2017, regarding acquisition of the Conestoga Substation.

5. Based upon advice of Amtrak's legal counsel, small portions of the January 26, 2017, resolution regarding the Conestoga Substation reflect attorney work product and attorney-client communication and are privileged communications protected from disclosure to third parties. Accordingly, on page 1 of the resolution, the dollar values reflected in a portion of the eighth WHEREAS clause and the dollar values reflected in a portion of the paragraph beginning "FURTHER RESOLVED" are redacted. Other than those two small redactions, Exhibit 1 to this Declaration is a true and accurate copy of the resolution adopted on January 26, 2017, by the Amtrak Board of Directors regarding Amtrak's acquisition of the Conestoga Substation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 22<sup>nd</sup> day of May, 2017 in Washington, DC.



---

Paula Benjamin  
Assistant Corporate Secretary  
National Railroad Passenger Corporation



**EXHIBIT 1**

## ACQUISITION OF THE CONESTOGA SUBSTATION EXECUTIVE SUMMARY AND RESOLUTION

### Background

The Conestoga Substation (Substation) was built in the 1930s and is owned and maintained by PPL Electric Utilities Corporation (PPL), a Pennsylvania utility regulated by the Pennsylvania Public Utility Commission (PA PUC). The Substation is located on the east side of the Susquehanna River near the Safe Harbor Hydro-Electric Facility from which the Substation receives electric power. Amtrak is the only entity receiving electric power from the Substation. The Substation's function is to transform the electric current to the 25Hz/138kV power that is used for Amtrak's catenary systems. The power is transmitted from the Substation over lines owned and maintained by Amtrak and also lines owned and maintained by PPL and another power company (BGE). Electricity from the Substation provides the power for more than 20% of the south end of Amtrak's Northeast Corridor and supports operations by Amtrak, MARC, DEL DOT, SEPTA, and NJT. The Substation is in need of substantial upgrades to continue to function reliably. Amtrak already owns and maintains three of the seven transformers at the Substation and has acquired two more that can replace some of the five currently owned by PPL. The Substation is necessary for Amtrak's intercity rail passenger transportation service.

In October 2016, PPL filed a request to the PA PUC for an increase of its charges to Amtrak by 750%, from \$445K/year to \$3.8M/year. If approved the rate increase would increase Amtrak's operating budget by approximately \$3.4M/year and approximately \$40M over a twenty-year period. Amtrak and PPL negotiated for more than a year prior to PPL's recent PA PUC rate increase filing. However, even though Amtrak offered **REDACTED**, no agreement on future rates was concluded. The PA PUC proceeding currently is on a fast track. A hearing on PPL's requested rate increase is scheduled for February 22, 2017.

Amtrak already owns, and Amtrak's Electric Traction Department operates and maintains, two other similar facilities along the Northeast Corridor. Amtrak is capable of owning, upgrading and maintaining this Substation as well.

Amtrak has conducted a financial analysis of the costs it would incur to operate the Substation over a twenty-year period versus the costs Amtrak would incur if PPL's rate increase is approved. An analysis of the twenty-year impact (excluding the acquisition cost) of Amtrak's and PPL's positions is as follows:

Amtrak Cost to Assume Ownership:

Amtrak Performance of the Substation Upgrades  
 One-time litigation expense  
 Remote Monitoring and additional Amtrak Labor  
 Transmission Line Lease  
 Acquisition of Substation

REDACTED

**Total Amtrak Cost**

**Payments to PPL via proposed rate increase**  
**Increased Cash Expenditure to Amtrak**

\$63.7M

REDACTED

Therefore, an acquisition cost of less than [REDACTED] would be a huge operating cost savings for Amtrak.

Consequently, it appears to be in Amtrak's best interests to acquire this functionally essential Substation and to upgrade it, operate it, and maintain it ourselves.

To the extent that financial resources are available, Amtrak is empowered by federal law to acquire by the exercise of eminent domain property necessary for intercity rail passenger transportation if it cannot acquire the property by agreement with the property owner. 49 U.S.C. §24311.

Because it is necessary for intercity rail passenger transportation, and in order to avoid the risks and expenses of the expedited PA PUC proceeding, Management is requesting authority to acquire the Substation now. Appraisals of the Substation property rights are currently being prepared by two experts hired by Amtrak's outside counsel for the PPL matters, McNees, Wallace & Nurick LLC, a law firm that has represented Amtrak in electric rate proceedings for many years. The appraisals of estimated just compensation for the Substation may not be completed before the Board Meeting. Therefore, Amtrak Management is requesting authority to expend up to [REDACTED] of capital funds for the acquisition of the Substation and the acquisition of materials and designs necessary to perform required upgrades. Even if the entire amount were to be required for this acquisition, the investment would result in an operational cost saving to Amtrak of up to [REDACTED] over the next twenty years.

**Recommendation:** Amtrak management recommends that the Board of Directors approve the acquisition of the Conestoga Substation either through a negotiated transaction or condemnation.

**RESOLUTION OF THE BOARD OF DIRECTORS  
OF NATIONAL RAILROAD PASSENGER CORPORATION  
AUTHORIZING MANAGEMENT TO ACQUIRE THE  
CONESTOGA SUBSTATION**

WHEREAS, the Conestoga Substation (Substation) is owned by PPL Electric Utilities Corporation (PPL), a regulated utility with headquarters in Allentown, PA, whose rates are regulated by the Pennsylvania Public Utility Commission (PA PUC); and

WHEREAS, the Substation is located along the Susquehanna River, receives electric power from the Safe Harbor Hydro-Electric Facility, and transforms the electric current to 25Hz/138kV to be used to power the electrified intercity rail lines owned by National Railroad Passenger Corporation (Amtrak); and

WHEREAS, Amtrak currently is the only entity receiving electric power from the Substation that supplies electricity for more than 20% of the south end of Amtrak's Northeast Corridor, which supports operations by Amtrak, MARC, DELDOT, SEPTA and NJT; and

WHEREAS, Amtrak already owns and maintains 3 of the 7 transformers at the Substation; and

WHEREAS, the Substation which was built in the 1930s requires major upgrades that PPL has not yet implemented; and

WHEREAS, PPL has initiated a PA PUC proceeding seeking approval to increase the rate charged to Amtrak from \$445/year to \$3.8M/year, a 750% increase to Amtrak's operating budget for this facility; and

WHEREAS, Amtrak's Electric Traction Department, which already operates and maintains two other similar facilities on the Northeast Corridor, is able to take over the operation and maintenance of the Substation and perform the necessary upgrades; and

WHEREAS, operation, maintenance and improvements performed by Amtrak would result in operating costs savings to Amtrak over a 20-year period that could be as much as [REDACTED]; and

WHEREAS, Amtrak has determined that acquisition by purchase or by condemnation of the Substation is necessary for intercity rail passenger transportation; and therefore, be it

RESOLVED, That the Board of Directors has determined that acquisition of the Substation is necessary for Amtrak's intercity rail passenger transportation service, and is otherwise in the best interests of Amtrak; and

FURTHER RESOLVED, That the Board of Directors hereby approves the execution of agreements for the acquisition of the Substation and the acquisition of materials and

designs necessary to perform required upgrades at a price of up to **REDACTED** **REDACTED** or, if negotiated acquisition is unsuccessful, a deposit into the registry of the federal court of just compensation based on appraised values of up to this amount to acquire the Substation, equipment and materials by condemnation; and

FURTHER RESOLVED, That the President and CEO and the Executive Vice President of Planning, Technology, and Public Affairs (Authorized Officers) are each hereby authorized and empowered to take any and all actions consistent with this resolution and, upon approval as to form from the Law Department, to make, execute and deliver in the name of and on behalf of Amtrak, all instruments, agreements, certification, pleadings, and all other documents as may be required or contemplated by the foregoing, containing such terms as the above-referenced officers deem necessary and advisable in order to effectuate the foregoing transaction.

National Railroad Passenger Corporation  
Board of Directors  
Adopted January 26, 2016

# **EXHIBIT D**

# Conestoga Substation and Conestoga-Perryville Line Values

- Substation + Towers + Wires:

- Net Book Value  
\$1,165,000

- Environmental Project:

- \$80,000

- Metering Value:

- \$140,000

- Land Value:

- Net Book Value  
\$315,000

- Annual Lease:

- \$50,000

Total Value =

Substation + Towers +  
Wires + Environmental  
Project + Metering +  
Land =

\$1,700,000

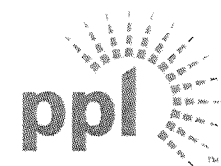


PPL Electric Utilities

January 12, 2010

# Maintenance Completed in the Past 20 Years

- Painting & Bolt Replacement of Lattice Structure
- Control Cable Replacement
- Replacement of Cable Trench System
- Refurbish Operating Mechanisms & Electrical Control Boards
- Battery Replacement
- Battery Charger Replacements
- New Roof On Control House
- Metering Equipment



PPL Electric Utilities



# **EXHIBIT E**

D.A. Urban  
J.J. Spanos  
Page 1 of 1

**PPL Electric Utilities Corporation  
Response to Interrogatories of the  
PP&L Industrial Customer Alliance  
Date June 2, 2015  
Docket Nos. R-2015-2469275  
and P-2015-2474714**

- PPLICA-I-Q8. For existing equipment at the Conestoga Substation, please provide the installation dates, depreciated book value, depreciation assumptions, remaining life, and any salvage value.
- PPLICA-I-A8. See Attachment 1 for the detail of equipment added by installation date, including the in-service year and depreciated book value at the Conestoga Substation. The depreciation assumptions and remaining life for depreciation purposes for Accounts 361 and 362 can be found in Table 1 (p II-3) and pp III-33 to III-37 of Exhibit JJS-1 to the Direct Testimony of John J. Spanos. The current or future salvage value is not an amount that is tracked or maintained by the Company.

PPL Electric Utilities Corporation  
Conestoga Substation - Summary of Distribution Assets as of May 31, 2015

Account Number	Property Unit	In-Service Year	Original Cost	Accumulated Reserve	Depreciated Book Value	Total
3602	land: 960300	1935	26,119.76	0.00	26,119.76	
<b>3602 Total</b>			<b>26,119.76</b>	<b>0.00</b>		<b>26,119.76</b>
3510	building: 040100	1935	19,872.99	19,747.21	125.78	
		1937	716.20	710.75	5.45	
		1938	4,906.84	4,865.81	41.03	
		1939	42.46	42.07	0.39	
		1941	38.62	38.19	0.43	
		1993	94,354.39	41,251.69	53,102.70	
		2008	41,325.29	4,673.43	36,651.86	
	drainage system: 174000	1935	2,332.25	2,317.49	14.76	
		1938	382.04	378.85	3.19	
		1950	1,059.64	1,031.49	28.15	
		2009	56,935.22	5,385.24	51,549.98	
	fencing: chain link: 173820	1935	3,021.21	3,002.09	19.12	
		1938	5,277.53	5,233.40	44.13	
		1951	133.49	129.58	3.91	
	fire protection system : 209600 : 209600	1935	5,427.27	5,392.92	34.35	
		1936	21.65	21.50	0.15	
		1937	2,067.96	2,052.21	15.75	
		1938	3,818.00	3,786.07	31.93	
		1942	353.90	349.57	4.33	
		1954	1,768.25	1,699.31	68.94	
		1958	2,770.29	2,613.71	156.58	
	grading: 173200	1935	78,627.27	78,129.61	497.66	
		1938	3,702.35	3,671.39	30.96	
		1940	1,006.96	996.79	10.17	
		1941	169.48	167.60	1.88	
		1953	5,578.61	5,380.82	197.79	
	improvements to site: 152600	1935	3,225.04	3,204.63	20.41	
	landscaping: 173400	1935	87.87	87.31	0.56	
	railroad equipment: 189000	1935	2,928.21	2,909.68	18.53	
		1938	7,515.82	7,452.97	62.85	
		1940	445.09	440.60	4.49	
	retaining wall: 174200	1979	86,416.09	62,253.35	24,162.74	
	roads & driveways: 174400	1935	14,423.00	14,331.71	91.29	
	water supply system: 372900	1935	2,286.70	2,272.23	14.47	
	yard lighting: 173000	1935	4,758.45	4,728.33	30.12	
		1938	5,516.78	5,470.65	46.13	
		1941	815.04	805.99	9.05	
		1993	3,676.30	1,607.28	2,069.02	
<b>3510 Total</b>			<b>467,804.55</b>	<b>298,633.49</b>		<b>169,171.06</b>
3620	ac system equipment: distribution p: 534530	1993	107,626.34	53,026.21	54,600.13	
	arresters & surge protection equipm: 534700	1935	1,209.58	1,199.79	9.79	
	arresters & surge protection equipm: 534820	1938	2,648.29	2,618.02	30.27	
		1976	6,303.46	4,140.09	1,163.37	
	building: 040100	2003	1,366.36	357.24	1,009.12	
	conduit sub: 539101: 539101	1935	21,807.27	21,630.83	176.44	
		1939	132.50	130.81	1.69	
		1941	926.10	911.52	14.58	
		1947	604.37	587.41	16.96	
		1976	2,823.69	2,204.29	619.40	
		1993	215,015.47	105,935.56	109,079.91	
	coupling capacitor volt transformer: 535520	1935	42,447.57	42,104.14	343.43	
		1991	36,300.00	19,406.48	16,893.52	
	current transformers: ct substation: 492800	1935	2,777.78	2,755.31	22.47	
		1938	2,020.76	1,997.66	23.10	
	dc system equipment: battery: 398401	2008	167,717.85	24,011.94	143,705.91	
	dc system equipment: charger: 534440	1986	3,779.31	2,382.48	1,396.83	
		2001	16,424.82	5,082.41	11,342.41	
		2008	38,553.92	5,519.71	33,034.21	
	equipment fdn & suppt sub: 531500: 531500	1935	13,056.38	12,950.73	105.63	
		1938	664.28	656.69	7.59	
		1940	7.99	7.88	0.11	
		1941	647.47	637.28	10.19	
		1992	126,663.52	65,091.30	61,572.22	
	general property: laboratory equipm: 803950	1935	1,580.17	1,567.39	12.78	
		1936	3,931.90	3,896.09	35.81	
		1938	48.24	47.69	0.55	
		1958	574.29	534.80	39.49	
	general property: office equipment: 803914	1935	18.57	18.42	0.15	

PPL Electric Utilities Corporation  
Conestoga Substation - Summary of Distribution Assets as of May 31, 2015

Account Number	Property Unit	In-Service Year	Original Cost	Accumulated Reserve	Depreciated Book Value	Total
	general property: office furniture: 803912	1935	106.11	105.25	0.86	
	general property: stores equipment: 803930	1935	84.84	84.15	0.69	
		1958	156.36	145.61	10.75	
	general property: tool, shop & gara: 803940	1935	295.81	293.42	2.39	
		1939	89.04	87.90	1.14	
		1948	86.41	83.76	2.65	
		1951	269.06	258.38	10.68	
	Non Utilized Plant:	2012	2,265.21	125.55	2,139.66	
		2013	21,681.33	761.47	20,919.86	
		2014	57,737.42	900.62	56,836.80	
	potential transformers: pt substati: 500901	1935	3,918.95	3,887.24	31.71	
		1938	1,971.08	1,948.55	22.53	
		1941	528.61	520.29	8.32	
	power circuit breakers: 12 & below: 532240	1935	91,793.26	91,050.59	742.67	
		1938	54,615.78	53,991.43	624.35	
		1941	22,792.72	22,433.83	358.89	
	power fuse: 12 kv & below: 532860	1935	1,982.09	1,966.05	16.04	
		1938	793.85	784.77	9.08	
		1941	205.16	201.93	3.23	
	prot and contrl eq sub 533501: 533501	1935	20,765.78	20,597.77	168.01	
		1937	349.86	346.29	3.57	
		1938	21,475.17	21,229.67	245.50	
		1941	2,622.28	2,580.99	41.29	
		1945	747.36	729.92	17.44	
		1947	212.72	206.75	5.97	
		1949	250.80	242.40	8.40	
		1950	2,162.79	2,083.85	78.94	
		1952	284.22	271.96	12.26	
		1960	7,011.93	6,454.32	557.61	
		1993	75,427.74	37,162.35	38,265.39	
	station grounding: 538900	1935	13,036.96	12,931.48	105.48	
		1941	348.16	342.68	5.48	
		1947	349.95	340.13	9.82	
		1993	7,864.07	3,874.53	3,989.54	
	structures: bus str 12 kv & below: 541140	1935	25,426.52	25,219.81	206.71	
		1938	24,502.27	24,222.17	280.10	
		1940	432.14	426.01	6.13	
		1941	3,967.67	3,905.20	62.47	
		1947	829.27	806.00	23.27	
	structures: misc str 138 kv: 541520	1935	37,163.54	36,862.86	300.68	
		1937	21.74	21.52	0.22	
		1938	5,682.62	5,617.66	64.96	
		1942	472.85	464.81	8.04	
	switches: 138 kv: 536620	1935	14,742.41	14,623.13	119.28	
		1938	11,133.82	11,006.54	127.28	
	switches: 23 kv: 536720	1935	25,174.99	24,971.31	203.68	
		1938	23,228.03	22,962.49	265.54	
		1941	7,465.35	7,347.80	117.55	
		1947	1,770.48	1,720.80	49.68	
	switches: 69 kv: 536640	1935	4,390.76	4,355.24	35.52	
		1993	33,334.27	16,423.40	16,910.87	
	switches: MCD: 69 kv: 536580	1935	4,105.00	4,071.79	33.21	
		1938	3,636.00	3,594.43	41.57	
	transformer transfer system: 397300	1935	9,251.19	9,176.34	74.85	
		1938	880.40	870.34	10.06	
	transformers power: 138 kv 1 ph: 530720	1935	393,661.23	390,476.24	3,184.99	
		1937	485.99	481.02	4.97	
		1938	40.73	40.26	0.47	
		1942	941.43	925.02	16.41	
		2012	31,872.99	1,766.59	30,106.40	
	transfrmr str svc:pmdt/pole:539600: 539600	1935	649.87	644.61	5.26	
	wiring system: <4000v: 538740	1993	416,287.24	205,099.76	211,187.48	
	wiring system: 4000v & above: 538720	1941	7,221.69	7,107.98	113.71	
		1947	2,244.71	2,181.72	62.99	
		1976	1,349.20	1,053.24	295.96	
		1977	2,501.64	1,921.38	580.26	
		1993	3,307.01	1,629.32	1,677.69	
3620 Total			2,329,135.16	1,502,432.60		826,702.56
Grand Total			2,823,059.47	1,801,066.09		1,021,993.38

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER	:	
CORPORATION (AMTRAK)	:	NO. 17-CV-1752
60 Massachusetts Avenue, NE	:	
Washington, DC 20020	:	
	:	
Plaintiff	:	
	:	
v.	:	CIVIL ACTION – LAW
	:	
4.0446 ACRES MORE OR LESS OF	:	
LAND AND FIXTURES located at	:	
Powerhouse Road, Manor Township	:	
Lancaster County, PA 17516	:	
	:	
and	:	
	:	
PPL ELECTRIC UTILITIES CORP.	:	
Two North Ninth Street	:	
Allentown, PA 18101	:	
	:	
Defendant	:	

**ORDER**

AND NOW, this \_\_\_ day of \_\_\_\_\_, 2017, upon consideration of Plaintiff’s Motion for Immediate Possession, and any response thereto, it is hereby ordered that Plaintiff’s Motion is GRANTED, and Defendant PPL Electric Utilities Corp. is directed to deliver possession of the real property and fixtures that are the subject of this litigation to Plaintiff within five (5) days of the date of this Order.

Plaintiff will continue to allow Defendant to access the property consistent with Defendant's rights under the floating easements reserved to Defendant in the Declaration of Taking.

BY THE COURT:

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Jeffrey L. Schmehl, U.S.D.J.

# APPENDIX B

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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NATIONAL RAILROAD PASSENGER  
CORPORATION (AMTRAK),

Plaintiff

v.

4.0446 ACRES MORE OR LESS OF  
LAND AND FIXTURES

and

PPL ELECTRIC UTILITIES CORP.,

Defendant.

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CIVIL ACTION – LAW  
NO. 17-CV-1752

**DEFENDANT PPL ELECTRIC UTILITIES CORP.’S BRIEF IN OPPOSITION TO  
PLAINTIFF’S MOTION FOR IMMEDIATE POSSESSION**

Defendant PPL Electric Utilities Corp. (“PPL”) respectfully submits this Brief in opposition to Plaintiff National Railroad Passenger Corporation’s (“Amtrak”) Motion for Immediate Possession.

**I. INTRODUCTION**

While this case is about ownership and operation of the Conestoga Substation (the “Substation”), a facility that PPL has owned, operated, and provided public utility electricity service through for over eighty years, the present dispute is about whether Amtrak can take immediate possession of the Substation before the case is resolved. The answer is *no*, as Amtrak’s attempt to put the “cart before the horse” is legally flawed and makes no practical sense. Amtrak cannot take immediate possession of the Substation for four fundamental reasons.

First, Amtrak’s request is premature. PPL has asserted various defenses in its Answer



challenging Amtrak's authority to condemn the Substation. The Court should not award possession until it first decides the merits of PPL's defenses and the validity of the taking. PPL's defenses raise a number of significant factual disputes. The Court has approved the parties' stipulation that contemplates 120 days of discovery on the central issue of the case—whether Amtrak has the authority to condemn the Substation based upon PPL's challenges. That stipulation also contemplates that the parties will then file cross-motions for summary judgment on that central issue by December 9, 2017, with responsive briefs due in January 2018. The Court-approved stipulation also provides that following the disposition of those motions, the Court will schedule a hearing as necessary on the issue of Amtrak's legal authority to exercise its power of eminent domain over the Substation. Thus, where the Court, by agreement of the parties, will not be able to rule upon the merits of the taking and PPL's defenses until early 2018, Amtrak's motion for immediate possession is procedurally flawed and premature. Further, the parties entered into a Stipulation (approved by the Court) that PPL would continue to operate and maintain the Substation during the pendency of the case. Amtrak has failed to provide the Court with any reason why the Court should award possession before it decides the merits of the case.

Second, even if Amtrak could move for possession before the Court determines whether Amtrak has the right to condemn the Substation, Amtrak has failed to establish its entitlement to condemn or possess the Substation, because it has not demonstrated any irreparable harm or immediate need for possession. Nothing has changed since Amtrak stipulated that PPL would continue to operate and maintain the Substation. Further, the balance of equities favors denying possession, as PPL would suffer undue hardship in giving up possession.

Third, before the Court could even determine the "terms under which, possession of the property is given to Amtrak," the Court would need to understand the complexities and

intricacies of the operation of the Substation. State and federal authorities regulate the ownership and operation of the Substation, and any transfer of possession would require coordination with and approval of such authorities. The Pennsylvania Public Utility Commission (“PUC”) and the Federal Energy Regulatory Commission (“FERC”) regulate, among other things, the transmission and sale of electricity through the Substation, and their approval is required before possession can be transferred to Amtrak. Also, PPL has contracts with the Safe Harbor Water Power Corporation (“SHWPC”) and BIF II Safe Harbor Holdings LLC (“BIF II”) that are impacted if possession is transferred. SHWPC’s electric facilities are directly interconnected to the Substation, and BIF II supplies the 25 Hz power generated by SHWPC to Amtrak through an electricity retailer. If possession were transferred to Amtrak, PPL would be in breach of these agreements, and SHWPC and BIF II would be negatively affected. Further complicating matters, Amtrak purports to grant PPL a “floating easement” so that it can continue to operate the Substation even if condemned, yet Amtrak fails to explain to the Court the terms under which PPL would operate and maintain the Substation with Amtrak in possession.

Finally, Amtrak’s request is pretext and appears to be nothing more than an attempt to avoid fairly compensating PPL for the public utility electricity service it provides. Amtrak has used this condemnation action as a means to avoid a rate-setting proceeding pending before the PUC, rather than for a valid public purpose. On June 7, 2017, the PUC denied Amtrak’s motion to dismiss the rate-setting proceeding on many of the same grounds raised in this case. The instant motion seems to be an attempted end-run around that decision. Indeed, Amtrak has not even compensated PPL for the service that PPL has continued to provide via the Substation since Amtrak instituted this action on April 17, 2017, on grounds that it does not have to compensate PPL absent a court order. Amtrak’s refusal to compensate PPL for this service ignores that the

parties stipulated and the Court ordered that PPL shall continue to operate the Substation.

In sum, PPL has asserted legitimate defenses to Amtrak's taking, which will be the subject of discovery and then motions for summary judgment. Amtrak has not provided the Court with any valid reason to award possession now before PPL conducts discovery and before the Court decides Amtrak's substantive right to condemn the Substation.

## **II. FACTUAL BACKGROUND**

PPL is a public utility and electric distribution company that has provided public utility electricity service through the Substation to Amtrak or its predecessor for 83 years. (Answer ¶¶ 14, 20, 21, 23, 3.a). The Substation is fundamentally different from the other substations Amtrak operates. Unlike the other substations operated by Amtrak, the Substation is connected directly to a generator. (Answer ¶ 21). The Substation is also subject to the regulation of the PUC and FERC. (Answer ¶¶ 3.d, 3.e, 3.g, 3.i, 3.j, 3.l). Ownership and operation of the Substation is also governed by PPL's interconnection service agreement with the SHWPC and BIF II, which allow SHWPC to participate in the wholesale electric capacity market. (Answer ¶¶ 3.e, 3.l; Compl. ¶¶ 9-10 & Ex. D-E). SHWPC's electric facilities directly interconnect to the Substation, and BIF II supplies the 25 Hz power generated by SHWPC to Amtrak through an electricity retailer. (Answer ¶ 21). PPL's ownership and operation of the Substation is also governed by PPL's transmission contract with SHWPC and Baltimore Gas and Electric Company ("BGEC"), as power is sold by SHWPC to BGEC through PPL's transmission lines, which are connected to the Substation. (Answer ¶ 22).

Granting Amtrak's motion would negatively affect PPL's ability to comply with those agreements. In particular, the Court would need to determine the scope of the purported "floating easement" that Amtrak alleges it is carving out for PPL to provide public utility services. Significantly, the definition of "floating easement" in Amtrak's current Motion is materially

different than the definition in the Complaint, suggesting that Amtrak is attempting to rescind the level of control necessary for PPL to operate the Substation in accordance with its obligations under its service agreements. But Amtrak lacks the authority to dictate to PPL what obligations PPL will have going forward.<sup>1</sup>

After decades of reliable service, the Substation requires substantial upgrades and repairs. (Answer ¶¶ 23, 3.d). In 2015, as part of a request for a general rate increase, PPL proposed, among other things, to increase the monthly distribution charge for the rate applicable to service through the Substation, known as Rate Schedule LPEP, from \$37,100.00 per month to \$252,647.17 per month. (Answer Ex. F). The proposed increase in the distribution charge for Rate Schedule LPEP was due to the substantial capital upgrades required at the Substation, which Amtrak agreed were necessary.<sup>2</sup> *Id.* Amtrak and PPL could not reach resolution regarding the rate increase required for PPL to make the necessary capital improvements to the Conestoga Substation, so they entered into a Settlement Agreement in 2015 to attempt to resolve the dispute. (Answer Ex. C). Importantly, Amtrak acknowledged in the Settlement Agreement that the capital improvements were necessary, and the parties agreed to a monthly rate. *Id.* The Settlement Agreement further provides that if Amtrak and PPL could not reach agreement on how to fund the upgrades by September 1, 2016, then PPL “will undertake all improvements needed for the Conestoga Substation that are in its opinion necessary or proper to provide safe and reliable service to Amtrak, and will make an appropriate tariff filing to fully recover those costs.” *Id.* Amtrak could participate in that proceeding to challenge the reasonableness of the

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<sup>1</sup> Transferring possession of the Substation to Amtrak would require that these existing agreements be undone and new ones negotiated under FERC’s jurisdiction.

<sup>2</sup> Amtrak is the only customer taking service under Rate Schedule LPEP. *Id.*

proposed rate. *Id.* The parties did not reach agreement by September 1, 2016; therefore, PPL filed a rate adjustment proceeding with the PUC on October 5, 2016. (Answer Ex. F). Amtrak filed a complaint in that proceeding on December 19, 2016. (Answer Ex. G).

Thereafter, the parties mutually agreed to stay the procedural schedule of the PUC proceeding for 60 days to allow the parties to explore a resolution. The parties did not agree that PPL would discontinue the capital improvements necessary for the Substation. Instead of negotiating in good faith during that 60-day period, Amtrak prepared and proceeded with filing its Condemnation Complaint. Amtrak also immediately seized possession of the Substation and in fact deployed its own police force to block PPL from commencing construction of the capital improvements. (Decl. of Jeff Byrnes, Doc. #16, Ex. A). PPL filed an Answer to Amtrak's Condemnation Complaint, raising a number of defenses that challenge Amtrak's right to condemn the Substation. (Answer). The Court has not yet had an opportunity to determine whether Amtrak has the right to condemn the Substation, and the parties have not yet engaged in discovery. Indeed, the parties have entered into stipulations governing both the operation of the Substation until the Court has the opportunity to make such a determination and the timing for discovery and cross-motions for summary judgment in this case.

After initiating this condemnation case, Amtrak attempted to dismiss the PUC proceeding, arguing that the proceeding is no longer necessary because PPL is not the owner of the Substation and the PUC does not have jurisdiction as a result of the condemnation. (Amtrak's Motion to Dismiss, attached as Exhibit "A"). On June 7, 2017, the PUC refused to dismiss the proceeding. (PUC Order, attached as Exhibit "B"). Amtrak's present motion seems to be a collateral attack on the PUC proceeding because Amtrak has been unsuccessful in dismissing that action. Further, despite stipulating that PPL would continue to operate and maintain the

Substation, Amtrak has refused to compensate PPL at the rate agreed to in the Settlement Agreement for its utility service since April 17, 2017, the date it filed this action. (June 9, 2017 Letter from Amtrak's Counsel, attached as Exhibit "C").

### **III. ARGUMENT**

#### **A. Amtrak's motion is premature.**

Amtrak is not entitled to possession because this Court has not ruled on the merits of Amtrak's attempt to condemn the Substation. Amtrak argues that the preliminary injunction standard applies to its request for an order granting it immediate possession of the Substation. But the cases that Amtrak cites do not establish that this is the applicable standard. Rather, the correct standard is that before Amtrak may obtain possession, the Court should first determine whether Amtrak has the right to condemn the Substation, which includes not only a determination as to whether Amtrak has properly exercised its eminent domain power under 49 U.S.C. § 24311, but also includes a determination as to whether Amtrak must obtain both FERC's and the PUC's approval of the condemnation under the Federal Power Act, 16 U.S.C. § 824b, and the Pennsylvania Public Utility Code, 66 Pa.C.S. § 1102(a)(3). Only if the Court determines that Amtrak has the right to condemn the Substation would Amtrak be entitled to possession, and even then, the Court should not grant possession without balancing the equities and ensuring there is no undue hardship to PPL and other parties connected to the Substation in transferring possession.

Under Amtrak's condemnation statute, 49 U.S.C. § 24311, title to the property automatically passed to Amtrak on the date that Amtrak filed the Declaration of Taking and deposited estimated just compensation with the Court. While title automatically passes, possession does not. Instead, "the time by which, and the terms under which, possession of the property is given to Amtrak" is within the Court's discretion. 49 U.S.C. § 24311(b)(2)(A).

Because the Court has discretion in fixing the date and the terms for transfer of possession, it has a duty to exercise that discretion equitably. *See United States v. Certain Land in Borough of Manhattan*, 233 F. Supp. 899 (S.D.N.Y. 1964) (deciding when courts should grant possession under the Declaration of Taking Act, 40 U.S.C. § 3114, which contains similar language to Amtrak's condemnation statute).

It would be inequitable for a court to grant a condemnor possession while a condemnee's defenses challenging the condemnor's right to take property are pending. Instead, a court should only grant possession after the condemnor has established that it has the right to condemn the property. *See United States ex rel. TVA v. Easement & Right-Of-Way*, 2012 U.S. Dist. LEXIS 117576 (W.D. Tenn. 2012) (noting that when the United States is following the quick-take procedure under 40 U.S.C. § 3114, the requirements of 40 U.S.C. § 3114(a) must be satisfied before possession may be granted (*i.e.*, the United States must describe a valid public use in its declaration of taking), and finding that because the use for which the condemnor was taking the property was "valid," the court could grant possession). Indeed, in the sole case Amtrak cites where a court granted Amtrak possession, the condemnees had not challenged Amtrak's power to condemn. *National Railroad Passenger Corp. v. Penn Cent. Corp.*, No. 89-C-1631, 1989 U.S. Dist. LEXIS 5210 (N.D. Ill. May 10, 1989). Instead, they had only argued that possession should be delayed because Amtrak had deposited inadequate compensation for the taking. *Id.* The court dismissed their argument about compensation as a basis for delaying possession, but it expressly noted that the condemnees had "not argued [that] Amtrak does not have a legitimate and immediate need or that it is not empowered to proceed." *Id.* at \*1.

The other cases Amtrak cites in support of its argument that the preliminary injunction standard should apply to its Motion all arise in the context of condemnations by natural gas

companies under the Natural Gas Act (the “NGA”), 15 U.S.C. § 717f(h). Unlike Amtrak’s condemnation statute, however, the NGA does not contain any provisions addressing when and how possession can be granted; the NGA merely grants condemnation power without addressing possession. Because the NGA does not include a statutory provision for possession, courts find that they can grant possession under their equitable powers by issuing preliminary injunctions. *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000). This reasoning does not apply to Amtrak’s request for possession, because Amtrak’s condemnation statute expressly addresses possession and squarely places the determination of when possession should pass within the court’s discretion.

Even in the NGA condemnation cases, however, courts will only grant possession after they determine that the condemnor has the power to take the property. In *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 825 (4th Cir. 2004), the court first decided whether the condemnor had a right to take, and only after it had determined that the condemnor had the right did it decide on whether it was entitled to immediate possession. The court stated:

The district court discharged its duty to adjudicate these cases by first taking up the question of whether ETNG had a substantive right to condemn the landowners’ property. . . . [O]nce ETNG’s right to take the easements was determined, it was proper for the district court to consider ETNG’s motions for equitable relief in the various cases, specifically, its requests for preliminary injunctions granting immediate possession. . . . [O]nce a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.

*Id.* at 822-28. Similarly, in *N. Border Pipeline Co. v. 86. 72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998), the court determined that a natural gas company could not obtain immediate possession where it had not established its entitlement to condemn the property. Subsequent courts have interpreted this holding to mean that immediate possession is improper when there has been no order confirming the right to condemn. *See N. Border*, 125 F. Supp. at 301 (“[I]n



this case, plaintiff does have a preexisting entitlement to the easements, the judgments of condemnation, which make an award of possession appropriate.”); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002) (same). Without a determination from this Court that Amtrak has the substantive right to condemn the Substation, granting Amtrak immediate possession would be improper.

In fact, consistent with the approach the courts take in deciding a condemnor’s right to take property before granting possession, Amtrak and PPL entered into a joint discovery plan and stipulation to resolve PPL’s defenses to Amtrak’s condemnation complaint. In the plan, the parties agreed to have 120 days of discovery regarding Amtrak’s authority to condemn the Substation and PPL’s defenses to the taking. (Motion to Enter Joint Stipulation). They further agreed that this discovery period would be followed by cross-motions for summary judgment, at which time the Court would decide the merits of the claims (or determine that a hearing is necessary to determine the merits). *Id.* As indicated in PPL’s Answer to Amtrak’s Complaint, there are many factual issues that need to be developed during discovery. Because Amtrak has agreed to a schedule and procedure for deciding the merits of this case, it would be premature for this Court to rule on Amtrak’s Motion before it rules on the merits. Instead, as the parties agreed, the Court should first rule on their cross-motions for summary judgment before deciding if, when, and how it should grant Amtrak possession.

**B. Even if Amtrak’s Motion were not premature, Amtrak has failed to establish that it is entitled to immediate possession.**

Even if Amtrak could move for possession before the Court determines whether Amtrak has the right to condemn the Substation, Amtrak has failed to establish that it would be entitled to immediate possession. In moving for possession, a condemnor must show that the balance of equities favors granting possession and that the condemnee will not suffer undue hardship in

giving up possession. *United States v. 74.57 Acres of Land*, 2012 U.S. Dist. LEXIS 51441 (S.D. Ala. 2012) (discussing a similar provision in the Declaration of Taking Act, 40 U.S.C. § 3114). Here, the balance of equities favors denying possession, and PPL and others connected to the Substation would suffer undue hardship if Amtrak were granted immediate possession.

**1. *Amtrak is not likely to succeed on the merits of its condemnation complaint.***

The equities do not favor Amtrak, because Amtrak is unlikely to succeed on the merits of its condemnation complaint. Granting Amtrak possession when it does not have a likelihood of being found to have the right to condemn the Substation would be inequitable.

**a. Amtrak's decision to condemn is subject to scrutiny.**

Amtrak asserts that it has broad discretion to condemn and that its decision to condemn should be subject to limited, deferential review. (Br. at 9-11). However, Amtrak is not a “governmental body” for the purposes of condemning property.<sup>3</sup> Rather, it is a statutorily created entity, and it “has not been authorized to exercise the sovereign’s power of eminent domain. It has been granted a limited power . . . to condemn land ‘[necessary for] intercity rail passenger service.’” *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir. 1987). As such, “Amtrak’s exercise of its delegated power of eminent domain is entitled to less deferential review than that of a governmental agency.” *Id.* at 1265.

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<sup>3</sup> Although courts have construed Amtrak to be a governmental body in different types of actions in order to protect citizens’ constitutional rights, those cases do not apply to expand Amtrak’s statutorily limited eminent domain power. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 394 (1995) (holding that Amtrak was a governmental body for the purpose of upholding citizens’ First Amendment rights); *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S.Ct. 1225, 1228, 1233 (2015) (holding that Amtrak is a governmental body for “purposes of determining the validity of the metrics and standards,” in part because the “structural principals secured by the separation of powers protect the individual,” and because “[t]reating Amtrak as a governmental [body] for these [specific] purposes . . . is not an unbridled grant of authority to an unaccountable actor”).

In the case that Amtrak relies on to attempt to shield its condemnation of the Substation from this Court's scrutiny, *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), the issue was not what level of deference the courts should apply to Amtrak's decision to condemn. Instead, the Court was reviewing the Interstate Commerce Commission's (the "ICC") decision to allow Amtrak to condemn another rail carrier's property under a different provision of Amtrak's condemnation statute that subjects this type of condemnation to the ICC's review. 49 U.S.C. § 24311(c) (requiring Amtrak to apply to the ICC<sup>4</sup> for an order establishing Amtrak's need to take another rail carrier's property). The Court stated that because the ICC—a governmental agency—was ruling on whether to allow Amtrak's condemnation, the “case turns on the need for deference to the ICC, not Amtrak.” *Id.* at 421. The Court further confirmed that “delegations of power to private entities [such as Amtrak] are of a limited nature.” *Id.*

Amtrak also tries to support its condemnation by stating that “[e]very exercise of Amtrak's federal eminent domain authority has been upheld by the federal courts.” (Br. at 11). But Amtrak's prior condemnations are irrelevant to this Court's review of Amtrak's current decision to condemn. Amtrak is not above this Court's review, and it cannot take property to subvert the proper adjudication of its dispute with PPL over payment of upgrades to the Substation. Merely because Amtrak has properly exercised its condemnation power in the past does not mean that it has done so in this case.<sup>5</sup>

**b. Amtrak admits that its true purpose in acquiring the Substation is to avoid paying increased tariffs to PPL.**

In Amtrak's Brief in Support of its Motion, Amtrak admits that its true purpose in

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<sup>4</sup> The ICC's functions have since been transferred to the Surface Transportation Board.

<sup>5</sup> Apparently, Amtrak also believes that its attempted condemnation voids the Settlement Agreement it entered into.

acquiring the Substation is to avoid paying increased rates to PPL. (Br. at 13) (“PPL asserts that Amtrak’s true goal in these condemnation proceedings is to avoid paying increased tariffs to PPL to fund the improvements—PPL is right about this.”). As PPL pleaded in its Answer to Amtrak’s Complaint, this purpose cannot support Amtrak’s condemnation of the Substation. Condemning property to avoid increased utility rates is not a public purpose, and Amtrak’s acknowledgement that this is its purpose for the condemnation undercuts its argument that the Substation is “necessary for intercity rail passenger transportation.” Any post-hoc justification Amtrak may come up with as to why the Substation is “necessary for intercity rail passenger transportation” is pretextual, because Amtrak’s true purpose is avoiding increased tariffs for electric service.

c. **Amtrak has not established a connection between its financial motivations for the condemnation and the necessity of Amtrak’s ownership of the property for intercity rail passenger transportation.**

Amtrak has not established that there is a connection between its alleged financial motivations for condemning the Substation and the necessity of Amtrak’s ownership of the Substation for intercity rail passenger transportation. Amtrak baselessly states that “[i]f the proposed rate increase were approved by the PUC, it would have a negative effect on Amtrak’s ability to operate the NEC” and that “Amtrak initiated this condemnation to protect its ability to operate the NEC efficiently.” (Br. at 4). However, the Condemnation Complaint and Amtrak’s filings in the PUC proceedings do not support this assertion. Amtrak has never provided any credible support for why it needs to own the Substation in order to operate the NEC efficiently. Rather, PPL has provided reliable service for decades—in fact, PPL is statutorily obligated to provide reliable and safe electric service under the PUC’s regulation. *See* 66 Pa.C.S. 1501.

Moreover, even assuming a pure financial motivation could support the condemnation, the documents that Amtrak attached to its Motion to support its financial motivations for

condemning the Substation do not in fact provide any support to Amtrak's argument that it will save money by owning the Substation. Amtrak has redacted all financial information from its supporting documentation. Additionally, the Resolution of Amtrak's Board of Directors authorizing the condemnation is dated January 2016 instead of 2017. While this may be a typo, it shows that Amtrak is not careful about its decision-making. The Resolution also focuses on the financial savings to Amtrak from the condemnation, stating that taking the Substation is "in the best interests of Amtrak." (Br. Ex. C) (emphasis added). Under any definition of public purpose for a taking, a condemner cannot support a decision to condemn that is based on a determination that owning the property will be in a for-profit corporation's best interest, rather than the public's. *See also Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1232 (2015) ("[R]ather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute.").

Not only has Amtrak failed to show any connection between its financial motivations and its allegations that its ownership of the Substation is "necessary for intercity rail passenger transportation," but Amtrak also has a proven track record of making bad financial decisions.<sup>6</sup>

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<sup>6</sup> Much of Amtrak's poor financial decision-making is publicly available information. *See* Office of Inspector General, National Railroad Passenger Corporation, Report No. OIG-SP-2017-009, *AMTRAK: Top Management and Performance Challenges—Fiscal Years 2017 and 2018* (Mar. 29, 2017) (identifying as one of Amtrak's systemic problems "the company's inconsistent use of its strategic goals to drive spending priorities and business decisions" and its failure to adequately manage the company's assets, and additionally noting that Amtrak failed to notice that an individual was using the company's electricity account to supply power to a facility that he had purchased from Amtrak for 18 years); Office of Inspector General, National Railroad Passenger Corporation, Report No. OIG-E-2013-020, *Corporate Governance: Planned Changes Should Improve Amtrak's Capital Planning Process, and Further Adoption of Sound Business Practices Will Help Optimize the Use of Limited Capital Funds* (Sept. 27, 2013) (analyzing Amtrak's capital planning process in 2013 and finding that Amtrak generally did not use good business planning in choosing which projects to pursue). PPL anticipates obtaining additional information about Amtrak's financial decision-making in discovery.

**d. PPL is likely to succeed on the merits of its other defenses**

PPL has also raised other defenses to Amtrak's condemnation of the Substation in its Answer to the Complaint. In particular, PPL has asserted that Amtrak engaged in bad faith, abused its discretion, and did not exercise reasonable business judgment in determining to condemn the Substation. Although the parties have not yet engaged in discovery on those issues, the facts alleged in Amtrak's Complaint and the statements Amtrak has made in this current Motion regarding its motivations for condemning the Substation support PPL's defenses.

PPL also asserted in its Answer that Amtrak cannot condemn the Substation until both the PUC and FERC have authorized the transfer of the Substation, because it is utility property subject to the regulation of both agencies. PPL is likely to succeed on these defenses. As PPL pleaded in its Answer, Section 1102(a)(3) of the Pennsylvania Public Utility Code provides that the PUC's approval is required before any property used and useful in providing service to the public may be transferred "by any method or device whatsoever." 66 Pa.C.S. § 1102(a)(3); *see also Public Serv. Water Co. v. Pa. Public Util. Comm'n*, 645 A.2d 423, 427 (Pa. Cmwlth. 1994) (holding that 66 Pa.C.S. § 1102(a)(3) is "prohibitive" rather than "regulatory," such that property may not be transferred until *after* the PUC approves an application for a certificate of public convenience).

FERC's approval is also required because Section 203 of the Federal Power Act ("FPA") provides: "No public utility shall, without first having secured an order of the Commission authorizing it to do so—(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000." 16 U.S.C. § 824b. A transfer of FERC-jurisdictional facilities by condemnation is subject to this requirement, meaning that the condemnation "cannot be effectuated unless the Commission has authorized the transfer under section 203 of the FPA." *Public Service Company of Colorado*, 149

FERC ¶ 61,228 (Dec. 18, 2014).

Despite what Amtrak contends in its Motion, FERC also regulates the Substation, such that it is a FERC-jurisdictional facility. Under the FPA, FERC has jurisdiction over all facilities used for the transmission of electric energy in interstate commerce and sales of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). FERC's jurisdiction under the FPA extends not only to electric power transmitted across state lines, but also within a state interconnected to the interstate transmission system. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453, 469 (1972) (upholding FERC's predecessor agency's determination that, given the interconnected nature of the grid, all transmissions fall within its jurisdiction); *New York v. FERC*, 535 U.S. 1, 7 (2002) ("In the rest of the country [other than Alaska, Hawaii and parts of Texas], any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."). FERC's jurisdiction over transmission is not limited by the fact that the power transmitted is not part of a wholesale transaction, but instead is consumed at retail. *New York*, 535 U.S. at 17 ("There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market . . ."). In fact, the Supreme Court expressly rejected the distinction upon which Amtrak rests its claim that FERC lacks jurisdiction over the Substation:<sup>7</sup>

It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.

*Id.* at 20. Here, the Substation operates in interstate commerce subject to FERC's jurisdiction

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<sup>7</sup> *See* Br. at 16 ("Amtrak is (was) the Substation's only consumer . . .").

because it is connected to PPL's transmission lines, which transmit power in interstate commerce. Contrary to Amtrak's assertions, the rate mechanism used to recover the costs of the Substation is not a factor that is determinative or relevant to whether that facility is subject to FERC's jurisdiction.

Moreover, the Substation has a value in excess of \$10 million for purposes of Section 203 of the FPA, such that Amtrak's condemnation cannot be effectuated without FERC's approval. Where FERC-jurisdictional facilities are disposed of by transactions between non-affiliated companies (such as condemnations), the value of the facility is its market value. 18 C.F.R. § 33.1(b)(3); *see also Transactions Subject to FPA Section 203*, 113 FERC ¶ 61,315 at 101, 116-18 (2005). Here, the market value of the Substation would likely include its original book value plus the investments that PPL has made toward capital improvements needed at the Substation, because any arms-length transaction for its purchase would likely factor these amounts into the sales price. 18 C.F.R. § 33.1(b)(3) (“[FERC] rebuttably presume[s] that the market value is the transaction price.”).<sup>8</sup> The original book value of the Substation plus PPL's investments result in a market value greater than \$10 million. (Decl. of John H. Schwartz, attached as Exhibit “D”). Because the Substation is a FERC-jurisdictional facility with a value greater than \$10 million, Amtrak cannot effectuate this condemnation without FERC's approval under Section 203 of the FPA. 16 U.S.C. § 824b.

PPL additionally alleged in its Answer that Amtrak does not have the power to condemn the Substation because the PUC—and not Amtrak—has jurisdiction to determine the reasonableness of PPL's rates. 66 Pa.C.S. §§ 1301-1329. Because the PUC has jurisdiction over

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<sup>8</sup> If this case proceeds to the just compensation phase, PPL intends to provide an expert opinion on valuation.



the reasonableness of PPL's rates, this Court should not grant Amtrak possession while the PUC is still adjudicating that issue.

Amtrak tries to maneuver around this jurisdictional hurdle by asserting that the PUC no longer has jurisdiction "over the Conestoga Substation," because Amtrak's "federal condemnation authority preempts any review by the PUC." (Br. at 17). But the proceeding before the PUC is a rate proceeding, not a condemnation proceeding, and this condemnation action only pertains to Amtrak's authority to condemn the Substation. *See* 49 U.S.C. § 24311 (granting federal district courts jurisdiction over Amtrak's exercise of eminent domain to acquire property "necessary for intercity rail passenger transportation"). While this Court has jurisdiction over Amtrak's condemnation action, it does not have jurisdiction over PPL's rates. Rather, the PUC has sole and exclusive jurisdiction over public utilities' rates. *Springfield Twp. v. Pa. PUC*, 676 A.2d 304, 308 (Pa. Cmwlth. 1996) (citing *Optimum Image, Inc. v. Philadelphia Electric Co.*, 600 A.2d 553 (Pa. Super. 1991)). Indeed, Amtrak advanced this same argument before the PUC to attempt to dismiss PPL's rate proceeding, but the PUC retained jurisdiction and refused to dismiss the proceeding. (Ex. B, PUC Order).

As the party seeking to invoke preemption, Amtrak has the obligation to prove that the federal law covers the same subject matter as the state law, regulation, or order it seeks to preempt. *United Transp. Union v. Pa. PUC*, 68 A.3d 1026, 1033 (Pa. Cmwlth. 2013) (citing *BNSF Ry. Co. v. Swanson*, 533 F.3d 618 (8th Cir. 2008)). Contrary to Amtrak's assertion, the federal condemnation authority granted in 49 U.S.C. § 24311 does not preempt the PUC's jurisdiction over public utility rates, services, or facilities.

Federal law can preempt state law in three ways: (1) where Congress "enacts a provision which expressly preempts the state enactment"; (2) "where Congress has legislated in a field so

comprehensively that it has implicitly expressed an intention to occupy the given field to the exclusion of state law”; or (3) “where a state law conflicts with a federal law,” either because “it is impossible to comply with both federal and state law” or because “the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Office of Disciplinary Counsel v. Marcone*, 855 A.2d 654, 664 (Pa. 2004). Nothing in 49 U.S.C. § 24311 grants federal courts any jurisdiction over utility rates and service, or otherwise expressly preempts the PUC from exercising its jurisdiction over public utility rates. Instead, 49 U.S.C. § 24311(b)(2)(B) limits the federal courts’ jurisdiction to “the disposition of outstanding charges related to the property.” PPL’s proposed rate adjustment, which is the subject of the PUC proceeding, does not pertain to “outstanding charges.” Rather, PPL’s proposed rate adjustment is a prospective rate that, if approved by the PUC, will become effective on the date the upgrades to the Substation are complete and in service.

Further, as Amtrak admitted before the PUC, the PUC proceeding is based on the PUC’s jurisdiction to review PPL’s proposed tariff change; it is not an *in rem* proceeding regarding the Substation or any property owned by Amtrak. (Ex. A, Amtrak’s Motion to Dismiss at 13). In contrast, this eminent domain action is an *in rem* proceeding that adjudicates rights in specific property—namely, the Substation. *See U.S. v. Sid-Mars Restaurant & Lounge, Inc.*, 644 F.3d 270, 275 (5th Cir. 2011). Accordingly, the PUC proceeding and this federal eminent domain action do not pertain or relate to the same thing, and this condemnation action does not preempt the PUC’s jurisdiction in the rate proceeding.

**2. *Amtrak has not demonstrated that it has an immediate need for possession.***

The equities also do not favor granting Amtrak possession, because Amtrak has failed to demonstrate that there is an immediate need for it to possess the Substation. As PPL pleaded in

its Answer to the Complaint, PPL has owned and operated the Substation for decades, and it has provided Amtrak reliable and adequate service. Indeed, PPL has continued to provide Amtrak reliable service after Amtrak filed the Complaint, pursuant to the Stipulation that the parties entered and this Court approved, which provides that “PPL will continue to perform normal operational and/or maintenance functions at the Conestoga Substation.” (May 23, 2017 Stipulation & [Proposed] Order).

To support its alleged need for possession, Amtrak merely states (without proof) that it “cannot be certain that the Conestoga Substation will operate reliably” if it does not have possession. (Br. at 23). But ensuring reliability of PPL’s service is precisely the function of the PUC. 66 Pa.C.S. § 1501 (requiring PUC-regulated public utilities to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities” and to provide service that is “reasonably continuous and without unreasonable interruptions or delay”); *id.* § 1505 (requiring the PUC to ensure that public utility service is “reasonable, safe, adequate, [and] sufficient”). Indeed, this is the reason that PPL proposed its rate adjustment and initiated its current proceedings before the PUC—so that it could maintain the reliability of its service by performing upgrades to the Substation and recouping those costs through its rates. Moreover, Amtrak has not alleged that there has ever been a time where PPL has not provided Amtrak reliable service. Rather, PPL has consistently provided reliable service and is currently taking steps to ensure that it can continue to provide reliable service by seeking to fund upgrades to the Substation.

Amtrak also has not provided any evidence that it could better ensure the reliability of the service provided through the Substation than PPL. In fact, contrary to what Amtrak asserts, the Substation is different from the other substations that Amtrak operates, because, upon PPL’s information and belief, the other substations that Amtrak operates are not directly connected to

power generators. In contrast, the Substation is directly connected to a power generator (SHWPC), which implicates FERC's jurisdiction over the Substation. (Answer ¶¶ 21, 3.e, 3.1). Moreover, the energy generated from SHWPC and transmitted to the Substation is not solely for Amtrak's benefit. Rather, upon information and belief, in addition to converting energy to 25 Hz power for Amtrak, there are also frequency converters which allow energy from SHWPC to flow through the Substation and be converted to 60 Hz power, after which that power continues to PPL's Manor Substation (which is a networked facility). Given the complex arrangement of the Substation, with both FERC-jurisdictional and PUC-jurisdictional aspects, the operation of the Substation would significantly change if Amtrak were to take possession.

**3. *The equities favor PPL's continuing possession of the Substation.***

Granting Amtrak possession would also be inequitable, because PPL and others connected to the Substation would suffer undue hardship. If Amtrak takes possession of the Substation now, PPL will not be able to fulfill its obligations to provide service, as regulated by both FERC and the PUC. As PPL pleaded in its Answer, it has existing agreements with third parties relating to the Substation that are subject to FERC's and the PUC's jurisdiction. If possession is transferred before the agreements can be redone, PPL could be in default of those agreements, and it will suffer irreparable damage. For example, under Section 2.3 of PPL's Transmission Contract with SHWPC and BGEC, PPL is required to "cooperate in scheduling the outages of [its] transmission facilities for inspection, maintenance, or other proper causes in such a manner as to permit the optimum utilization of Safe Harbor's capacity and energy resources," and under Section 3.1, PPL is required to "transmit all of the power and energy delivered by Safe Harbor to [PPL] for delivery to [BGEC] or for [BGEC's] account." (Compl. Ex. D). Without owning and operating the Substation, PPL cannot meet these obligations.

PPL's Interconnection Service Agreement with PJM and SHWPC also imposes numerous

obligations that PPL will not be able meet if it does not own and operate the Substation. (Compl. Ex. E). For instance, Section 7.0 of that agreement requires PPL to provide interconnection to PJM's Transmission System; Section 9.0 requires PPL to warrant the design, construction, and operation of the Substation; and Section 23.0 requires PPL to comply with security standards for the Substation. *Id.* PPL cannot comply with these obligations if it does not own and operate the Substation.

SHWPC will also be harmed if possession were transferred to Amtrak and PPL were unable to perform its obligations under these agreements, because the Interconnection Service Agreement allows SHWPC to participate in the wholesale electric capacity market. (Compl. Ex. E, Specs. § 2.1). The capacity market allows a generator to receive payment when it is able to send power within PJM's network on demand. (Decl. of Frank Johnson Richardson, II, attached as Exhibit "E"). To participate in this market and receive a capacity payment, a generator like SHWPC must send its power through facilities controlled by a FERC-regulated transmission operator, like PPL. *Id.* If an entity that is not subject to FERC's regulation (like Amtrak) controls the facilities, then it is not required to provide power upon PJM's demand, and the generator cannot participate in the wholesale electric capacity market. *Id.* PPL's operation of the Substation allows SHWPC to receive capacity payments from the energy it generates, which would not occur if Amtrak operated the Substation. SHWPC would thus be harmed if Amtrak took over possession and operation.

Amtrak appears to attempt to remedy this harm by reserving "floating easements" to PPL so that PPL can fulfill its obligations under these existing service agreements. However, Amtrak's description of the "floating easements" indicates that Amtrak does not intend to give PPL the level of control necessary to operate the Substation in accordance with those

agreements. The definition of “floating easement” in Amtrak’s current Motion is materially different than the definition in the Complaint, suggesting that Amtrak is attempting to rescind PPL’s level of control over the operation of the Substation. Moreover, by purporting to reserve these “floating easements,” Amtrak appears to attempt to dictate what PPL’s obligations with respect to service through the Substation will be after possession is transferred. But Amtrak does not have the right to dictate PPL’s service obligations—FERC and the PUC have jurisdiction.<sup>9</sup>

The equities also favor PPL’s continued possession of the Substation because Amtrak and PPL entered into a stipulation (which the Court approved), pursuant to which Amtrak agreed that PPL would continue to operate the Substation and refrain from commencing capital improvements until further order of court. (May 23, 2017 Stipulation & [Proposed] Order). Amtrak has offered no reason not to maintain the *status quo* established by the stipulation until the Court can address the merits of its condemnation. PPL has not violated the stipulation. Rather, PPL has held off on undertaking capital improvements to the Substation. Although PPL has continued with the PUC rate proceedings, it has only done so to ensure that it can quickly begin construction if it is successful in its defenses to Amtrak’s condemnation. The rates approved by the PUC will only come into effect if PPL builds the improvements at the Substation (which it has not done), and if this Court rules in PPL’s favor, PPL will unquestionably be responsible to complete the upgrades in order to provide reliable service.

The equities additionally favor PPL’s continued possession of the Substation because Amtrak’s Motion appears to be just another example of Amtrak’s bad faith in its dealings with

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<sup>9</sup> Additionally, by reserving “floating easements,” Amtrak appears to invite PPL to provide public utility service at the Substation indefinitely. As long as PPL provides public utility service, however, it will be entitled to earn a rate determined by the PUC. This further undercuts Amtrak’s attempts to avoid the PUC proceedings.

PPL. Amtrak filed the Motion soon after the PUC declined to dismiss PPL's rate proceeding. (Ex. B, PUC Order). The timing of these events appears to indicate that Amtrak filed the Motion in an attempt to circumvent the PUC's refusal to dismiss the proceeding, essentially requesting that this Court moot the PUC's proceedings by transferring possession to Amtrak.

Indeed, consistent with its approach in the PUC proceeding, Amtrak has routinely indicated in its interactions with PPL that it believes that only Amtrak—and no other authority—has the power to decide what rules and obligations it should be subject to. For instance, Amtrak is currently refusing to pay amounts it owes to PPL for service provided through the Substation, even though Amtrak agreed to the rate in the Settlement Agreement and agreed in the stipulation approved by this Court that PPL would continue to operate and maintain the Substation. (May 23, 2017 Stipulation & [Proposed] Order; Ex. C, June 9, 2017 Letter from Amtrak's Counsel). Amtrak has also sent policemen to the Substation to prevent PPL from accessing it, even though Amtrak does not have the right to possession. (Decl. of Jeff Byrnes, Doc. #16, Ex. A). Amtrak also filed this Motion while in the midst of negotiating a Joint Plan and Stipulation with PPL for resolving the merits of this case, which did not contemplate a motion of this sort. (Motion to Enter Joint Stipulation). Thus, in all aspects, the equities favor PPL's continued possession.

**4. *The public interest favors denying Amtrak's Motion for Immediate Possession.***

The public interest also favors denying Amtrak's request to take possession of the Substation. As indicated, Amtrak's condemnation of the Substation and its Motion for Immediate Possession essentially boil down to Amtrak's displeasure with the PUC's authority to determine the reasonableness of PPL's rates. But, as discussed above, the PUC has sole and exclusive jurisdiction over the regulation of public utilities' rates, and this condemnation action does not preempt the PUC's jurisdiction. If this Court were to grant Amtrak immediate possession, it

would undercut both the PUC's and FERC's jurisdiction, which would harm the public.

The public would also be harmed if this Court granted Amtrak possession, because granting possession would be validating Amtrak's bad faith and bullying tactics in resolving a dispute over rates for public utility service. If actors like Amtrak can condemn any property they want as a means of resolving billing disputes, and then take immediate possession of that property before the court determines that they have properly exercised their eminent domain power, then no property is safe. Amtrak and other actors like it could potentially take possession of other public utility facilities whenever they dispute the rates charged to them for service. Not only would this deprive the public of services that were previously provided through the condemned facilities, but it would thwart the orderly administration of disputes involving regulated entities. Condemnors like Amtrak must have more than private financial motivations and a push to be free of state regulation to support condemnation and immediate possession of public utility property.

#### **IV. CONCLUSION**

Because this Court has not yet determined that Amtrak has the right to take the Conestoga Substation, and because in any case, Amtrak has failed to establish that the equities favor granting it possession, this Court should deny Amtrak's Motion for Immediate Possession.

Respectfully submitted,

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*PPL Electric Utilities Corp.*

Dated: August 2, 2017



**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2017, I electronically filed the foregoing Brief in Opposition to Plaintiff's Motion for Immediate Possession with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel or parties of record electronically by CM/ECF.

DUANE MORRIS LLP

/s/Patrick J. Loftus

Patrick J. Loftus (60417)

Attorneys for Defendant PPL Electric Utilities Corporation

# EXHIBIT A



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May 11, 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 P.A. PUC No. 201  
for Rate Schedule LPEP; Docket No. R-2016-2569975**

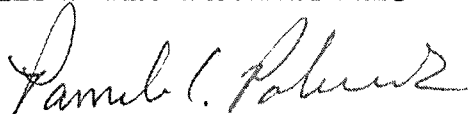
Dear Secretary Chiavetta:

Attached please find for filing with the Pennsylvania Public Utility Commission the Motion to Dismiss of the National Railroad Passenger Corporation ("Amtrak") in the above-referenced proceedings. As shown on the attached Certificate of Service, all parties to this proceeding are being duly served. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By

  
Pamela C. Polacek

Counsel to National Railroad Passenger Corporation ("Amtrak")

Enclosures

c: Certificate of Service  
Administrative Law Judge David A. Salapa (via Email and First Class Mail)

[www.McNeesLaw.com](http://www.McNeesLaw.com)

Harrisburg, PA • Lancaster, PA • Scranton, PA • State College, PA • Columbus, OH • Frederick, MD • Washington, DC

**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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*Via First Class Mail Only*

  
Pamela C. Polacek

Counsel to National Railroad Passenger  
Corporation

Dated this 11<sup>th</sup> day of May, 2017, at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>NATIONAL RAILROAD PASSENGER CORPORATION,</b>	:	
	:	
<b>COMPLAINANT</b>	:	<b>Docket No. C-2016-2580526</b>
	:	
<b>v.</b>	:	
	:	
<b>PPL ELECTRIC UTILITIES CORPORATION,</b>	:	
	:	
<b>RESPONDENT</b>	:	
	:	
<b>PPL ELECTRIC UTILITIES CORPORATION SUPPLEMENT NO. 213 TO TARIFF ELECTRIC PA PUC NO. 201 FOR RATE SCHEDULE LPEP</b>	:	<b>Docket No. R-2016-2569975</b>
	:	

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**NOTICE TO PLEAD**

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TO: PPL Electric Utilities Corporation  
Two North Ninth Street  
Allentown, PA 18101

Pursuant to 52 Pa. Code §5.103(c), you are hereby notified that National Railroad Passenger Corporation has filed its Motion to Dismiss, which you are hereby notified to file a written response to within twenty (20) days of the date of service of this Motion unless otherwise provided in Chapter 5 of Title 52 of the Pennsylvania Administrative Code. Your failure to answer will allow the presiding officer to rule on the Motion to Dismiss without a response from you, thereby requiring no proof. All Pleadings such as a Motion to Dismiss must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for National Railroad Passenger Corporation.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: 

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Counsel to National Railroad Passenger  
Corporation

Dated: May 11, 2017

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>NATIONAL RAILROAD PASSENGER CORPORATION,</b>	:	
	:	
<b>COMPLAINANT</b>	:	<b>Docket No. C-2016-2580526</b>
	:	
v.	:	
	:	
<b>PPL ELECTRIC UTILITIES CORPORATION,</b>	:	
	:	
<b>RESPONDENT</b>	:	
	:	
<b>PPL ELECTRIC UTILITIES CORPORATION SUPPLEMENT NO. 213 TO TARIFF ELECTRIC PA PUC NO. 201 FOR RATE SCHEDULE LPEP</b>	:	<b>Docket No. R-2016-2569975</b>
	:	

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**MOTION TO DISMISS OF THE NATIONAL RAILROAD PASSENGER CORPORATION**

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Pursuant to 52 Pa. Code §5.103, National Railroad Passenger Corporation ("Amtrak") hereby submits this Motion to Dismiss ("Motion") the above-captioned proceeding for lack of subject matter jurisdiction and federal preemption.

As set forth below, on April 17, 2017, pursuant to 49 U.S.C. § 24311, Amtrak initiated an eminent domain proceeding at the United States District Court for the Eastern District of Pennsylvania ("District Court") to acquire certain facilities and equipment used by PPL Electric Utilities Corporation ("PPL") to provide service to Amtrak under PPL's Tariff Electric Pa. P.U.C. No. 201. Once Amtrak completed its eminent domain filing with the District Court, title to the facilities and equipment vested in Amtrak in fee simple absolute. Accordingly, as of April 18, 2017, PPL no longer owns the facilities and equipment which form the basis for the above-captioned rate proceeding. Pursuant to the terms of 49 U.S.C. § 24311 and the Supremacy Clause

in Article VI, clause 2 of the United States Constitution, the District Court, and not the Pennsylvania Public Utility Commission ("PUC" or "Commission"), possesses jurisdiction over the facilities and equipment in question. Because the proposed rate for upgrades to Conestoga Substation is the sole basis for PPL's rate schedule action and Amtrak's complaint, and PPL no longer owns the Conestoga Substation, there is no further basis for PUC jurisdiction over Docket Numbers R-2016-2569975 and C-2016-2580526, and these proceedings should be dismissed.

Because granting this Motion will immediately terminate the proceeding, Amtrak also requests, pursuant to 52 Pa. Code §5.103(d)(1)(i), that the Presiding Officer immediately suspend the current procedural schedule until such time as the Presiding Officer rules on this Motion and the parties pursue any desired appeals of the decision. In support of its Motion, Amtrak avers as follows:

**I. INTRODUCTION**

**A. Rate Proceeding at the PUC**

On October 5, 2016, PPL filed Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201 ("Supplement No. 213") for Rate LPEP – Power Service to Electric Propulsion ("Rate LPEP") with the PUC at Docket Number R-2016-2569975 requesting to add the following language to Rate Schedule LPEP:

Effective on the date that the Conestoga Substation upgrade is completed and placed in service, the distribution charge will be \$319,671.00 per month (Customer Charge). Customers under Rate Schedule LPEP will be given written notice 30 days before the effective date of the new distribution charge.

Supplement No. 213, Twenty-Sixth Revised Page No. 29. As of October 5, 2016, PPL owned four of the transformers at the Conestoga Substation and Amtrak owned three of the transformers at the



Conestoga Substation.<sup>1</sup> Each party also owned other related equipment at the Conestoga Substation. At that time, PPL provided Amtrak with Commission-regulated electric distribution service pursuant to Rate LPEP. PPL's Rate LPEP proceeding was limited to rates charged to Amtrak and not to any other electric customer.<sup>2</sup> If implemented, Supplement No. 213 would have increased the Rate LPEP monthly charge significantly while providing no projected in-service date for the potential equipment upgrade at the Conestoga Substation.

On December 19, 2016, Amtrak filed a Complaint and New Matter under Docket No. C-2016-2580526 opposing Supplement No. 213.<sup>3</sup> Amtrak challenged PPL's proposed tariff change as premature because there was no projected in-service date for the new rate, and challenged the proposed rate in the new tariff as excessive, unjust and unreasonable. As indicated in Amtrak's Complaint, this proceeding represents a continuation of a dispute between Amtrak and PPL that began in PPL's 2015 base rate proceeding regarding the cost, scope, timing and payment for upgrades to the Conestoga Substation. Two separate settlement agreements, the Mutual Settlement Agreement Among PPL Electric Utilities Corporation and National Railroad Passenger Corporation ("Mutual Settlement Agreement")<sup>4</sup> and the Joint Petition for Approval of Settlement

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<sup>1</sup> The "Conestoga Substation" is the substation that connects Amtrak to the Safe Harbor Power Corporation's ("Safe Harbor") hydroelectric generation facility.

<sup>2</sup> Amtrak is the only customer served by the Conestoga Substation and is the only PPL customer that receives service at 25 Hertz (rather than 60 Hertz). Safe Harbor produces power for Amtrak at 25 Hertz, which is necessary to operate Amtrak's electric traction system. Safe Harbor delivers the 25 Hertz power to the Conestoga Substation, which was owned partly by PPL and partly by Amtrak when Supplement No. 213 was filed. PPL has no other 25 Hertz substations on its system. Amtrak, on the other hand, operates multiple 25 Hertz substations along the Northeast Corridor.

<sup>3</sup> Amtrak's Complaint addressed the propriety of Supplement No. 213, while Amtrak's New Matter asserted that 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, Administrative Law Judge David A. Salapa denied Amtrak's New Matter. As a result, the proceeding carried forward and solely focused on Supplement No. 213.

<sup>4</sup> See Complaint and New Matter of National Railroad Passenger Corporation, Exhibit B, *Nat'l. R.R. Passenger Corp. v. PPL Elec. Utils. Corp.*, Docket No. C-2016-2580526 & *PPL Elec. Utils. Corp. Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201*, Docket No. R-2016-2569975 (filed Dec. 19, 2016).

of All Issues ("2015 Settlement")<sup>5</sup>, were executed and collectively defined a process for continued negotiation between Amtrak and PPL regarding the disputes over the proposed substation upgrades. The Mutual Settlement Agreement terminated on September 1, 2016, however, when negotiations concluded, the parties had not achieved a mutually-acceptable resolution. Paragraph 31 of the 2015 Settlement required PPL to submit a tariff filing for Rate LPEP "to reflect (i) the negotiated agreement ultimately reached by PPL Electric and Amtrak or (ii) the fact that PPL Electric and Amtrak were unable to reach an agreement by September 1, 2016." 2015 Settlement, *supra* n. 5, Paragraph ¶31. By submitting Supplement No. 213, PPL conceded that the Mutual Settlement Agreement expired with no mutually-acceptable resolution. Pursuant to Paragraph 9 of the Mutual Settlement Agreement, Amtrak specifically reserved all rights and arguments regarding any filing submitted by PPL. Mutual Settlement Agreement, ¶ 9.<sup>6</sup>

In multiple pleadings submitted by Amtrak in this proceeding, Amtrak provided PPL and the PUC with notice that Amtrak intended to acquire the PPL-owned property and equipment at the Conestoga Substation, and Amtrak's willingness to invoke its Federal eminent domain rights if a voluntary transaction did not occur. *See e.g.*, Complaint and New Matter of National Railroad Passenger Corporation, Docket Nos. R-2016-2569975 and C-2016-2580526, p. 8 (Dec. 19, 2016); Prehearing Memorandum of the National Railroad Passenger Corporation, Docket Nos. R-2016-2569975 and C-2016-2580526, p. 3 (Jan. 3, 2017); Petition of the National Passenger Railroad Corporation for Amendment of December 22, 2016 Order to Suspend These Proceedings, Docket Nos. R-2016-2569975 and C-2016-2580526, p. 2 (Jan. 3, 2017); Petition of the National Passenger

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<sup>5</sup> 2015 Settlement, *Pa. Pub. Util. Comm'n. v. PPL Elec. Utils. Corp.*, Docket Nos. R-2015-2469275, *et al.* (Sep. 3, 2015).

<sup>6</sup> Complaint and New Matter of National Railroad Passenger Corporation, Exhibit B, *Nat'l. R.R. Passenger Corp. v. PPL Elec. Utils. Corp.*, Docket No. C-2016-2580526 & *PPL Elec. Utils. Corp. Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201*, Docket No. R-2016-2569975 (filed Dec. 19, 2016).

Railroad Corporation for Amendment of December 22, 2016 Order to Suspend These Proceedings (Updated to Reflect PUC Order Errata), Docket Nos. R-2016-2569975 and C-2016-2580526, p. 2 (Jan. 4, 2017). For example, Amtrak asserted that a suspension was appropriate because of "Amtrak's current plans to acquire the Conestoga Substation equipment and property by purchasing the facility from PPL, or if that is not possible, to take the Conestoga Substation pursuant to Amtrak's federal eminent domain authority [under] 49 U.S.C. § 24311." Petition of the National Passenger Railroad Corporation for Amendment of December 22, 2016, Order to Suspend These Proceedings (Updated to Reflect PUC Order Errata), Docket Nos. R-2016-2569975 and C-2016-2580526, p. 2 (Jan. 4, 2017). Amtrak averred the suspension would enable the PUC, the PUC's presiding officer, and parties to:

[A]void the prospect of judicial waste by proceeding with haste to resolve issues that may very well be rendered moot by Amtrak's acquisition of the Conestoga facility by purchase or pursuant to a Federal court eminent domain proceeding, to avoid rulings that may conflict with the jurisdiction of a federal court, and to have sufficient time to evaluate the multitude of unique legal issues that would arise as a result of Amtrak's current plans to acquire the Conestoga Substation equipment and property by purchasing the facility from PPL, or if that is not possible, to take the Conestoga Substation pursuant to Amtrak's federal eminent domain authority. [*Id.*]

On March 3, 2017, Amtrak made PPL a good faith offer to purchase the Conestoga Substation in lieu of condemnation for two million dollars (\$2,000,000.00), an amount estimated by a certified real estate appraiser to be the fair market value of the Conestoga Substation. Amtrak's offer to purchase the Conestoga Substation exceeded the value PPL ascribed to it in Docket Number R-2016-2569975.<sup>7</sup>

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<sup>7</sup> See PPL Cost of Service study for the historic test year (2014), which was entered into the record in Docket No. R-2016-2569975 as Exhibit JDT 1. Page 7 of 188, which provides the summary of the study and shows Plant in Service for LPEP of \$3.15 million, with accumulated reserves of \$1.9 million, gives us a net book value of approximately \$1.23 million.

On March 17, 2017, PPL proposed that Amtrak refrain from filing a condemnation action and that the parties request a 60-day stay of the proceedings before the PUC so that the parties could engage in meaningful settlement negotiations. Amtrak agreed to this proposal. The ALJ revised the scheduling order to allow the parties 60 days to discuss settlement.

On March 17, 2017, PPL promised Amtrak that a settlement proposal would be forthcoming. To date, Amtrak has not received such a proposal.

Rather than providing a counter-proposal, on or about April 12, 2017, contractors employed by PPL were conducting activities at the Conestoga Substation to modify the PPL-owned equipment.<sup>8</sup>

**B. Initiation of Eminent Domain Proceeding in Federal Court**

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 Federal Rule of Civil Procedure (F.R.C.P.) 71.1. *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corp.*, Docket No. 17-CV-1752, Civil Action – Law (E.D. Pa. 2017) (See Eminent Domain Filings in "Appendix A").

On April 18, 2017, Amtrak submitted to the District Court a Notice of Condemnation and a deposit in the amount of Amtrak's estimate of the just compensation for the property and equipment that was specified in the Declaration of Taking. 49 U.S.C. § 24311(b)(1) notes "[a]n interest is condemned and taken by Amtrak for its use when a declaration of taking is filed... and an amount of money estimated in the declaration to be just compensation for the interest is deposited in the court." 49 U.S.C. § 24311(b)(2) adds:

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<sup>8</sup> See Appendix A, *infra*, at pp. 331-35 (Mull Declaration).

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 – (A) the time by which, and the terms under which, possession of the property is given to Amtrak; and (B) the disposition of outstanding charges related to the property. [Emphasis added.]

By operation of law, fee title to the Conestoga Substation transferred to Amtrak, subject only to the floating easement Amtrak preserved for PPL to ensure PPL's continued ability to perform PPL's obligations under (1) the Transmission Contract between PPL, Safe Harbor, and Baltimore Gas and Electric Company ("Transmission Contract") and (2) the Interconnection Service Agreement among PJM Interconnection, L.L.C. and Safe Harbor and PPL ("Interconnection Service Agreement").<sup>9</sup>

On April 18, 2017, Amtrak submitted to the District Court a Motion for a Temporary Restraining Order to enjoin PPL from any activities at the Conestoga Substation except routine operations and maintenance.<sup>10</sup> On April 28, 2017, PPL responded to the Motion for a Temporary Restraining Order.

Also on April 28, 2017, United States District Judge Jeffrey L. Schmehl conducted a telephonic conference with the parties to discuss the schedule and process to address the Motion for a Temporary Restraining Order, Amtrak's request for a permanent injunction, and Amtrak's Complaint and Declaration of Taking.<sup>11</sup> Counsel for PPL represented to the District Court in that hearing that PPL would take no further action to alter the Conestoga Substation. Judge Schmehl

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<sup>9</sup> Copies of the Transmission Contract and the Interconnection Service Agreement were attached as Exhibits D and E, respectively, to Amtrak's Declaration of Taking and filed with the District Court. See Appendix A herein for copies of those agreements. Both contracts are filed with the Federal Energy Regulatory Commission and are not within the Commission's jurisdiction.

<sup>10</sup> Appendix A, *infra*, at pp. 303-306.

<sup>11</sup> PPL has retained the following counsel from Duane Morris, L.L.P., for the eminent domain proceeding in the District Court at Docket No. 17-CV-1752: Patrick J. Loftus, George J. Kroclic, Meredith E. Carpenter, and Sean P. McConnell.

ordered the parties to submit a stipulated Temporary Restraining Order. Amtrak and PPL are currently negotiating the terms of the stipulated Temporary Restraining Order. The District Court also will be holding a hearing on Amtrak's request for an injunction.

The Commission no longer has subject matter jurisdiction over the Conestoga Substation, and its state jurisdiction is preempted by federal law. Accordingly, the Commission's jurisdiction over the Conestoga Substation and claims and defenses relating to it previously raised before the Commission by PPL and Amtrak is preempted by Federal law. Therefore, the PUC should dismiss Docket Numbers R-2016-2569975 and C-2016-2580526.

## II. JURISDICTION

"As an administrative agency created by statute, the PUC has only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers." *Norfolk S. Ry. Co. v. Pa. Pub. Util. Comm'n.*, 875 A.2d 1243, 1249 (Pa. Commw. Ct. 2005) (citing *Peoples Natural Gas Co. v. Pa. Pub. Util. Comm'n.*, 664 A.2d 664 (Pa. Commw. Ct. 1995)). The law clearly indicates that the PUC cannot exceed its jurisdiction, and instead must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348, 350 (Pa. Super. Ct. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602, 604 (Pa. 1967) (citing *Commonwealth v. Yorktowne Paper Mills, Inc.*, 214 A.2d 203 (Pa. 1965)). Subject matter jurisdiction permits a court to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Commw. Ct. 1992) (citing *Am. Labor Party Case*, 44 A.2d 48 (Pa. 1945); *Lashe v. Northern York Cnty. School Dist.*, 417 A.2d 260 (Pa. Commw. 1980)). "Questions of jurisdiction can never be waived, and may be raised at any time by the parties or *sua sponte* by an appellate court." *Pennhurst Med. Grp., P.C. v. Dep't of Pub. Welfare*, 796 A.2d 423, n. 2 (Pa. Commw. 2002) (citing *Commonwealth v. Little*, 314 A.2d 270 (Pa. 1974); *Pennsylvania Liquor Control Bd. v. Kohn*, 520 A.2d 534 (Pa. Commw. Ct. 1987)).

Article VI of the United States Constitution establishes the doctrine of federal preemption. U.S. Const. art VI, § 2 (the "Supremacy Clause"). "Federal law preempts, and thereby displaces, state law in three different situations: (1) 'express preemption,' (2) 'field preemption'... , or (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*)). The United States Supreme Court described the potential types of federal preemption as follows:

[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L. Ed. 2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," *id* at 79, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).

*Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("*Freightliner*").

### III. ARGUMENT

#### A. **Because Amtrak Obtained Title To The Conestoga Substation On April 18, 2017, The Commission's Jurisdictional Basis for Current Proceeding is Eliminated and the Proceeding Should be Dismissed.**

On April 17, 2017, pursuant to Federal Rule of Civil Procedure 71.1(d), Amtrak commenced an action to condemn property in the District Court by filing a Complaint for Condemnation, Declaration of Taking, and other related filings (*see* Appendix A). Amtrak's authority to acquire the property and equipment at the Conestoga Substation by eminent domain derived from 49 U.S.C. § 24311. On April 18, 2017, Amtrak submitted the Notice of Condemnation and a deposit to the District Court. Thus, as of April 18, 2017, Amtrak owns fee title in the Conestoga Substation as a matter of federal law.

The Commission initially had jurisdiction over the current proceeding because PPL, a PUC-regulated public utility, was seeking to change the rate that it would charge to Amtrak for the electric distribution service that PPL was providing to Amtrak through the equipment that PPL owned at the Conestoga Substation. 66 Pa. C.S. § 1308(a) ("[u]nless the commission otherwise orders, no public utility shall make any change in any existing and duly established rate, except after 60 days notice to the commission"). Amtrak filed a Complaint against the tariff and rate change, and the Commission thus suspended the tariff supplement, establishing this proceeding for adjudication of whether the proposed change is just and reasonable. *See id.* at § 1308(b).

As of April 18, 2017, Amtrak owns the property and equipment at the Conestoga Substation by operation of federal law; PPL no longer owns anything other than the previously-mentioned floating easements to perform under the FERC contracts, which do not impact Amtrak. PPL no longer owns any equipment to provide PUC-regulated distribution service to Amtrak, and the proposed basis for the rate change (*i.e.*, the substation upgrade) will be performed by Amtrak, not PPL. As such, their tariff supplement is moot, and the proceedings at this docket are moot.

Further, Amtrak is not a "public utility" subject to the Commission's jurisdiction. *See* 66 Pa.C.S. § 102 (definition of "public utility"). Amtrak is not distributing electricity "to or for the public" and, instead, provides service only to itself. *See id.* ("The term [public utility] does not include: (i) Any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself."); *see also Bethlehem Steel Corp. v. Pa. P.U.C.*, 713 A.2d 1110, 1114 (Pa. 1998); *Drexelbrook Assocs. v. Pa. Pub. Util. Comm'n.*, 212 A.2d 237, 239 (Pa. 1965). As such, the Commission no longer has a jurisdictional basis upon which to continue the current proceeding addressing PPL's request for a prospective electric rate increases to Rate LPEP<sup>12</sup>.

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<sup>12</sup> Amtrak is not asserting that the PUC does not have jurisdiction over PPL or its service to other customers, but that those other services are not at issue in this proceeding.



Accordingly, the Commission must dismiss the proceeding from a lack of jurisdiction. Any attempt to continue this litigation concurrent with the federal court eminent domain action raises potential for judicial waste by devoting PUC resources to resolving issues regarding PPL's proposed rate and tariff language that have become moot since Amtrak condemned the Conestoga Substation on April 17, 2017, and took ownership of the Conestoga Substation on April 18, 2017.

**B. The Federal Court, Not The PUC, Now Has Exclusive Jurisdiction Over Matters Relating To the Conestoga Substation.**

Section 24311(a)(1)(A) of Title 49 of the United States Code authorizes Amtrak to acquire by eminent domain property, such as the Conestoga Substation, that is "necessary for intercity rail passenger transportation." 49 U.S.C. 24311(a)(1)(A). Section 24311(b)(1) also prescribes that the "district court of the United States for the judicial district in which the property is located" has jurisdiction over all matters relating to the condemned property. *Id.* at § 24311(b)(1).

In addition, the District Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 (because the authority for Amtrak to acquire an interest in property by eminent domain is a federal question arising under the laws of the United States) and has subject matter jurisdiction pursuant to 28 U.S.C. § 1349 (because the United States Government owns a majority of Amtrak's stock).

In addition, Fed. R. Civ. P. 71.1 (a) states that it "govern[s] proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Subsection (h)(1) of Fed. R. Civ. P. 71.1 makes clear that "[i]n an action involving eminent domain under federal law, the [federal] court tries all issues, including compensation."<sup>13</sup>

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<sup>13</sup> Omitting references to non-jurisdictional procedural exceptions relating to trial of compensation issues.

Pursuant to the doctrine of federal preemption, which derives from Article VI, clause 2 of the U.S. Constitution,<sup>14</sup> a state public utility commission cannot act contrary to federal law that grants jurisdiction to the federal court to make determinations regarding Amtrak's exercise of federal eminent domain over the Conestoga Substation. 49 U.S.C. §24311 and Fed. R. Civ. P. 71.1. This interpretation comports with other general provisions on condemnation proceedings initiated by the federal government. *See also*, 40 U.S.C. §§ 3113-3114 (indicating that federal courts have a right to review declarations of taking by the federal government once eminent domain proceedings are initiated at the federal court level) and *AA Am. Dev. Corp. v. United States*, 2007 U.S. Dist. LEXIS 59692, \*7-11 (2007) (holding that when the federal government files a Declaration of Taking, Notice of Condemnation, and deposit with the district court pursuant to 40 U.S.C. § 3114, the federal preemption doctrine applies and overrides conflicting state law).

When a federal court of competent jurisdiction obtains possession, custody and control over a property in an *in rem* proceeding such as eminent domain, that authority and power may not be disturbed by any other court. *United States v. Sid-Mars Restaurant & Lounge, Inc.*, 644 F. 3d 270, 275 (5<sup>th</sup> Cir 2011) ("*Sid-Mars Restaurant*"). In eminent domain actions under Federal authority, the condemnor may obtain an injunction to ensure that the federal District Court retains the first priority to decide title issues, even if the *in rem* state court proceeding regarding the particular property started before the federal proceeding.<sup>15</sup>

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<sup>14</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art VI., § 2.

<sup>15</sup> Amtrak is not an ordinary private corporation, it is a federal actor. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995) ("Facing the question of Amtrak's status for the first time, we conclude that it is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution"). Congress formed Amtrak to address a public transportation issue and "provide modern and efficient intercity and commuter rail passenger service." *Nat'l. R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 410 (1992). In recognition of Amtrak's status as a federal actor with statutory obligations, Congress passed several pieces of legislation to enable Amtrak to fulfill its statutory duties, including the ability to acquire property by eminent domain. 49 U.S.C. § 24311.

The pending proceeding here is based on the Commission's jurisdiction to review a proposed tariff change for PPL; the proceeding is not an *in rem* proceeding regarding the Conestoga Substation.<sup>16</sup> As a result, the District Court is the first court to have possession, custody and control over the Conestoga Substation.

Controlling federal precedent also demonstrates that the Commission lacks authority to act contrary to federal laws governing Amtrak. *See, Nat'l. R.R. Passenger Corp. v. Commonwealth of Pa. Pub. Util. Comm'n.*, 848 F.2d 436 (3d Cir. 1988) (injunction entered in Amtrak's favor against impositions by the PUC for public highway bridge costs); *Nat'l. R.R. Passenger Corp. v. Caln Twp.*, 2010 U.S. Dist. LEXIS 1876 (E.D. Pa. 2010) (injunction entered in Amtrak's favor against a Pennsylvania township's imposition of local ordinances against Amtrak); *UGI Utils., Inc. v. Nat'l. R.R. Passenger Corp.*, 2004 U.S. Dist. LEXIS 29305 (M.D. Pa. 2004) (holding that a Pennsylvania public utility's actions under state law to take Amtrak's property were preempted by federal law); *Nat'l. R.R. Passenger Corp. v. Colonial Pipeline*, No. 05-2267, 2006 WL 236788 (D. Md. 2006) (holding that a utility's actions under state law to take Amtrak's property were preempted by federal law).

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<sup>16</sup> *In rem* proceedings are actions "determining the title to property and the rights of the parties not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." Black's Law Dictionary 32 (8<sup>th</sup> ed 2004). In other words, eminent domain cases are *in rem* proceedings because the action is not against the owner, but against the land or property interest to be acquired. With regard to the PUC in particular, Pennsylvania courts have held that the PUC lacks jurisdiction resolve real property issues, which are matters for a court of general jurisdiction. *Redding v. Atlantic City Elec. Co.*, 269 A.2d 680, 681-84 (Pa. 1970) (holding that a court of equity may determine the validity and scope of a proposed condemnation once the necessity of the service has been determined); *see also Fairview Water Co. v. Pa. Pub. Util. Comm'n.*, 502 A.2d 162, 167 (Pa. 1985) (holding that the PUC does not have jurisdiction to determine the scope and validity of an easement); Opinion and Order, *Perrige v. Metropolitan Edison Co.*, Pennsylvania Public Utility Commission Docket No. C-00004110, p. 6 (2003).

**C. The PUC Is Preempted From Addressing Issues Regarding The Transfer Of Possession And The Disposition Of Outstanding Charges Related To The Conestoga Substation.**

Amtrak now owns the Conestoga Substation because "a declaration of taking [wa]s filed under this subsection and an amount of money estimated in the declaration to be just compensation for the interest [wa]s deposited in the court." 49 U.S.C. § 24311(b)(1). Now that the declaration has been filed, the District Court may decide – (A) the time by which, and the terms under which, possession of the property is given to Amtrak; and (B) the disposition of outstanding charges related to the property. *See id.* at § 24311(b)(2)(A)-(B).

Therefore, 49 U.S.C. § 24311(b) vests jurisdiction exclusively in the District Court to determine issues of possession, outstanding charges and any challenges that PPL may wish to assert against the taking or the just compensation. Congress intended for ownership to transfer to Amtrak upon the filing of the declaration and the deposit, thus expressly preempting any state or local jurisdiction to review the taking and also to make rulings regarding any outstanding charges relating to the condemned property. Continued Commission jurisdiction here, contrary to 49 U.S.C. § 24311 and Fed. R. Civ. P. 71.1, would be contrary to the Supreme Court's ruling in *Freightliner*:

a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L. Ed. 2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," *id.* at 79, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).

*Freightliner* 514 U.S. 280, 287 (1995). See also, *Union Ctr. Redevelopment Corp. v. Nat'l. R.R. Passenger Corp.*, 103 F.3d 62 (8<sup>th</sup> Cir. 1997) (state law preempted by Amtrak taking under federal authority).

Congress expressly granted the federal courts with the jurisdiction over Amtrak federal eminent domain actions. Therefore, continuing Commission jurisdiction would be in actual conflict with the jurisdiction of the District Court and would stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress under 49 U.S.C. §24311 and Fed. R. Civ. P. 71.1.

Furthermore, as noted above, continuation of Commission jurisdiction over any charges related to the Conestoga Substation also is preempted. The language in Section 24311(b) clearly places those issues within the jurisdiction of the District Court. Under the standard set forth by the Supreme Court in *Freightliner*, the Commission is preempted from further consideration of this proceeding, and it should be dismissed. *Freightliner*, 514 U.S. 280 (1995). Even the review of PPL's proposed rate increase for Rate LPEP for the period prior to Amtrak's ownership would be the equivalent of addressing the "disposition of any outstanding charges related to" the property and equipment that PPL formerly owned at the Conestoga Substation. This continuation would contradict the clear language and Congressional intent behind Section 24311(b).

As previously explained, the precedent in *Sid-Mars Restaurant* also establish that the federal courts should be given primacy when the state court cannot make a full determination of the basic issue of title and when confusion may be caused by inconsistent judgments. Congress determined that the federal courts should have exclusive jurisdiction to determine issues regarding possession and any ongoing charges once Amtrak's eminent domain action is filed and the deposit made with the District Court. Further action by the Commission is expressly preempted.

**IV. REQUEST FOR SUSPENSION OF PROCEDURAL SCHEDULE**

Pursuant to 52 Pa. Code § 5.103(d)(1)(i), Amtrak also requests that the Presiding Officer immediately suspend the current procedural schedule until such time as the Presiding Officer rules on this Motion and the parties pursue any desired appeals of the decision. Suspension of the procedural schedule is appropriate because it will avoid the prospect of judicial waste by proceeding with haste to resolve issues in this proceeding that will be rendered moot by this Motion and will avoid rulings that may conflict with the jurisdiction of the District Court.

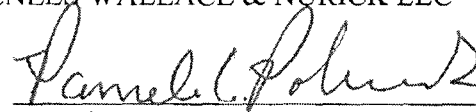
**V. CONCLUSION**

Based on the foregoing, Amtrak respectfully requests that the Commission dismiss the above-captioned proceeding for lack of subject matter jurisdiction. While the Presiding Officer decides this Motion, Amtrak requests that the filing of any further testimony be immediately suspended pursuant to 52 Pa. Code §5.103(d)(1)(i).

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By



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Counsel to National Railroad Passenger  
Corporation

Dated: May 11, 2017

**AFFIDAVIT**

COMMONWEALTH OF PENNSYLVANIA :  
 : ss:  
COUNTY OF DAUPHIN :

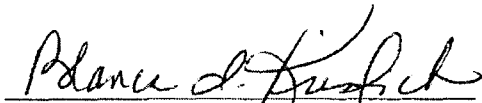
Pamela C. Polacek, being duly sworn according to law, deposes and says that she is Counsel to National Railroad Passenger Corporation, that in this capacity she is authorized to and does make this affidavit for them, and that the facts set forth in the foregoing Motion to Dismiss filed by National Railroad Passenger Corporation are true and correct to the best of her knowledge, information, and belief.



Pamela C. Polacek

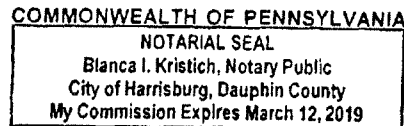
Sworn to and Subscribed before me

this 11<sup>th</sup> day of May, 2017.



Notary Public

(SEAL)



# EXHIBIT B



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	R-2016-2569975
	:	
PPL Electric Utilities Corporation	:	
	:	
National Railroad Passenger Corporation	:	
	:	C-2016-2580526
v.	:	
	:	
PPL Electric Utilities Corporation	:	

**ORDER DENYING MOTION TO DISMISS  
OF NATIONAL RAILROAD PASSENGER CORPORATION**

On October 5, 2016, PPL Electric Utilities Corporation (PPL) filed Supplement No. 213 to Tariff Electric Pa. P.U.C. No. 201 (Supplement 213), to become effective January 1, 2017. Supplement 213 proposes an annual increase of approximately \$2.320 million in the distribution revenues received from rate schedule Power Service to Electric Propulsion (LPEP). PPL states that the National Passenger Railroad Corporation, (Amtrak) is its sole customer under rate schedule LPEP.

On December 19, 2016, Amtrak filed a complaint with new matter that the Commission docketed at Docket No. C-2016-2580526. The complaint alleges that if the Commission grants PPL's requested increase in distribution revenues, it would increase the LPEP monthly customer charge to \$319,671.00 in order to recover costs associated with upgrades to the Conestoga Substation. This is an increase from the current \$126,323.59 LPEP monthly customer charge placed in effect January 1, 2016, pursuant to the settlement in the case at R-2015-2469275.

The complaint further asserts that Amtrak will own or have supplied more than 70% of the transformer capacity for the Conestoga Substation. According to the complaint, Amtrak already owns 3 of the 7 transformers at the Conestoga Substation. Amtrak plans to deliver 2 or more transformers to replace the older transformers owned by PPL. Therefore, the proposed rate increase is unjust and unreasonable.

The new matter asserts that, pursuant to the settlement in the case at R-2015-2469275, on September 1, 2017, the LPEP monthly customer charge reverted to the rate of \$37,100.00 per month in effect prior to January 1, 2016. Amtrak also states in new matter that it should receive a refund of the payments for the period from January 1, 2016 to August 31, 2016.

On December 22, 2016, the Commission suspended PPL's filings, pursuant to 66 Pa. C.S. §1308(b), from January 1, 2017 until June 1, 2017. Subsequently, the Commission issued an errata notice indicating that PPL's filings were suspended until July 1, 2017.

On December 22, 2016 PPL filed an answer and new matter to Amtrak's complaint with new matter. The answer admits that PPL's filing proposes to increase the LPEP monthly customer charge from the current \$126,323.59 to \$319,671.00.

The answer denies that Amtrak will own or has supplied more than 70% of the transformer capacity for the Conestoga Substation. The answer asserts that PPL owns four of the transformers as well as the control building, control equipment and circuit breakers at the Conestoga Substation. In addition, PPL owns all of the land for the Conestoga Substation.

The answer contends that Amtrak's new matter in its complaint is procedurally improper. The answer denies that on September 1, 2016, the LPEP monthly customer charge reverted to the rate of \$37,100.00 per month in effect prior to January 1, 2016. Rather, the answer contends the rate of \$126,323.59 per month was effective January 1, 2016 and remains in effect unless and until the Commission approves a new rate. The answer denies that Amtrak is entitled to receive a refund for payments for the period from January 1, 2016 to August 31, 2016.

The new matter states that Amtrak has agreed that upgrades to the Conestoga Substation are required to provide continuous reliable and safe service to Amtrak. Amtrak has also agreed that, as the only customer served by the Conestoga Substation, it is responsible for the reasonable and prudent costs to upgrade the Conestoga Substation.

The new matter contends that the \$126,323.59 per month customer charge was set forth in the settlement in the case at R-2015-2469275, that the PPL Industrial Customer Alliance (PPLICA) joined the settlement on behalf of Amtrak, that the Commission approved the \$126,323.59 customer charge and that the charge is set forth in PPL's currently effective tariff. The new matter argues that Amtrak's request for a refund is barred as a matter of law.

The new matter alleges that the upgrades to the Conestoga Substation were due to be completed and in service by December 31, 2016. However, Amtrak and PPL agreed that PPL would temporarily discontinue work on the Conestoga Substation.

The new matter states that nothing in the settlement in the case at R-2015-2469275 provides that the LPEP customer charge would revert back to \$37,100.00 if Amtrak and PPL were unable to resolve the issues surrounding the upgrade of the Conestoga Substation. The new matter contends that Amtrak's request for a refund is a violation of the settlement in the case at R-2015-2469275. The answer with new matter requests that the Commission deny Amtrak's complaint.

Also on December 22, 2016, PPL filed preliminary objections to Amtrak's complaint. The preliminary objections reiterate the assertions in PPL's answer with new matter.

The preliminary objections request that Amtrak's request for refunds be denied for failure to state a claim upon which relief may be granted because the request is barred as a matter of law, barred by the settlement in the case at R-2015-2469275 and barred by the express terms of the agreement between PPL and Amtrak.

The preliminary objections also contend that the new matter in Amtrak's complaint does not comply with the Commission's regulations. Nothing in the Commission's regulations authorize new matter to be included in a complaint. The preliminary objections request that the Commission dismiss Amtrak's request for a refund of the LPEP charges and/or strike the new matter.

On December 27, 2016, the Commission's Bureau of Investigation and Enforcement (I&E) filed a notice of appearance.

By notice dated December 28, 2016, the Commission scheduled a prehearing conference for this matter on January 6, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg and assigned the matter to me. I issued a prehearing order, dated December 29, 2016, addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On January 3, 2017, Amtrak filed an answer to PPL's preliminary objections. The answer reiterates the assertions in Amtrak's complaint with new matter. The answer denies that Amtrak's request for a refund is barred as a matter of law, barred by the settlement in the case at R-2015-2469275, barred by the express terms of the agreement between PPL and Amtrak or because the complaint fails to conform with the Commission's regulations. The answer requests that PPL's preliminary objections be denied.

Also on January 3, 2017 Amtrak filed a petition requesting that the Commission suspend PPL's filing indefinitely. In support of its petition Amtrak alleges that it plans to purchase the Conestoga Substation. If it cannot purchase the Conestoga Substation, Amtrak alleges it will take the Conestoga Substation through its eminent domain authority.

Once Amtrak acquires the Conestoga Substation, the petition asserts that PPL will not own any distribution service property serving Amtrak or provide distribution service to Amtrak. If PPL does not own any distribution service property serving Amtrak or provide distribution service to Amtrak, there is no basis to charge Amtrak for distribution services under

the LPEP customer charge. Once it acquires the Conestoga Substation, Amtrak will no longer be a customer of PPL and PPL's filing will be moot.

The petition requests that the Commission suspend PPL's filing indefinitely. Alternatively, the petition requests that the Commission suspend PPL's proceedings for the full nine months authorized by 66 Pa.C.S. § 1308(b), until October 1, 2017.

On January 5, 2017, PPL filed an answer to Amtrak's petition. The answer opposes suspending PPL's filing indefinitely. However, the answer agrees that the Commission should suspend PPL's filing for nine months. The answer requests that the Commission deny the request to suspend PPL's filing indefinitely but grant the request to suspend the filing for nine months.

I conducted a prehearing conference in this case on January 6, 2017. Present were counsel for PPL, Amtrak and I&E. As a result of the prehearing conference, I issued Prehearing Order #2, dated January 6, 2017, which established a litigation and briefing schedule based on the Commission's December 22, 2016 order and subsequent errata notice suspending PPL's filings until July 1, 2017.

In anticipation that the Commission would address Amtrak's petition at its January 19, 2017 public meeting, the parties requested a further prehearing conference. N.T. 6-7. By notice dated January 9, 2017, the Commission scheduled a further prehearing conference for this matter on January 20, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

On January 11, 2017, Amtrak filed an answer to PPL's new matter. The answer generally denies the assertions in PPL's new matter.

On January 17, 2017, Amtrak filed objections to PPL's interrogatories. Generally, the objections contend that PPL's interrogatories request information that is

irrelevant, beyond the scope of this proceeding and concern matters over which the Commission has no jurisdiction.

By order dated January 18, 2017, I sustained PPL's preliminary objections, in part. I struck the new matter portion of Amtrak's complaint without prejudice because the new matter was a complaint against PPL's existing LPEP rate, not its proposed LPEP rate.

By opinion and order dated January 19, 2017, the Commission modified its December 22, 2016 order and suspended PPL's filings until October 1, 2017. I conducted a further prehearing conference on January 20, 2017 in order to revise the litigation and briefing schedule in light of the Commission's January 19, 2017 opinion and order. As a result of the further prehearing conference, I issued Prehearing Order #3, dated January 23, 2017, which modified the litigation and briefing schedule.

On January 20, 2017, PPL filed a motion to compel responses to discovery propounded on Amtrak, pursuant to 52 Pa.Code §§ 5.342(g) and 5.350(e). According to the motion to compel, the Respondent served interrogatories and requests for documents on the Complainant on January 11, 2017. The motion to compel asserts that on January 17, 2017 Amtrak filed objections to interrogatories.

On January 24, 2017, Amtrak filed an answer to PPL's motion to compel. The answer contends that PPL's interrogatories request information that is irrelevant, beyond the scope of this proceeding and concern matters over which the Commission has no jurisdiction.

By order dated January 27, 2017, I granted PPL's motion to compel, in part.

By notice dated January 27, 2017, the Commission scheduled a hearing in this matter on April 18, 20 and 21, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

On February 2, 2017 Amtrak provided responses to PPL's discovery requests.

On February 7, 2017, PPL filed a second motion to compel responses to discovery propounded on Amtrak, pursuant to 52 Pa.Code §§ 5.342(a)(4) and Prehearing Order #2, dated January 6, 2017. According to the second motion to compel, Amtrak provided responses to interrogatories and document requests PPL to Amtrak Set I, Nos. 19, 21, 22, and 23 that did not fully and completely answer the interrogatories and document requests.

On February 10, 2017, Amtrak filed an answer to PPL's second motion to compel. The answer contends that Amtrak's responses are complete based on the status of the decisions made by Amtrak concerning purchase of the Conestoga Substation.

By order dated February 17, 2017, I denied PPL's second motion to compel.

On March 15, 2017, Safe Harbor Water Power Corporation (Safe Harbor) and BIF II Safe Harbor Holdings LLC (BIF II) (collectively Petitioners) filed a petition to intervene in this proceeding. The Petitioners' petition alleges that Safe Harbor is a hydroelectric electric generator with generator facilities located on the Susquehanna River. BIF II is Safe Harbor's corporate parent and purchases all of the electric output from Safe Harbor's generation facilities.

BIF II delivers electric power to the Conestoga Substation. BIF II has a contract with an electricity supplier to supply power to Amtrak. The power supplied by BIF II through the electric supplier is delivered through Safe Harbor's interconnection with the Conestoga Substation.

On March 23, 2017, PPL filed a letter advising that it had no objection to the petition to intervene filed by Safe Harbor and BIF II.

On April 3, 2017, Amtrak filed an answer to the petition to intervene filed by Safe Harbor and BIF II. The answer denied that Safe Harbor and BIF II have a substantial or material interest in this proceeding. By order dated April 5, 2017, I granted the Petitioners' petition to intervene.

On March 23, 2017, PPL filed a motion requesting that I extend the litigation schedule established in Prehearing Order #3. The motion alleged that the parties had continued to discuss and analyze their respective positions. The motion further stated that the parties believe that additional time would be helpful to evaluate the various positions of the parties and engage in further settlement discussions. The motion stated that PPL would file a new tariff supplement suspending its filing until January 1, 2018. The motion contended that this extension will provide additional time to discuss settlement. I granted the motion and issued Prehearing Order #4, dated March 24, 2017, which modified the litigation and briefing schedule.

By notice dated March 27, 2017, the Commission scheduled a hearing in this matter on June 19-21, 2017 at 10:00 a.m. in Hearing Room 2, Commonwealth Keystone Building in Harrisburg.

On March 28, 2017, PPL filed Tariff Supplement No. 226. Supplement No. 226 further suspended the Rate Schedule LPEP rate increase proposed in Supplement No. 213 until January 1, 2018.

On May 11, 2017, Amtrak filed a motion, pursuant to 52 Pa.Code § 5.103, to dismiss PPL's filing. In support of its motion, Amtrak alleges that on April 17, 2017, it initiated an eminent domain proceeding in the United States Court for the Eastern District of Pennsylvania (District Court) to acquire the certain facilities and equipment at the Conestoga Substation.

Amtrak argues that once it completed its eminent domain filing with the District Court, title to the facilities and equipment at the Conestoga Substation vested in Amtrak in fee simple absolute. Therefore as of April 18, 2017, PPL no longer owned the facilities and equipment at the Conestoga Substation. Amtrak contends that the District Court, not the Commission, possesses jurisdiction over the facilities and equipment at the Conestoga Substation.



Amtrak asserts that because PPL's rate increase request is solely for upgrades to the Conestoga Substation and PPL no longer owns the Conestoga Substation, there is no further basis for Commission jurisdiction and the Commission should dismiss PPL's filing. Amtrak further states that because granting its motion will terminate the proceeding, I should suspend the procedural schedule set forth in Prehearing Order #4, dated March 24, 2017.

On May 23, 2017, Amtrak filed a letter indicating that it would not be serving rebuttal testimony. The letter indicates that Amtrak's participation in this proceeding is limited to pursuing its motion to dismiss and preserving its federal claims in its eminent domain proceeding. Amtrak's letter indicates that any testimony it would present at this time would be highly speculative since, unless the District Court transfers title to the Conestoga Substation back to PPL, Amtrak will be upgrading the Conestoga Substation, not PPL.

Attached to Amtrak's letter is a stipulation and order of the District Court, dated May 23, 2017, prohibiting PPL from making any capital improvements, upgrades or alterations to the physical condition of the Conestoga Substation. The order states that PPL will continue to perform normal operational and maintenance functions at the Conestoga Substation.

On May 31, 2017, PPL filed an answer to Amtrak's motion to dismiss. PPL argues that the Commission has jurisdiction over this proceeding since the Commission has jurisdiction over public utility rates and services.

PPL argues that, until the Federal Court approves Amtrak's condemnation and determines the terms under which possession of the Conestoga Substation will be given to Amtrak, PPL will continue to be in possession of and operate that Conestoga Substation.

PPL points out that Amtrak's motion to dismiss assumes that its request to condemn the Conestoga Substation will be granted by the Federal Court. PPL opposes the condemnation.

PPL asserts that Amtrak's condemnation filing carves out a continuing floating easement for PPL. As a result, even if the Federal Court approves Amtrak's condemnation filing, PPL will continue to have a property interest in the Conestoga Substation, will operate the Conestoga Substation and will provide public utility service, subject to the jurisdiction of the Commission.

PPL argues that there is a question of whether Amtrak may be a public utility subject to the regulatory jurisdiction of the Commission if its condemnation of the Conestoga Substation is approved by the Federal Court.

Finally, PPL contends that Amtrak's request for an indefinite suspension is beyond the authority granted to the Commission by 66 Pa. C.S. § 1308(b) and is based on events that may or may not occur in the future. The answer requests that the Commission deny Amtrak's motion.

The Amtrak's motion to dismiss is ready for decision. For the reasons set forth below, I will deny the motion to dismiss.

As I understand Amtrak's argument, Amtrak's exercise of its eminent domain authority and the District Court's exclusive jurisdiction over the eminent domain proceeding preempt the Commission from acting on PPL's filing in this proceeding. I will therefore start with a brief explanation of preemption. The Pennsylvania Supreme Court has explained preemption as follows:

The principle of preemption is grounded in the Supremacy Clause of the United States Constitution, which, when applicable, subordinates the laws of the states to those of the federal government. Kuznik v. Westmoreland County Bd. Of Comm'rs, 588 Pa. 95, 902 A.2d 476, 493 (Pa. 2006) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)). Since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), it is axiomatic that "state law that conflicts with federal law is 'without effect.'" *Id.*

Council 13 v. Commonwealth, 2009 Pa. LEXIS 2771 (Pa. Dec. 28, 2009). The United States Supreme Court has set forth how the Supremacy Clause, U.S. Const., Art. VI, cl. 2, has been determined to have invalidated a state law:

Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Pre-emption of a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject." Ibid.; see Hines v. Davidowitz, 312 U.S. 52 (1941).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, supra, at 67. See generally Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-699 (1984).

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

The United States Supreme Court has also held repeatedly that "state laws can be pre-empted by Federal regulations as well as by federal statutes." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

Here, Amtrak argues that continuing Commission jurisdiction over PPL's rate request in this proceeding, pursuant to 66 Pa. C.S. § 1308(b), is in conflict with Amtrak's taking of the Conestoga Substation, pursuant to 49 U.S.C. §24311, because the Public Utility Code at

66 Pa. C.S. § 1308(b) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in 49 U.S.C. § 24311.

The provision at 49 U.S.C. § 24311 states in part:

**(a)General Authority.—**

(1) To the extent financial resources are available, Amtrak may acquire by eminent domain under subsection (b) of this section interests in property—

(A) necessary for intercity rail passenger transportation, except property of a rail carrier, a State, a political subdivision of a State, or a governmental authority; or

(B) requested by the Secretary of Transportation in carrying out the Secretary's duty to design and build an intermodal transportation terminal at Union Station in the District of Columbia if the Secretary assures Amtrak that the Secretary will reimburse Amtrak.

(2) Amtrak may exercise the power of eminent domain only if it cannot—

(A) acquire the interest in the property by contract; or

(B) agree with the owner on the purchase price for the interest.

**(b)Civil Actions.—**

(1) A civil action to acquire an interest in property by eminent domain under subsection (a) of this section must be brought in the district court of the United States for the judicial district in which the property is located or, if a single piece of property is located in more than one judicial district, in any judicial district in which any piece of the property is located. An interest is condemned and taken by Amtrak for its use when a declaration of taking is filed under this subsection and an amount of money estimated in the declaration to be just compensation for the interest is deposited in the court. The declaration may be filed with the complaint in the action or at any time before judgment. The declaration must contain or be accompanied by—

(A)a statement of the public use for which the interest is taken;

(B)a description of the property sufficient to identify it;

(C)a statement of the interest in the property taken;

(D)a plan showing the interest taken; and

(E)a statement of the amount of money Amtrak estimates is just compensation for the interest.

(2) 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—

(A)the time by which, and the terms under which, possession of the property is given to Amtrak; and

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

(3) After a hearing, the court shall make a finding on the amount that is just compensation for the interest in the property and enter judgment awarding that amount and interest on it. The rate of interest is 6 percent a year and is computed on the amount of the award less the amount deposited in the court from the date of taking to the date of payment.

(4) On application of a party, the court may order immediate payment of any part of the amount deposited in the court for the compensation to be awarded. If the award is more than the amount received, the court shall enter judgment against Amtrak for the deficiency.

\*\*\*\*\*

PPL's filed its request pursuant to 66 Pa. C.S. § 1308(b). The provision at 66 Pa.C.S. § 1308(b) states as follows:

**(b) Hearing and suspension of rate change.**--Whenever there is filed with the commission by any public utility any tariff stating a new rate, the commission may, either upon complaint or upon its own motion, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and the decision thereon, the commission, upon filing with such tariff and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before it becomes effective, suspend the operation of such rate for a period not longer than six months from the time such rate would otherwise become effective, and an additional period of not more than three months pending such decision. The rate in force when the tariff stating the new rate was filed shall continue in force during the period of suspension, unless the commission shall establish a temporary rate as authorized in section 1310 (relating to temporary rates). The commission shall consider the effect of such suspension in finally determining and prescribing the rates to be thereafter charged and collected by such public utility. This subsection shall not apply to any tariff stating a new rate which constitutes a general rate increase as defined in subsection (d).

It is clear from the federal statute that the District Court has exclusive jurisdiction over Amtrak's eminent domain action and has exclusive authority to determine ownership of the Conestoga Substation, pursuant to 49 U.S.C. § 24311. What is unclear is how the Commission's jurisdiction over PPL's rate request pursuant to 66 Pa. C.S. § 1308(b) stands as an obstacle to the objectives of 49 U.S.C. § 24311. The statute addresses only Commission approval of a new rate filed by a public utility.

Furthermore, 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. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Opinion and Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Opinion and Order entered September 15, 1999). In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission does not have jurisdiction to determine the scope and validity of an easement. Since the Commission lacks jurisdiction over real property disputes, the Public Utility Code does not stand as an obstacle to the objectives of 49 U.S.C. § 24311.

However, Amtrak points out that the District Court's jurisdiction over Amtrak's eminent domain action at 49 U.S.C. § 24311(b)(2)(B) extends to disposition of outstanding charges related to the property. Amtrak contends that the Commission's consideration of PPL's proposed rate is the equivalent of addressing disposition of outstanding charges because PPL's proposed rate is based on the costs of owning and operating the Conestoga Substation. Therefore the Commission's consideration of PPL's proposed rate stands as an obstacle to the objectives of 49 U.S.C. § 24311.

Amtrak cites no cases which support its position interpreting the phrase "outstanding charges related to the property" used in 49 U.S.C. § 24311(b)(2)(B) to include proposed electric distribution rates. My research has failed to uncover any cases that interpret the phrase "outstanding charges related to the property" used in 49 U.S.C. § 24311(b)(2)(B). However, 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. I disagree with Amtrak's broad interpretation of this phrase.

First, PPL's proposed rate is not an outstanding charge related to the property where the Conestoga Substation is situated, such as a lien or mortgage. It is PPL's charge to Amtrak for providing electric distribution service. PPL's charge is based on the costs it incurs providing electric distribution service to Amtrak, including the costs of owning and maintaining

the Conestoga Substation. This is not a charge that is attached to the Conestoga Substation but rather is a charge for service to Amtrak.

Second, not all of the costs of PPL incurs in providing electric distribution service to Amtrak are related to the property where the Conestoga Substation is situated. Some of the costs PPL incurs relate to the wages paid to its employees who operate and maintain the Conestoga Substation. These costs are not attached to the Conestoga Substation but rather costs incurred in providing service to Amtrak.

Finally, PPL's proposed rate is not an outstanding charge attached to the property at the time Amtrak initiated its eminent domain proceeding. Rather, it is an ongoing charge not attached to the property. The District Court's order, dated May 23, 2017, directed PPL to continue to perform normal operational and maintenance functions at the Conestoga Substation. As both PPL and Amtrak agree, the proceeding in District Court could continue for a considerable period of time.

PPL will continue to be responsible for operating and maintaining the Conestoga Substation, pursuant to the District Court's order, pending the outcome of District Court proceeding. Therefore PPL will continue to incur costs in providing distribution service to Amtrak during the pendency of the District Court action. These costs are a component of the rate PPL seeks to charge Amtrak.

For the above reasons, I conclude that the continuing Commission jurisdiction over PPL's rate request in this proceeding, pursuant to 66 Pa. C.S. § 1308(b), is not in conflict with Amtrak's taking of the Conestoga Substation, pursuant to 49 U.S.C. § 24311, because the Public Utility Code at 66 Pa. C.S. § 1308(b) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in 49 U.S.C. § 24311. Therefore, Amtrak's eminent domain action pursuant to 49 U.S.C. § 24311 does not preempt the Commission's authority, pursuant to 66 Pa.C.S. § 1308(b) to review and establish PPL's electric distribution rate.

I will therefore deny Amtrak's motion to dismiss PPL's filing and deny its request to suspend the procedural schedule set forth in Prehearing Order #4, dated March 24, 2017.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion to dismiss filed by National Railroad Passenger Corporation at Docket Nos. R-2016-2569975 and C-2016-2580526 is denied.

Dated: June 7, 2017

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David A. Salapa  
Administrative Law Judge



**R-2016-2569975 - PPL ELECTRIC FILED SUPP NO 213 TO PA PUC NO 201; EFF: 1/1/17, PROPOSING AN INCREASE TO RATE SCHEDULE LPEP.**

(Updated 4/6/17)

CHRISTOPHER T WRIGHT ESQUIRE  
DAVID B MACGREGOR ESQUIRE  
17 NORTH SECOND STREET 12<sup>TH</sup> FL  
HARRISBURG PA 17101  
**717.731.1970**

**Accepts e-Service**

*(For PPL Electric Utilities Corporation)*

GINA L MILLER ESQUIRE  
PA PUBLIC UTILITY COMMISSION  
BUREAU OF INVESTIGATION & ENFORCEMENT  
PO BOX 3265  
HARRISBURG PA 17105-3265

**Accepts e-Service**

PAMELA C POLACEK ESQUIRE  
ADEOLU A BAKARE ESQUIRE  
ALESSANDRA L HYLANDER ESQUIRE  
MCNEES WALLACE & NURICK LLC  
100 PINE STREET  
HARRISBURG PA 17108-1166

**717.237.5368**

**Accepts e-Service**

**C-2016-2580526**

*(For National Railroad Passenger Corporation)*

BRIAN C WAUHOP ESQUIRE  
BUCHANAN INGERSOLL & ROONEY PC  
409 N SECOND STREET SUITE 500  
HARRISBURG PA 17101  
**717.237.4975**

**Accepts e-Service**

*(For Safe Harbor Power Corporation and  
BIF Safe Harbor Holdings LLC)*

# EXHIBIT C



JUN 14 2017

100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166  
Tel: 717.232.8000 • Fax: 717.237.5300

Kandice K. Hull  
Direct Dial: 717.237.5452  
Direct Fax: 717.260.1698  
khull@mcneeslaw.com

June 9, 2017

Patrick J. Loftus, Esquire  
DUANE MORRIS, LLP  
30 South 17th Street  
Philadelphia, PA 19103-4196

VIA E-MAIL & FIRST CLASS MAIL

RE: Dispute of Invoice dated May 3, 2017; Account No. 58011-02004

Dear Mr. Loftus:

The National Railroad Passenger Corporation ("AMTRAK"), hereby submits notice that it disputes the above-referenced invoice which PPL submitted to AMTRAK for payment. A copy of the invoice is enclosed for your reference. On June 5, 2017, AMTRAK submitted a payment of \$74,663.84, which represents charges on the invoice for service through April 18, 2017. AMTRAK is not responsible for the remainder of the charges on the invoice.

On April 18, 2017, by operation of law, fee title to the Conestoga Substation transferred to AMTRAK, subject only to the floating easements that AMTRAK preserved for PPL to ensure PPL's continued ability to perform PPL's obligations pursuant to a specified Transmission Contract and a specified Interconnection Service Agreement. *National Railroad Passenger Corporation (AMTRAK) v. 4.0446 Acres More or Less of Land and Fixtures and PPL Electric Utilities Corp.*, Docket No. 17-CV-1752, Civil Action-Law (E.D. Pa. 2017). Pursuant to 49 U.S.C. § 244311(b)(2)(B), the District Court now has jurisdiction over any outstanding charges related to the Conestoga Substation. Any claim against Amtrak by PPL relating to the Conestoga Substation for monies owed after April 18, 2017 will be determined by the District Court.

Please contact me at 717-237-5452 should you have any questions.

Sincerely,

McNEES WALLACE & NURICK LLC

By 

Kandice K. Hull

KKH:ajf  
Enclosure

[www.McNeesLaw.com](http://www.McNeesLaw.com)

Harrisburg, PA • Lancaster, PA • Scranton, PA • State College, PA • Columbus, OH • Frederick, MD • Washington, DC

700004304 170508 6 019



PPL Electric Utilities



Pay/Manage your account online at [ppl electric.com](http://ppl electric.com)



Questions? Please contact us by Jun 5. 1-800-DIAL-PPL (1-800-342-5775) Mon-Sun: 7am to 10pm

Bill Acct. No.	Due Date	Amount Due
58011-02004	Jun 5, 2017	\$238,903.32

**Your Electric Usage Profile**

Service to:  
AMTRAK  
CONESTOGA SUB STATION  
LANCASTER, PA 17604

Your next meter reading is on or about May 31, 2017.

**Billing Summary**

(Billing details on back)

Balance as of May 3, 2017	\$119,441.49
Charges:	
Total Other Charges	\$119,461.83
<b>Total Current Charges</b>	<b>\$238,903.32</b>
<b>Amount Due By Jun 5, 2017</b>	<b>\$238,903.32</b>
Account Balance	\$238,903.32

**How To Shop For Electricity**

You can choose the company that supplies your electricity. Visit [papowerswitch.com](http://papowerswitch.com) or [www.oca.state.pa.us](http://www.oca.state.pa.us) for supplier offers. If you are shopping, know your contract expiration date.

Here's the information you need to shop:

Bill Account Number: 58011-02004 Rate Schedule:  
Current Supplier: PPL Electric Utilities

**Manage Your Account**

Pay Your Bill	Online Options (ppl electric.com)
Online: Visit <a href="http://ppl electric.com">ppl electric.com</a>	- Report an outage/check outage status
Phone: Call 1-800-342-5775	- Make a payment, view your bill and usage history.
Mall: Use envelope provided	- Sign up for alerts.
Card: MasterCard, Discover, Visa or debit, call 1-844-278-3310 (service fee applies)	- Enroll in paperless billing, automatic bill pay, budget billing.
	- View your rate schedule at: <a href="http://ppl electric.com/rates">ppl electric.com/rates</a>
<b>Correspondence:</b> Customer Services, 827 Hausman Road, Allentown, PA 18104-9392	

Other important information on the back of this bill →

Return this stub in the envelope provided with a check payable to PPL Electric Utilities.



PPL Electric Utilities

Bill Acct. No.	Due Date	Amount Due
58011-02004	Jun 5, 2017	\$238,903.32

Amount Enclosed:

--	--	--	--	--	--	--	--	--	--

AMTRAK  
C/O ADVANTAGE IQ MS 1586  
PO BOX 2440  
SPOKANE, WA 99210

PPL ELECTRIC UTILITIES  
P.O. BOX 25222  
LEHIGH VALLEY, PA 18002-5222

700004304 170508 6 019

**Your Message Center**

- Before digging around your home or property, you should always call the state's One Call notification system to locate any underground utility lines. You can do this by simply dialing 811, which will connect you to the One Call system. Be safe and call 811 before you dig.
- Save postage and late charges - sign up for Automated Bill Payment.

**Billing Details - (Bill Acct. 58011-02004)**

Page 2

Previous Balance	\$238,882.98
Payment Received Apr 12, 2017 - Thank You!	-\$119,441.49
<b>Balance as of May 3, 2017</b>	<b>\$119,441.49</b>
<b>Other Charges for PPL Electric Utilities</b>	
Miscellaneous Adjustment	119,461.83
<b>Total of Other Charges</b>	<b>\$119,461.83</b>
<b>Amount Due By Jun 5, 2017</b>	<b>\$238,903.32</b>
<b>Account Balance</b>	<b>\$238,903.32</b>

Reading Dates		Meter	Meter	Meter Reading		Kilowatt
Previous/	Present	Number	Constant	Previous/	Present	Hours
Mar 30	May 1	81071413	1000	97255	01852	4597000
Mar 30	May 1	80023701	1000	72474	72475	1000
Mar 30	May 1	81071414	1000	05260	05260	0
Mar 30	May 1	81071415	1000	72499	77066	4567000
Days Billed: 0					Total	9165000

**General Information**

Generation prices and charges are set by the electric generation supplier you have chosen. The Public Utility Commission regulates distribution rates and services. The Federal Energy Regulatory Commission regulates transmission prices and services.

PPL Electric Utilities uses about \$1,505.97 of this bill to pay state taxes and about \$7,051.80 is used to pay the PA Gross Receipts Tax.

**Understanding Your Bill**

**Act 129 Compliance Rider** - Monthly charge to recover costs for energy efficiency and conservation programs approved by the PUC.

**kWh (Kilowatt-hour)** - A measure of how much electricity your household uses. One kilowatt-hour equals the amount of electricity used by ten 100-watt lights left on for one hour.

**Type(s) of Meter Readings:**

**Actual** - Measures your monthly electricity use based on an actual reading.

\*Federal I.D. 23-0959590

700004304 170508 6 019

5801102004 AMTRAK

Your Bill Account Number

5801102004

**Billing Details**

Charges for - PPL Electric Utilities 34160 Kw 9,144,000 Kwh

General Service Rate:LPEP for Mar 30 - May 1

Distribution Charge:

Customer Charge:	126,323.59
CER Charge:	-0.01
Smart Meter Rider	67.15
Act 129 Compliance Rider	-6,906.89
Storm Damage Expense Rider	-5.28
PA Tax Adj Surcharge at -0.01400000%	-16.73

<b>Total PPL Electric Utilities Charges</b>	<b>\$119,461.83</b>
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Account Balance \$ 119,441.49

<b>TOTAL AMOUNT DUE</b>	<b>\$238,903.32</b>
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700004304 170508 6 019

AMTRAK METER READINGS

KWH Use By Meter

<u>Reading Dates</u>		<u>Meter</u>	<u>Mtr.</u>	<u>Meter Reading</u>		<u>Kilowatt</u>
<u>Previous</u>	<u>Present</u>	<u>Number</u>	<u>Const.</u>	<u>Previous</u>	<u>Present</u>	<u>Hours</u>
3/30/2017	5/1/2017	81071415	1000	72499	77066	4567000
3/30/2017	5/1/2017	81071415-R	-1000	23165	23186	-21000
3/30/2017	5/1/2017	81071414	1000	5260	5260	0
3/30/2017	5/1/2017	81071414-R	-1000	8495	8495	0
3/30/2017	5/1/2017	80023701	1000	72474	72475	1000
3/30/2017	5/1/2017	80023701-R	-1000	1489	1489	0
3/30/2017	5/1/2017	81071413	1000	97255	101852	4597000
3/30/2017	5/1/2017	81071413-R	-1000	27331	27331	0

**Total 9,144,000**

DEMAND  
34160

70004304 170508 6 019

5801102004 AMTRAK

Your Bill Account Number  
5801102004

**Billing Details**

Charges for - PPL Electric Utilities 34160 Kw 9,144,000 Kwh

General Service Rate:LPEP for Mar 30 - May 1

Distribution Charge:

Customer Charge:	126,323.59
CER Charge:	-0.01
Smart Meter Rider	67.15
Act 129 Compliance Rider	-6,906.89
Storm Damage Expense Rider	-5.28
PA Tax Adj Surcharge at -0.01400000%	-16.73

<b>Total PPL Electric Utilities Charges</b>	<b>\$119,461.83</b>
---	---------------------

Account Balance \$ 119,441.49

<b>TOTAL AMOUNT DUE</b>	<b>\$238,903.32</b>
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700004304 170508 9 019

**AMTRAK METER READINGS**

**KWH Use By Meter**

<u>Reading Dates</u>		<u>Meter</u>	<u>Mtr.</u>	<u>Meter Reading</u>		<u>Kilowatt</u>
<u>Previous</u>	<u>Present</u>	<u>Number</u>	<u>Const.</u>	<u>Previous</u>	<u>Present</u>	<u>Hours</u>
3/30/2017	5/1/2017	81071415	1000	72499	77066	4567000
3/30/2017	5/1/2017	81071415-R	-1000	23165	23186	-21000
3/30/2017	5/1/2017	81071414	1000	5260	5260	0
3/30/2017	5/1/2017	81071414-R	-1000	8495	8495	0
3/30/2017	5/1/2017	80023701	1000	72474	72475	1000
3/30/2017	5/1/2017	80023701-R	-1000	1489	1489	0
3/30/2017	5/1/2017	81071413	1000	97255	101852	4597000
3/30/2017	5/1/2017	81071413-R	-1000	27331	27331	0

**Total 9,144,000**

**DEMAND**

34160

# EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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NATIONAL RAILROAD PASSENGER SERVICE :  
CORPORATION (AMTRAK) :

Plaintiff, :

v. :

4.0446 ACRES MORE OR LESS OF :  
LAND AND FIXTURES :

CIVIL ACTION – LAW :  
NO. 17-CV-1752 :

and :

PPL ELECTRIC UTILITIES CORP. :

Defendants. :

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**DECLARATION OF JOHN H. SCHWARTZ**

Comes now John H. Schwartz, pursuant to 28 U.S.C. 1746, and declares as follows:

1. I am employed by PPL Electric Utilities Corp. (“PPL”). I have been employed by PPL or its affiliates since 2001. I currently hold the position of Manager – Asset Management.
2. My office is located at 2 N. 9<sup>th</sup> St. Allentown, PA.
3. PPL is a public utility and electric distribution company headquartered in Allentown, Pennsylvania.
4. The net book value of the Conestoga Substation is \$1,109,994 as of June 30, 2017.
5. The original book value of the Conestoga Substation is \$2,951,536 as of June 30, 2017.

6. PPL has invested \$10,201,044 dollars towards capital improvements needed at the Conestoga Substation through June 30, 2017.

  
John H. Schwartz

# EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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NATIONAL RAILROAD PASSENGER SERVICE :  
CORPORATION (AMTRAK) :

Plaintiff, :

v. :

4.0446 ACRES MORE OR LESS OF :  
LAND AND FIXTURES :

CIVIL ACTION – LAW :  
NO. 17-CV-1752 :

and :

PPL ELECTRIC UTILITIES CORP. :

Defendants. :

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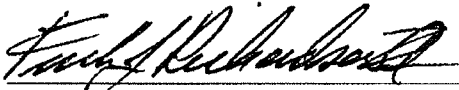
**DECLARATION OF FRANK JOHNSON RICHARDSON, II**

Comes now FRANK JOHNSON RICHARDSON, II, pursuant to 28 U.S.C. 1746, and declares as follows:

1. I am employed by PPL Electric Utilities Corp. (“PPL”). I have been employed by PPL since 2011. I currently hold the position of PJM & Federal Regulatory Policy Manager.
2. My office is located at 2 N. 9<sup>th</sup> St. Allentown, PA.
3. PPL is a public utility and electric distribution company headquartered in Allentown, Pennsylvania.
4. The PJM wholesale electric capacity market allows a generator to receive payment when it is able to provide capacity to send power within PJM’s network on demand.

5. To participate in the PJM wholesale electric capacity market and receive capacity payments, a generator must interconnect with and be able to send its power to the grid through facilities controlled by a FERC-regulated PJM transmission owner.

6. PPL is a FERC-regulated PJM transmission owner.

  
Frank Johnson Richardson, II

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),	:
	:
Plaintiff	:
	:
v.	:
	:
4.0446 ACRES MORE OR LESS OF LAND AND FIXTURES	: CIVIL ACTION – LAW
	: NO. 17-CV-1752
	:
and	:
	:
PPL ELECTRIC UTILITIES CORP.,	:
	:
Defendant.	:
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**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2017, upon consideration of Plaintiff's Motion for Immediate Possession and Defendant's Response in Opposition thereto, is hereby ORDERED that the Motion is DENIED.

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HON. JEFFREY L. SCHMEHL  
UNITED STATES DISTRICT JUDGE