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August 9, 2004

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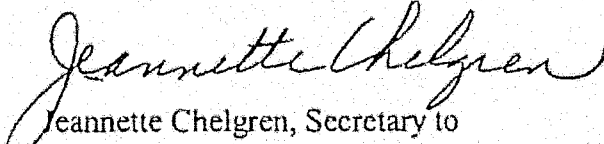
James McNulty, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

**In Re: Harmar Township v. Norfolk Southern Railway Company; Allegheny County;
and Commonwealth of Pennsylvania, Department of Transportation. PUC
Docket No. C-20030526; Our File No. 14077**

Dear Sir:

I enclose an original and ten (10) copies of the the Exceptions of Norfolk Southern Railway Company to the Recommended Decision for filing in the above-referenced matter. As evidenced by the Certificate of Service attached, copies of the Exceptions have been provided to all active parties of record. Once the Exceptions are filed, please return a time-stamped copy to our messenger. If you have any questions, please advise.

Sincerely yours,


Jeannette Chelgren, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Enclosures

cc: All Parties of Record (w/enc.)
Randal S. Noe, Esquire (w/enc.)
B. Terrance Sullivan (w/enc.)

**DOCUMENT
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Harmar Township, :
Complainant :
 :
vs. :
 :
Norfolk Southern Railway Company; :
Allegheeny County; and Commonwealth of :
Pennsylvania, Department of Transportation, :
Respondents :

Docket No. C-20030526

SECRETARY'S BUREAU

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EXCEPTIONS OF
NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Railway Company ("Norfolk Southern"), by and through its counsel, Nauman, Smith, Shissler & Hall, LLP, hereby files the following Exceptions to the Recommended Decision of Administrative Law Judge John H. Corbett, Jr. ("RD"), issued and re-served on July 19, 2004, pursuant to 52 Pa. Code § 5.533, as follows:

I. Norfolk Southern excepts to Conclusion of Law No. 1 on page 35 of the RD, which states that the Commission has jurisdiction over the subject matter of this proceeding pursuant to 66 Pa.C.S. §§ 701, 2702 and 2704. The ALJ held that the Commission has jurisdiction in this case under two independent bases, *i.e.*, "the responsibility" to ensure public safety at rail-highway crossings pursuant to 66 Pa.C.S. § 2702,¹ and "the right" to enforce its orders pursuant to 66 Pa.C.S. § 701. See RD at 29. The ALJ has erred in both regards.

¹ In this regard, it is to be noted that both the Commission's Bureau of Transportation and Safety ("BTS") and the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT") agreed with Norfolk Southern that the Commission lacked jurisdiction over the subject crossing under Sections 2702 and 2704 of the Code because it is not a "highway" crossing. See Main Briefs of BTS at 6-11 and PennDOT at 5-8.

The ALJ finds "pivotal" the distinction that the Pennsylvania Railroad Company ("PA Railroad") applied to the Public Service Commission ("PSC") in 1929 for a certificate of public convenience to "abandon"² the subject Guys Run Road vehicular crossing and to continue to maintain it as a four-foot wide pedestrian crossing, Township Ex. No. 2, but was granted authority in a 1930 PSC Report and Order ("1930 Order") to "alter" the subject Guys Run Road vehicular crossing into a four-foot wide pedestrian crossing, Township Ex. No. 4. See RD at 15. The PSC provided no explanation in its 1930 Order for this change in verbiage, but as explained in Norfolk Southern's Reply Brief at 10-11, which is incorporated herein by reference, this change has no substantive effect on the issue of the Commission's present lack of subject matter jurisdiction. See also the discussion of the jurisdictional issue at pages 4-8 of Norfolk Southern's Main Brief, which is incorporated herein by reference.

The ALJ correctly notes that the 1913 Act did not define the terms "crossing" or "public highway." Nor did it define the terms "alter" or "abolish." The ALJ looks to the common meaning of "alter," which he states *Webster's New Collegiate Dictionary* defines as "to make different without changing into something else." He further looks to the dictionary definition of "abolish," which he states *Webster's* defines as "to do away with wholly" or "to destroy completely." RD at 15. However, the PSC did "do away with" the vehicular crossing and "chang[ed]" it into something else" by converting it into a pedestrian crossing. The case cited by the ALJ to back his position, *City of Erie v. Public Service Commission*, 74 Pa. Super. 265, 268-269 (1920), actually supports Norfolk Southern in this regard. RD at 21. In that case the Superior Court defines "alter" as "to change it

² The PA Railroad should have used the term "abolish" in its Application. See Act of July 26, 1913 (the "1913 Act"), P.L. 1374, Article V, § 12.

from a grade crossing to one overhead or underground," which was not done in the present case. Instead, the vehicular crossing was abolished, which the Superior Court defines in the *City of Erie* case as to "do away with it entirely."³

More importantly, however, the Pennsylvania legislature did provide a definition of the "highways" over which the Commission would have jurisdiction in rail-highway crossing matters when it repealed the 1913 Act and enacted the Public Utility Law of 1937. The Public Utility Law defined "highway" as "every way or place, of whatever nature, open to the use of the public as a matter of right for purposes of vehicular travel."⁴ See Act of May 28, 1937, P.L. 1053, § 2(12). Thus, the legislature "specifically pronounced" the type of crossings over which the Commission could exercise jurisdiction. See RD at 16. While the PSC may have thought in 1930 that it had continuing jurisdiction over a pedestrian-only crossing following its conversion from a vehicular crossing, it is clear that the new Commission which succeeded to the PSC's powers had no jurisdiction over pedestrian-only crossings after 1937. *County of Bucks, supra; Consolidated Rail Corporation v. PA PUC*, 463 A.2d 90 (Pa.Cmwlth. 1983). Furthermore, "[e]ven if the Public Service Commission had been given jurisdiction over pedestrian bridges by the 1913 law, it is within the powers of the General Assembly to narrow or redefine the PSC's jurisdiction as it sees fit."

³ To illustrate the confusion that could be caused if the Commission does not base its conclusions as to what was accomplished by the 1930 Order upon its practical effect rather than the verbiage used, the PSC should have termed the conversion of the at-grade vehicular crossing to the overhead pedestrian crossing at issue in the *County of Bucks v. PA Public Utility Commission*, 684 A.2d 678 (Pa.Cmwlth. 1996), an "alteration" rather than an "abolition," if the Superior Court definitions in the *City of Erie* and the ALJ's reasoning are strictly followed.

⁴ The present definition of "highway" in the Public Utility Code is substantively the same. 66 Pa.C.S. § 102.

County of Bucks, 684 A.2d at 682. Because the subject crossing is now outside the subject matter jurisdiction of the Commission, the 1930 Order is no longer enforceable. *Id.*

The ALJ makes much of the fact that the present proceeding is an action to enforce the 1930 Order under Section 701 of the Code, and that the PA Railroad did not appeal the validity of the 1930 Order when it was entered. RD at 18-21. However, there was nothing for the PA Railroad to appeal in regard to subject matter jurisdiction in 1930. The PSC's Order requiring it to construct and continually maintain the converted pedestrian at-grade crossing was not expressly contrary to the law at that time, and the Pennsylvania Railroad certainly could not be held to have been able to anticipate a change in the law regarding the Commission's jurisdiction seven years in the future.

None of the cases cited by the ALJ at pages 18-21 of the RD in support of his recommendation that the 1930 Order has *res judicata* effect on Norfolk Southern today involves the present situation where there was a change in the underlying law regarding the subject matter jurisdiction of the administrative or judicial tribunal over a prior Order imposing a continuing obligation. However, the Commonwealth Court did hold in *County of Bucks* that where the Commission's jurisdiction over pedestrian crossings had been abrogated, the Commission had no jurisdiction to make orders regarding that crossing pursuant to a prior order issued when the PSC may have had jurisdiction. *Id.*, 684 A.2d at 682. *Res judicata* therefore does not apply in these circumstances. See cases cited at pages 4-5 of Norfolk Southern's Reply Brief, which is incorporated herein by reference.

Under the ALJ's reasoning, a court order that prohibited a particular white woman and African-American man from marrying or which prohibited a particular African-American student

from attending a whites only college under old segregation laws could still be enforced after those laws were abrogated. Assuming *arguendo* that when issued the 1930 Order was lawful, this conclusion is not necessarily *res judicata* for a later period of time. In *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152; 62 S.Ct. 966, 969 (1942), the Supreme court concluded that "a determination that a continuous practice is lawful or unlawful for one period is not necessarily *res judicata* for a later period of time." KENNETH CULP DAVIS AND RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE SECTION 13.3 page 254 (3d ed. 1994). While the *Raladam* Court did not explain why the Federal Trade Commission could prosecute a company a second time for continuing the same practice, the best answer according to Davis and Pierce may be that the question of the legality of the 1929 practices was not necessarily the same as the question of the legality of the 1935 practices, even if the practices remained the same. *Id.* at 255. Davis and Pierce go on to say that if the court were to have held otherwise, the development of law and policy by administrative and judicial interpretation would be cut off. *Id.* Thus, *res judicata* does not prevent an agency, after a decent interval, from testing the question whether law or policy, concerning continuous practices, may have changed. *Id.*

Furthermore, enforcement of the 1930 Order in the manner recommended by the ALJ would have negative policy implications, in that Norfolk Southern would be treated differently than other railroads in the state in regard to the requirement to maintain a pedestrian crossing. This would lead to "inequalities in the administration" of the Public Utility Code, "discriminatory distinctions" in liability "and a fertile basis for litigious confusion." See *Commissioner of Internal v. Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720 (1948). A judicial determination regarding ongoing obligations

"must be confined" in future years to situations "where the controlling facts and applicable legal rules remain unchanged."⁵ *Id.*, 333 U.S. at 599-600, 68 S.Ct. at 720.

The Public Utility Code requires that a roadway at an intersection with railroad tracks be "open to the use of the public as a matter of right for purposes of *vehicular* traffic" in order for the Commission to have jurisdiction. 66 Pa.C.S. § 102 (emphasis added). In this proceeding, there is absolutely no evidence of vehicular usage of the crossing by either bicycles or motorized vehicles. See Norfolk Southern Reply Brief at 11-13, which is incorporated herein by reference. In this case, the Township's own evidence shows that bicycles are only carried up the stairs to and across the crossing and the only usage by a motorized vehicle was by "somebody [who] was crazy enough to drive one of those three-wheel vehicles." N.T. 50. If such usage could support the use of the crossing by vehicular traffic, then there would be no such thing as a pedestrian-only crossing. In addition, the *County of Bucks* case held that in order for a crossing to come within the jurisdiction of the Commission, the crossing must be "intended" for vehicular traffic. *County of Bucks*, 684 A.2d at 681-82. That the subject crossing was not intended for vehicular use is shown by the stairway and steep rise of six feet in elevation in a seven-foot distance on one side of the crossing, which the ALJ does not mention either in his discussion of usage of the crossing at pages 26-27 of the RD nor in the applicable finding of fact, *i.e.*, number 67 at page 11 of the RD. See Norfolk Southern Exhibit No. 1; N.T. 110-111.

⁵ In this regard, not only has the underlying law changed since 1930, but so has the underlying purpose for the pedestrian crossing, which was to serve a pedestrian station then at the site. See Township Exhibits No. 2 and 4.

Nor does the ALJ's discussion of the parties' "rights" at the crossing at pages 22-27 of the RD have any relevance. The requirement that a utility obtain Commission approval in order to abandon service, as found at 66 Pa.C.S. § 1102(a)(2) and as applied to railroads in *Lacy v. East Broad Top Railroad & Coal Company*, 168 Pa.Super. 351, 77 A.2d 706 (1951), has been abrogated by the Interstate Commerce Commission ("ICC") Termination Act, which took effect in 1996. That Act provided the federal Surface Transportation Board with broad and exclusive jurisdiction over railroad transportation, facilities, transactions and service, which regulation is exclusive and preempts other remedies provided under federal or state law. 49 U.S.C. § 10501(b); *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001); *CSX Transp., Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). In addition, the present proceeding does not concern a railroad service issue, merely a potential crossing issue.

Furthermore, the discussion at pages 24-26 of the RD that the Township has not vacated the roadway at the crossing is irrelevant in regard to the issue of the Commission's jurisdiction. In converting the crossing from vehicular to pedestrian in 1930, the PSC certainly meant to and did abolish it as a vehicular crossing, even if it did intend to retain jurisdiction over the crossing as a pedestrian-only crossing. Thus, it is no longer "a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular traffic," 66 Pa.C.S. § 102, no matter how the PSC termed the conversion. Whether or not the PSC or the Commission subsequently vacated the roadway at the crossing is also irrelevant, as the Commission may, but is not required to, vacate the portion of a roadway at a crossing in connection with the abolition of the crossing. See 66 Pa.C.S. § 2702(c); *Application of Consolidated Rail Corporation regarding Whitehouse Lane*, A-

00107458 (Opinion and Order entered December 24, 1996), a copy of which is attached to Norfolk Southern's Reply Brief as Exhibit "A" (highway crossing over railroad abolished but roadway not vacated).

The case of *Reading Company v. PA PUC*, 333 A.2d 525 (Pa.Cmwlth. 1975), cited by the ALJ at page 25 of the RD, is not dispositive of the issue of the Commission's present jurisdiction in this proceeding. Examining the prior Commonwealth Court decision in that proceeding, denominated as *Township of Swatara v. PA PUC*, 312 A.2d 809 (1973), it is not clear that the bridges in question were pedestrian-only bridges before the Commission required the Reading Company to prepare preliminary plans and cost estimates to construct a pedestrian crossing on the 63rd Street bridge in Swatara Township. If the 63rd Street bridge was vehicular, and the Commission was merely ordering the railroad to construct a sidewalk on the bridge, then the Commission would have jurisdiction. See *County of Bucks*, 684 A.2d at 682, n.7. Even so, the parties' arguments in that case centered on whether or not the crossing carried a township road, which appears to concern whether the road was public or private, and not whether it carried "vehicular traffic." In addition, the *Reading Company* case predates both the *County of Bucks* and the *Consolidated Rail Corporation* cases, *supra*, which hold that the Commission lacks jurisdiction over pedestrian-only crossings.

The ALJ also discusses the distinction between the terms "jurisdiction" and "power" at page 29 of the RD. As discussed at pages 5-9 of Norfolk Southern's Reply Brief, which is incorporated herein by reference, the Commission must have jurisdiction over a crossing in order to have power to order a party to maintain the crossing. Even if the Commission would have jurisdiction over the

crossing, which is denied, it still would not have the power to order Norfolk Southern to "clear all vegetation within 200 feet of either side of this crossing along its right-of-way" in Recommended Ordering Paragraph 4 on page 36. As 66 Pa.C.S. § 2702(b) provides, the Commission's authority (and thus its power) to order a railroad to control the growth of brush and weeds on its property within 200 feet of a crossing is "to ensure proper visibility by *motorists*" (emphasis added). In this case there are no "motorists" utilizing the crossing.⁶

The ALJ obviously has much sympathy for residents living near the crossing who testified at the hearing as to the asserted inconvenience they may be caused if Norfolk Southern is not ordered to maintain the subject crossing. In this regard, it is interesting to note that the ALJ takes the assertions of the Township's witnesses which support the alleged usage and need for the crossing in the most positive light possible, without acknowledging evidence to the contrary pointed out by Norfolk Southern as discussed in subsequent exceptions. In any event, the ALJ's concern for the convenience of these residents, and the potential need for the Township and/or PennDOT to modify the roadway crossing located close to the nearby Wenzel Drive rail-highway crossing⁷ to accommodate pedestrians, cannot serve to confer jurisdiction on the Commission where it otherwise has none.

⁶ Norfolk Southern also takes the position that the Commission's jurisdiction to order the control of vegetation on its right of way is preempted by regulations enacted pursuant to the preemption provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20106, at 49 C.F.R. §§ 213.31 and 213.37.

⁷ This crossing has gates and lights. N.T. 18, Township Exhibit No. 6-B.

2. Norfolk Southern excepts to Conclusion of Law No 5 on page 35 of the RD, which states that "[t]he allocation of costs for this project and the assignment of future maintenance responsibilities as set forth in the following Recommended Order are fair, just and equitable to each party" for the reasons stated in Exception No. 1 above and the exceptions below, which are incorporated herein by reference.

3. Norfolk Southern excepts to the inclusion of the clause "and the Township cannot install sidewalks" at the end of the last sentence in Finding of Fact No 23 on page 5 of the RD. The Township's witness simply made bald assertions that sidewalks cannot be installed at the Wenzel Road crossing without any facts to back up the assertion. Furthermore, the assertion is belied by the Township witness' own testimony there is already a dirt path on the opposite side of Freeport Road from Wenzel Drive. N.T. 19. As the Township has the burden of proof in regard to all matters in this proceeding, 66 Pa.C.S. § 332(a), this assertion in Finding of Fact No. 23 should be struck, as there is no evidence in the record to support it.

4. Norfolk Southern excepts to Finding of Fact No. 33 on page 7 of the RD, as there is no evidence in the record that trains blowing their horn at or near the Guys Run Road crossing are doing so because of that crossing rather than the nearby AVJSA or Wenzel Drive crossings. See Township Exhibit No. 1.

5. Norfolk Southern excepts to Finding of Fact No. 35 on page 7 of the RD as being misleading in regard to usage of the crossing. The Township's witnesses used terms such as "extensively," "frequently," and "tremendous" to characterize the alleged usage of the crossing. N.T. 21, 29-30, 34, 75. When asked to provide numbers, however, one witness estimated the pedestrian count at 6 to 12 persons per day during the summer. N.T. 34, while another estimated it at 10 to 12 people a day "during normal months of the year," N.T. 89. Therefore, adding "Each day about 6 to 12" at the beginning of Finding of Fact 35 would more accurately reflect the evidence of record.

6. Norfolk Southern excepts to the second sentence in Finding of Fact 36 on page 7 of the RD, which should be struck as inaccurate. There is no evidence in the record of any usage of the crossing by recreational vehicles except for "somebody [who] was crazy enough to drive one of those three-wheel vehicles." NT 50. Furthermore, the statement that "it is possible to cross on a motorcycle" is pure speculation.

7. Norfolk Southern excepts to Finding of Fact No. 38 on page 7 of the RD as being misleading as to usage of the crossing. The tavern owner estimated the daily usage of the crossing as 10 to 12 people "during normal months of the year" with an increase in the summer. This usage is not even limited to her customers, as her estimate included people "from our street or our customers." N.T. 89. Therefore the following sentence should be added at the end of Finding of Fact 38: "She estimated daily pedestrian traffic at the crossing at about 10 to 12 people, with an increase in the summer."

8 Norfolk Southern excepts to Finding of Fact No. 40 on page 8 of the RD for the same reason it excepts to Finding of Fact No. 35, which exception is incorporated herein by reference. The testimony of the Township's witnesses would only support the insertion of "6 to 12 people or more" or "upwards of 6 to 12 people" rather than the phrase "many people." The *American Heritage Dictionary of the English Language* (4th ed.) defines "many" as "being one of a large indefinite number; numerous."

9. Norfolk Southern excepts to Finding of Fact No. 41 on page 8 of the RD, in that the marina owner's statement that his business would suffer if the subject crossing were closed is not supported by his own testimony. He testified that his patrons access his business by car or by boat. N.T. 97. Following the sustaining of an objection to a leading question by the Township's attorney in which the answer was supplied, the marina owner testified that his patrons instead utilize the crossing to access other business establishments, which would of course have no effect on his own business.

10. Norfolk Southern excepts to Finding of Fact No. 47 on page 8 of the RD, as being inconsistent with other testimony of the same Township witness as cited in Finding of Fact No. 48 on page 9 of the RD. As cited in Finding of Fact No. 48, that witness testified that the zoning of Wenzel Peninsula permits only residences, private garages, group garages and nursing homes, and that present marine operations or other businesses located in that area are only permitted as non-conforming uses because they are "grandfathered." N.T. 34-36, Township Exhibit No. 11.

Therefore no new marinas or commercial development would be permitted under the zoning law and Finding of Fact No. 47 should be struck.

11. Norfolk Southern excepts to Findings of Fact Nos. 50 and 51 on page 9 of the RD, as being irrelevant, as they have no bearing upon whether the subject crossing is open to "vehicular traffic" as a matter of right at the relevant times.

12. Norfolk Southern excepts to Finding of Fact No. 52 on page 9 of the RD, in that it fails to state that the grade of the crossing was changed in connection with the 1930 Order to enable the railway tracks of a street railway company to match the grade of the adjacent state highway. See Township Exhibit No. 4.

13. Norfolk Southern excepts to Finding of Fact No. 55 on page 9 of the RD, which states that the Township "maintains the approaches to the Guys Run Road Crossing." At the very least, this Finding is overstated, as the approach on the Wenzel Drive side of the crossing is simply gravel with weeds growing through, see Norfolk Southern Exhibit No. 3 (Photos E and G), and at most it is inaccurate, as the steps on the Freeport Road side are severely deteriorated, *id.* (Photos A, B and D), and the Township admits it has performed no maintenance on the steps in recent years. N.T. 63. This Finding would more accurately reflect the evidence of record if the word "maintain" were replaced with "performs minimal maintenance on."

14. Norfolk Southern excepts to Finding of Fact No. 59 on page 10 of the RD, in that there is no evidence in the record that Norfolk Southern removed timber between the rails and asphalt within its right of way at the Guys Run Road crossing. Norfolk Southern took over operations on the line from Conrail in 1999. NT 106-107, 115-116. The Township's own witness testified that plank timbers were taken out about "15 years ago," while he has not noticed asphalt in the crossing within "the last five years or so. It was probably longer than that." N.T. 43-44.

15. Norfolk Southern excepts to Finding of Fact No. 67 on page 11 of the RD as being misleading. While it is technically accurate that the difference in elevation from the top of rail to either Freeport Road or Wenzel Drive is approximately six feet, the Finding of Fact leaves out the important distinction that the elevation change is about six feet in a seven-foot distance on the Freeport Road side of the crossing. NT 111; Norfolk Southern Exhibit No. 1.

16. Norfolk Southern excepts to Findings of Fact Nos. 84 and 85 on page 13 of the RD. These purported Findings of Fact are in effect legal argument, which would have been more proper to address in the Discussion section of the RD. In this regard, Norfolk Southern incorporates its discussion of the subject case at pages 6-7 of its Main Brief as if stated in full herein.

Respectfully submitted,
NAUMAN, SMITH, SHISSLER & HALL, LLP

By *Benjamin C. Dunlap, Jr.*
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Supreme Court I.D. #66283
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717-236-3010
Attorney for Norfolk Southern Railway Company

Date: August 9, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Harmar Township,
Complainant

vs.

Norfolk Southern Railway Company;
Allegheny County; and Commonwealth of
Pennsylvania, Department of Transportation,
Respondents

Docket No. C-20030526

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SECRETARY'S BUREAU

CERTIFICATE OF SERVICE

I hereby certify that I served one (1) copy of the Exceptions of Norfolk Southern Railway to Recommended Decision, in the above action, this day by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

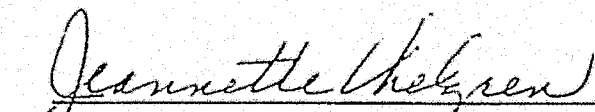
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Date: August 9, 2004


Jeannette Chelgren, Secretary to
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SPRINGER BUSH & PERRY P.C.

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August 19, 2004

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VIA FEDERAL EXPRESS

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Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

RECEIVED

AUG 19 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: *Harmar Township v. Norfolk Southern Railway Company*
PUC Docket No. C-20030526

Dear Mr. McNulty:

Enclosed please find an original and ten (10) copies of the Reply Exceptions of Harmar Township to the Exceptions of Norfolk Southern Railway Company to the Recommended Decision for filing in the above-captioned docket number. Copies of the Reply Exceptions have been provided to all parties of record.

Very truly yours,

SPRINGER BUSH & PERRY P.C.

DOCUMENT

By: 
Shawn N. Gallagher

SNG/dms

Enclosures

cc: All Parties of Record (w/encl.)
Harmar Township, c/o Robert Seibert (w/encl.)
Blaine A. Lucas, Esquire (w/encl.)

Harmar Township ("Township"), by and through its counsel, Springer, Bush & Perry, P.C., hereby files the following Reply to the Exceptions of Norfolk Southern Railway Company ("Norfolk"), filed with the Public Utility Commission ("Commission") on August 9, 2004, and received by the Township on August 11, 2004, to the Recommended Decision of Administrative Law Judge John H. Corbett, Jr. ("ALJ"), issued and re-served on July 19, 2004, pursuant to 52 Pa. Code § 5.535, as follows:

I. The Conclusion of Law No. 1 on page 35 the Recommended Decision, which states that the Commission has jurisdiction over the subject matter of this proceeding pursuant to Sections 701, 2702 and 2704 of the Public Utility Code (the "Code"), 66 Pa.C.S. § 101 *et seq.*, should be sustained. 66 Pa C.S §§ 701, 2702, 2704¹; *see* Recommended Decision at p. 29.

Norfolk's Exception No. 1 to the ALJ's Recommended Decision is replete with misapplications of law and mischaracterizations of fact. As discussed in great detail in the Township's Main Brief at pp. 6-22, the Township's Reply Brief at pp. 11-12, both of which are incorporated herein in their entireties by reference, and the Recommended Decision at pp. 15, 21-22, the Commission has subject matter jurisdiction over the present matter pursuant to Section 2702 of the Code because the Public Service Commission ("PSC") granted the Pennsylvania Railroad Company ("Pennsylvania Railroad") a certificate of public convenience and issued it a report and order at Application Doc. No. 21878-1930 ("Order") in 1930 for the "alteration" of the Guys Run Road Crossing and not for the "abandonment" or "abolishment" of

¹ To the extent Norfolk finds it noteworthy that both the Commission's Bureau of Transportation and Safety ("BTS") and the Commonwealth of Pennsylvania, Department of Transportation ("PennDOT") agreed with Norfolk that the Commission lacked jurisdiction over the Guys Run Road Crossing under Sections 2702 and 2704 of the Code, it should equally be noted that neither BTS nor PennDOT filed exceptions to the Recommended Decision. See Recommended Decision on pp. 21-26.

the crossing, as petitioned for by Pennsylvania Railroad (Norfolk Exc. No. 1 at p. 2; Twp. Exhs. 2-4).

Norfolk contends that the PSC's "change in verbiage" between the Petition and 1930 Order had no substantive effect on the issue of the Commission's "present lack of subject matter jurisdiction" (Norfolk Exc. No. 1 at p. 2). In support of this contention, Norfolk claims that the ALJ's reliance on how *Webster's New Collegiate Dictionary* and *City of Erie v. Public Service Commission*, 74 Pa.Super. 265 (Pa.Super. 1920), define the terms "alter" and "abolish" actually support the assertion that the Guys Run Road Crossing was abolished (Recommended Decision at pp. 15, 21; Norfolk Exc. No. 1 at pp. 2-3).

Norfolk claims that the PSC abolished the Guys Run Road Crossing because the term "abolish" means "to do away with wholly," by "chang[ing] it into something else" (Norfolk Exc. No. 1 at p. 2). The difficulty with Norfolk's interpretation is its failure to realize that the Guys Run Road Crossing was "altered" and made "different *without* changing into something else" (Recommended Decision p. 15) (emphasis added). In 1929 the Guys Run Road Crossing was a railroad crossing for the use of pedestrians in the same place as it exists today. It remained a railroad crossing for the use of pedestrians after 1930. It was never changed into anything other than a railroad crossing; it was only made different by narrowing it to four feet in width (Twp. Exhs. 3-4).

Similarly, Norfolk incorrectly asserts that the Superior Court's definition of "alter" in *City of Erie* supports its argument. The Superior Court's definition of "alter" was not limited to just changing "a grade crossing to one overhead or underground" (Recommended Decision at p. 21; Norfolk Exc. No. 1 at p. 3). This definition was a mere example of what the term "alter" included ("[t]he words [relocate, alter and abolish] are not used to limit the powers of the

commission but in amplification of them”). *City of Erie*, Pa. Super. at 268-269. Of those words, the only one that was clearly distinguishable was “abolish” (“[t]he last word is clear, and means that the crossing is to be eliminated”) *Id.* Norfolk also conveniently ignores the Superior Court’s determination that “when crossings are abolished, the part of the street which crosses the railroad tracks can no longer be part of a thoroughfare.” *Id.*

In an effort to buttress its argument, Norfolk then goes on to comparing the holding in *City of Erie* and the ALJ’s reasoning in the Recommended Decision to the holding in *County of Bucks v. PA Public Utility Commission*, 684 A.2d 678 (Pa.Cmwlth. 1996), as illustrative of the confusion that “could be caused if the Commission does not base its conclusions as to what was accomplished by the 1930 Order upon its practical effect rather than the verbiage used” (Norfolk Exc. No. 1 at p. 3, footnote 3). Norfolk claims that the PSC in *County of Bucks* should have termed the conversion of the at-grade vehicular crossing to the overhead pedestrian crossing at issue “an ‘alteration’ rather than an ‘abolition.’” *Id.* What Norfolk fails to understand is that if the Superior Court definitions in the *City of Erie* and the ALJ’s reasoning are strictly followed there is no confusion.

The vehicular and pedestrian crossing in *County of Bucks* was completely destroyed and the road ceased to exist. Moreover, it was changed into something else, a new pedestrian bridge, which did not exist before the abolition of the crossing. The Guys Run Road Crossing was and always has been a pedestrian crossing, even before the “alteration” in 1930 (Recommended Decision at p. 15).

As explained in detail in the Township’s Main Brief at pp. 51-54 and Reply Brief at 16-18, the holding in *County of Bucks* is not applicable to the case *sub judice*. Norfolk even cites one of the relevant portions of the holding in *County of Bucks* that is critical in differentiating the

crossing in *County of Bucks* from the Guys Run Road Crossing (“[e]ven if the Public Service Commission had been given jurisdiction over pedestrian *bridges* by the 1913 law, it is within the powers of the General Assembly to narrow or redefine the PSC’s jurisdiction as it sees fit”) (Norfolk Exc. No. 1 at pp. 3-4 *quoting County of Bucks*, 684 A.2d at 682) (emphasis added).

Norfolk next argues that the Commission does not have subject matter jurisdiction over the Guys Run Road Crossing pursuant to Section 701 of the Code because *res judicata* does not apply to Pennsylvania Railroad’s failure to appeal the validity of the 1930 Order when it was entered (Recommended Decision at pp. 18-21). Norfolk states that “[t]he PSC’s Order requiring it to construct and continually maintain the converted pedestrian at-grade crossing was not expressly contrary to the law at that time, and the Pennsylvania Railroad certainly could not be held to have been able to anticipate a change in the law regarding the Commission’s jurisdiction seven years in the future” (Norfolk Exc. No. 1 at p. 4).

As discussed in more detail in Paragraph 11, below, this is specious reasoning on the part of Norfolk. Assuming, *arguendo*, that the PSC had the requisite authority to require the maintenance of pedestrian only crossings when the 1930 Order was entered and such authority was abrogated in 1937 by the Public Utility Law (the “Law”) of May 28, 1937, P.L. 1053, when the Pennsylvania Legislature repealed the Public Service Company Law (the “Act”) of July 26, 1913, P. L. 1374, according to Norfolk, its predecessors could have refused maintenance any time after 1937 (Norfolk Exc. No. 1 at p. 3, footnote 4). However, its predecessors chose to maintain the Guys Run Road Crossing per the requirements of the 1930 Order for nearly half a century (Tr. pp. 13, 23, 39-40, 43-44, 104). As explained in the Township’s Main Brief at p. 54, and the Township’s Reply Brief at pp. 13-16, *res judicata* applies to the 1930 Order and Norfolk is estopped from denying that the Commission is without jurisdiction.

Norfolk puts forth the proposition that when there is a change in the underlying law regarding the subject matter jurisdiction of an administrative or judicial tribunal over a prior Order imposing a continuing obligation that the doctrine of *res judicata* may not always apply (Norfolk Exc. No. 1 at pp. 4-5). Even though all of the cases cited to by Norfolk to support this position are clearly distinguishable from the present matter, assuming *arguendo* that the underlying law has changed, *res judicata* would still apply to the 1930 Order because the disputed portion of Guys Run Road is still "a way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular traffic." 66 Pa.C.S. § 102; *Consolidated Rail Corp v Pennsylvania Public Utility Commission* ("Conrail"), 463 A.2d 90 (Pa.Cmwlt. 1983).

Norfolk's claim that "enforcement of the 1930 Order in the manner recommended by the ALJ would have negative policy implications, in that Norfolk Southern would be treated differently than other railroads in the state in regard to the requirement to maintain a pedestrian crossing" is pure speculation and unsupported by anything in the record (Norfolk Exc. No. 1 at pp. 4-5). Norfolk fails to cite any legal authority for the proposition that any railroad company in Pennsylvania is not required to maintain an altered vehicular and pedestrian crossing. It is interesting that Norfolk cites to *Commissioner of Internal v. Sunnen*, 333 U.S. 591 (1948), as authority for the proposition that the ALJ's Recommended Decision "would lead to 'inequalities in the administration' of the Public Utility Code, 'discriminatory distinctions' in liability 'and a fertile basis for litigious confusion'" (Norfolk Exc. No. 1 at pp. 4-5, footnote 5). If anything, the ALJ's Recommended Decision would do the opposite by reaffirming the distinction of terms as set forth in *City of Erie*, and settling the interpretation of pre-Law orders issued by the PSC.

Furthermore, Norfolk has failed to cite any legal authority whatsoever for the proposition that the alteration of a public crossing is tantamount to the abandonment or abolishment of the same. *See City of Erie* at Pa.Super. 269 (“three words are used in the act, ‘relocate,’ or ‘alter,’ or ‘abolish’ . . . we must presume that each of these words has some distinctive meaning”). As explained in the Township’s Reply Brief at pp. 10-11, as the party asserting the affirmative defense of subject matter jurisdiction, Norfolk has the burden of proving the Guys Run Crossing was abolished, and this is a burden which it has thoroughly failed to satisfy.

Norfolk goes onto argue that the Commission does not have subject matter over the Guys Run Road Crossing because “there is absolutely no evidence of vehicular usage of the crossing by either bicycles or motorized *vehicles* there” as defined in Section 102 of the Code, 66 Pa.C.S. § 102 (Norfolk Exc. No. 1 at p. 6) (emphasis in Norfolk’s Exc.). This statement is categorically false (Twp. Main Br. pp. 20-22; Tr. pp. 24, 30, 33-34, 76-77, 123; *see* Twp. Exh. 1). While Norfolk concedes in its Main Brief at p. 5 that bicycles are considered “vehicles” within the statutory definition of a “highway” under 66 Pa.C.S. §§ 102, 2702(a), it claims that the constant usage by the Township residents of the Guys Run Road Crossing as a bicycle crossing is insufficient to support a finding of subject matter jurisdiction because the crossing must be “intended” for vehicular traffic (Norfolk Exc. No. 1 at p. 6, *quoting County of Bucks* A.2d at 681-82). The Guys Run Road Crossing was intended for vehicular traffic. Unlike the pedestrian bridge crossing at issue in *County of Bucks*, the Guys Run Road Crossing was not constructed solely for pedestrian use. it was constructed primarily for vehicular use, it was altered for pedestrian use (Twp. Exhs. 2, 3, 4, 12, Twp. Br. 51-54).

The only factor Norfolk cites to support its position is “the stairway and steep rise of six feet in elevation in a seven-foot distance on one side of the crossing” (Norfolk Exc. No. 1 at pp.

6, 7). As made clear in the Township's Main Brief at p. 22 and the Township's Reply Brief at pp. 12-13, it was impossible for the PSC to have even considered the increased grade and stairs in making its determination to alter the Guys Run Road Crossing. Therefore, they cannot be used as evidence of the intended use of the crossing.

Moreover, Norfolk should be estopped from arguing that the grade and stairs at the Guys Run Road Crossing preclude the consideration of bicycles under a Section 2702 analysis. It was Norfolk and its predecessors in interest that created "the steep six-foot rise leading up to the subject crossing" over the past 74 years (Norfolk Exc. No. 1 at pp. 6, 7; Twp. Main Br. pp. 21, 22; Norfolk Main Br. pp. 3, 8; Tr. pp. 100, 130). As the record indicates, Norfolk's maintenance at the Guys Run Road Crossing since 1930 is the reason why the public has to carry their bicycles up the incline and steps (Tr. pp. 100, 130; Twp. Exhs. 4 and 8H).

The next argument proffered by Norfolk is that the ALJ's discussion of the parties' "rights" at the Guys Run Road Crossing has no relevance to this proceeding (Recommended Decision pp. 22-27; Norfolk Exc. No. 15 at pp. 7-8). Norfolk maintains that the ALJ's requirement that a utility obtain Commission approval in order to abandon service, as applied to railroads in *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa. Super. 1951), is preempted by the Interstate Commerce Commission ("ICC") Termination Act of 1995.

Even though the Interstate Commerce Commission Termination Act of 1995 does provide the federal Surface Transportation Board with broad and exclusive jurisdiction over railroad transportation, facilities, transactions and services, as Norfolk acknowledges, "the present proceeding does not concern a railroad service issue, merely a potential crossing issue" (Norfolk Exc. No. 1 at p. 7). The cases cited by Norfolk for this proposition are therefore distinguishable. As fully discussed in the Township's Main Brief at pp. 13-20, it is submitted that

the rationale for the holding in *Lacy* is much broader and encompasses the principal that the abandonment or abolishment of any kind cannot occur without the consent of the Commonwealth.

For example, in *CSX Transp., Inc. v. Pennsylvania Public Utility Com'n*, 558 A.2d 902 (Pa.Cmwth. 1989), a railroad asserted that the Commission was preempted from assigning maintenance responsibilities to it in regard to a crossing on a line for which the ICC had approved abandonment. The railroad argued that the ICC's approval of the abandonment of the railroad's predecessor's rail line preempted the Commission's authority to require the railroad to file with the Commission an application for a certificate of public convenience to abolish a crossing which was at one time traversed by the abandoned rail line.

The Commonwealth Court held that ICC authority over abandonment of rail lines, in the course of regulating commerce, did not preempt the Commission's authority to abolish crossings and to assign maintenance responsibilities, in the course of regulating the safety of crossings. The Court stated that the railroad confused the concept of rail line abandonment which is within the exclusive jurisdiction of the ICC and the abolition of a rail/highway crossing which is within the exclusive province of the Commission pursuant to Section 2702 of the Code. Of particular importance, the Court found that the only way to *abolish* a rail-highway crossing was through a certificate of public convenience. *CSX Transp., Inc.* at A.2d 906 (emphasis added). Since a certificate of public convenience is the only vehicle by which a railroad can effectuate the abolishment or abandonment of a rail-highway crossing pursuant to Section 2702 of the Code, the remainder of the ALJ's explanation on the vacation of roads is not only relevant, it is essential (Recommended Decision pp. 24-26).

To support its argument that the Guys Run Road Crossing was not intended for vehicular traffic, Norfolk puts forward the hypothesis, without any supporting evidence, that “[i]n converting the crossing from vehicular to pedestrian in 1930, the PSC certainly meant to and did abolish [the Guys Run Road Crossing] as a vehicular crossing” (Norfolk Exc. No. 1 at p. 7). Norfolk goes on to cite *Application of Consolidated Rail Corporation regarding Whitehouse Lane*, A-00107458 (Opinion and Order entered December 24, 1996) (a copy of which was allegedly attached to Norfolk’s Reply Brief as Exhibit “A”, and which the Township never received) for the proposition that a highway crossing over a railroad can be abolished without vacating the roadway. The docket at No. A-00107458 (Opinion adopted October 24, 2002 and Order entered October 29, 2002) and (Opinion adopted December 18, 2003 and Order entered December 19, 2003) does not adequately address the issue of whether the road was open to vehicular traffic or if it was a public or private road (Norfolk Exc. No. 1 at p. 8).

Norfolk then discounts the ALJ’s utilization of *Reading Company v. Pennsylvania Public Utility Commission*, 333 A.2d 525 (Pa.Cmwlt. 1975), on pure speculation and then argues that even if the ALJ correctly applied *Reading* to the present matter the holding in *Reading* predated *County of Bucks* and *Conrail*, therefore allegedly divesting the Commission of jurisdiction over pedestrian-only crossings (Norfolk Exc. No. 1 at p. 8). As discussed in detail in the Township’s Main Brief at pp. 6-22 and Reply Brief at pp. 16-18, the Guys Run Road Crossing is still a vehicular and a pedestrian crossing.

Norfolk also argues that even if the Commission would have jurisdiction over the Guys Run Road Crossing that it still would not have the power to order Norfolk to “clear all vegetation along its right-of-way” because Section 2702(b) of the Code only provides the Commission with the authority to control “the growth of brush and weeds upon property owned by the

railroad within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists" (Recommended Decision at p. 29; Norfolk Exc. No. 1 at p. 9 quoting 66 Pa.C.S. § 2702(b)). As discussed in the Township's Reply Brief at pp. 18-19, and in contravention of *Conrail*, Norfolk erroneously asserts that bicyclists are not motorists.

Moreover, Norfolk also mistakenly takes the position that the Commission's jurisdiction to order the control of vegetation on its right of way is preempted by regulations enacted pursuant to the provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20106, at 49 C.F.R. §§ 213.31 and 213.37 (Norfolk Exc. No. 1 at p. 9, footnote 6). With regard to highway-rail crossings, these provisions only apply to the obstruction of railroad signs and signals and not to the visibility of motorists and pedestrians at highway-rail crossings.

Norfolk's final argument against Commission jurisdiction over this matter alleges that the Wenzel Drive rail-highway should be used to accommodate pedestrians, and "cannot serve to confer jurisdiction on the Commission where it otherwise has none" (Norfolk Exc. No. 1 at p. 9). This portion of Norfolk's Exception to Conclusion of Law No. 1 should be overruled as stated for the reasons set forth in Paragraph 3 below, and in the Township's Main Brief at pp. 45-51. In support of this argument, Norfolk again misapplies the evidence of record in this proceeding by insinuating that the Wenzel Drive Crossing already "has gates and lights" (Norfolk Exc. No. 1 at p. 9, footnote 7). It utterly fails to mention that the gates and lights are located on Wenzel Drive and not on Freeport Road as discussed in the Township's Main Brief at pp. 45-51 (Tr. p. 19; Twp. Exhs. 6A-C compare Twp. Exhs. 9A-C).

2. The Conclusion of Law No. 5 on page 35 of the Recommended Decision which states that "the allocation of costs for this project and the assignment of future maintenance responsibilities as set forth in the following Recommended Order are fair, just and equitable to

each party” should be sustained for the reasons set forth in Paragraph No. 1, above. Moreover, the Commission has exclusive jurisdiction over rail/highway crossings, and also has full power to order all parties to maintain any portion of a rail/highway crossing the Commission deems fit, regardless of what those parties’ responsibilities would otherwise be. 66 Pa.C.S. §§2702, 2704.

3. Finding of Fact No. 23 on page 5 of the Recommended Decision should be sustained as it is substantially supported by evidence in the record. The Township produced testimonial evidence and several exhibits that show the inability of the Township to install sidewalks (Tr. pp. 19, 26; Twp Exhs. 1, 6B, 6D, 7A, 7C). Norfolk’s contention that a sidewalk could be installed on the opposite side of Freeport Road from Wenzel Drive because a dirt path already exists is a gross mischaracterization of the testimony. The testimony in the transcript cited to by Norfolk for this proposition correctly states “there is a dirt kind of path at one part but it is unsafe and it is not advisable to use it” (Tr. p. 19) (emphasis added). Moreover, as explained in detail in the Township’s Main Brief at pp. 27-35, that portion of road between Freeport Road and Guys Run Road is the center of a highly established business district in the Township where there is heavy ingress and egress for vehicles into those business establishments (Tr. pp. 20, 57; Twp Exhs. 1, 7A-7C)

As a participant, Norfolk had the right to present evidence, cross-examine, object, and to submit rebuttal evidence at the hearing with regard to the ability of the Township to install sidewalks. 66 Pa.C.S. §§ 332(c), 703(c); 52 Pa. Code § 5.243(a). If Norfolk disagreed with the direct testimony of the Township it should have addressed this issue at the time of the hearing.

Furthermore, Norfolk’s assertion that “the Township has the burden of proof in regard to all matters in this proceeding” pursuant to 66 Pa.C.S. § 332(a) is a misapplication of the law as explained in the Township’s Reply Brief at pp. 5-8 (Norfolk Exc. No. 3 at p. 10). In any case

involving any alleged violation by a public utility of any lawful determination or order of the Commission, the burden of proof shall be upon the public utility to show that it has complied with the determination or order of the Commission. 66 Pa C.S. § 315(b). Thus, Norfolk has the burden of proof with regard to all matters in this proceeding and it has failed to produce any substantial and legally credible evidence to support any of its contentions.

4. Finding of Fact No. 33 on page 7 of the Recommended Decision should be sustained as it is supported by testimonial evidence in the record (Tr. 31-32, 78). The evidence of record shows that trains sound off after the Allegheny Valley Joint Sewer Authority crossing and before the Guys Run Road Crossing. *Id.*

5. Finding of Fact No. 35 on page 7 of the Recommended Decision should be sustained as stated. This finding as set forth is accurate and substantially supported by evidence in the record (Tr. pp. 23, 25-27, 29-30, 68- 89, 95-97; Twp Exhs. 1, 7, 9). Norfolk's assertion that the use of the subject crossing by "10 to 12 people a day during normal months of the year" as indicative of the usage is a misstatement of the evidence of record (Norfolk Exc. No. 5 at p. 11, Tr. p. 89). The testimony cited to by Norfolk was in reference to the residents that only live on Wenzel Drive and patrons of her establishment and not the public in general (Tr. p. 89). Norfolk fails to account for the rest of the testimony that states "in the summer time we have people from the island come over, dock their boats at our tavern, boat dock place, and go over to the restaurants. *So it increases in the summer*" (Tr. p. 89; Twp. Exh. 1) (emphasis added).

Moreover, Norfolk fails to factor in the usage of the hundreds of people who have summer residences on Twelve Mile Island seven months of the year and can only access the Wenzel Peninsula via boat (Tr. pp. 15, 23, 41-42, 69; Twp. Exh. 1), the residents that live on Terrace Drive, Guys Run Road, and Campbells Run Road who use the Guys Run Road Crossing

for access to the river, businesses and recreational facilities located on the Wenzel Peninsula (Tr. pp. 21, 30, 34-25, 69-70, 95-98; Twp Exh. 1), and the public in general (Tr. pp. 89-90; Twp. Exh 14). Norfolk also ignores the evidence of record that the use of the Guys Run Road Crossing will increase due to the Pennsylvania Fish and Boat Commission's plans to develop its facilities in the near future and the development of a substantial section of undeveloped property located on the Wenzel Peninsula (Tr. pp. 34-35, 93; Twp Exh. 1). Therefore, adding "Each day about 6 to 12" at the beginning of Finding of Fact 35 would not accurately reflect the evidence of record

6. Finding of Fact No. 36 on page 7 of the Recommended Decision should be sustained as stated as it is reflective of the evidence of record (Tr. pp. 33-34, 50-51, 71, 76-77).

7. Finding of Fact No. 38 on page 7 of the Recommended Decision should be sustained as stated for the reasons set forth in Paragraph 5, above.

8. Finding of Fact No. 40 on page 8 of the Recommended Decision should be sustained as stated for the reasons set forth in Paragraph 5, above.

9. Finding of Fact No. 41 on page 8 of the Recommended Decision should be sustained as it is supported by testimonial evidence in the record. The marina owner's statement that his business would suffer if the Guys Run Road Crossing was closed is supported by his testimony that his marina is the only public facility in the area to dock boats and that his customers utilize the crossing to access businesses on Freeport Road (Tr. pp. 95-98). Moreover, Norfolk's assertion that "patrons instead utilize the crossing to access other business establishments, which would of course have no effect on his own business" is speculative and unsupported by the uncontested evidence of record (Norfolk Exc. No. 9 at p. 12). It is axiomatic that his business would suffer if the Guys Run Road Crossing did not exist as it is the only

pedestrian passage to Freeport Road available to his customers. See Township's Main Brief at 31-35.

10. Finding of Fact No. 47 on page 8 of the Recommended Decision should be sustained because it is not inconsistent with the other testimony of the same Township witness as cited in Finding of Fact No. 48 on page 9 of the Recommended Decision. Norfolk mischaracterizes the testimony of the witness as "only" applying to "residences, private garages, group garages and nursing homes" (Norfolk Exc. No. 10 at p. 12). Those uses cited by the witness were "a variety of things" that could be developed on the property (Tr. p. 35; Twp. Exh. 11). The evidence of record clearly establishes that the property in question was recently purchased by a commercial development company (Tr. pp. 35-36, 93-94; Twp. Exh. 11). Furthermore, Norfolk also fails to adequately recognize all of the uses permitted in the district, any non-conforming use status that the property already has, or the possibility of the developer requesting a rezoning of the property.

11. Findings of Fact Nos. 50 and 51 on page 9 of the Recommended Decision should be sustained, as the Pennsylvania Railroad Company's Survey dated June 6, 1950 and the deed dated June, 1985 are relevant probative evidence that the disputed portion of Guys Run Road was and still is open to vehicular traffic subsequent to its alteration in 1930 (Tr. pp. 19, 37, 44-45, 91-92, 102-105; Twp. Exhs. 1, 12, 14, 16). As discussed in Paragraph 3, above, and explained in detail in the Township's Reply Brief at pp. 5-8 and 10-12, it is Norfolk's burden to prove that the subject crossing is not open to "vehicular traffic".

Norfolk asserts that the 1930 Order became unenforceable when the Pennsylvania legislature enacted the 1937 Law that repealed the 1913 Act and that "the Pennsylvania Railroad certainly could not be held to have been able to anticipate a change in the law regarding the

Commission's jurisdiction seven years in the future" (Norfolk Exc. No. 1 at pp. 3-4). The fact that Norfolk's predecessors in interest maintained the subject crossing well after 1937 (Tr. pp. 13, 23, 39-40, 43-44, 104), coupled with later documentation, the deed (Twp. Exh. 15) and especially Norfolk's predecessor in interest's own survey showing Guys Run Road as a public road (Twp. Exh. 15), is relevant evidence that the PSC intended to keep the road open for "vehicular traffic" as contemplated by Section 2702 of the Code and understood and known by Norfolk's predecessor in interest. Moreover, Norfolk at no time whatsoever presented any documentary evidence to the contrary refuting that Guys Run Road is open for "vehicular traffic".

12. Finding of Fact No. 52 on page 9 of the Recommended Decision should be sustained as it is supported by the evidence of record (Tr. p. 100; Twp. Exh. 4). Norfolk's assertion that Finding of Fact No. 52 "fails to state that the grade of the crossing was changed in connection with the 1930 Order to enable the railway tracks of a street railway company to match the grade of the adjacent state highway" is irrelevant (Norfolk Exc. No. 12 at p. 13). As explained in detail in the Township's Reply Brief at pp. 12-13, the change in grade contained in the Order relates to the Wenzel Drive Crossing, and not the Guys Run Road Crossing (Twp. Exhs. 1-4).

13. Finding of Fact No. 55 on page 9 of the Recommended Decision should be sustained because it is reflective of the evidence of record (Tr. pp. 22-23, 38, 47-48, 50, 63, 70). The Township produced evidence that the stairs and railing were maintained prior to 1999 and the reason they have not been maintained since is because the Township is "waiting to see what will happen with this proceeding" (Tr. p. 63). The Township also presented testimony that it continuously maintains "to this day" the approach leading from Norfolk's right-of-way to

Wenzel Drive (Tr. p. 70). Moreover, the exhibits that Norfolk cites to support its assertion that the Township performs "minimal maintenance" on the approaches are self-serving as it only took pictures on one day at the crossing during the summer (Norfolk Exc. No. 13 at p. 13; Norfolk Exhs 3E, 3G; Twp. Exh. 8A); *see also Reading Company v Pennsylvania Public Utility Commission*, 333 A.2d 525, 528 (Pa.Cmwlth. 1975) ("decisional and statutory law on the subject of abandonment and vacation of the public use is voluminous, but nowhere have we found support for the proposition that failure to maintain alone constitutes abandonment").

14. Finding of Fact No. 59 on page 10 of the Recommended Decision should be sustained as the evidence of record substantially supports that Norfolk, through its predecessor in interest, Consolidated Rail Corporation, removed the timbers between the rails and asphalt within the right-of-way at the Guys Run Road Crossing (Tr. pp. 39-40, 43-44, 116, Norfolk Exh. 3E). It is irrelevant whether Norfolk actually removed the timbers and asphalt as it is responsible for the actions taken by Consolidated Rail Corporation as its predecessor in interest. *See CSX Transp., Inc v Pennsylvania Public Utility Com'n*, 558 A.2d 902 (Pa.Cmwlth. 1989); *Com., Dept. of Transp v Pennsylvania Public Utility Com'n*, 464 A.2d 645 (Pa.Cmwlth. 1983); *Consolidated Rail Corp. v Pennsylvania Public Utility Com'n*, 423 A.2d 1108 (Pa.Cmwlth. 1980).

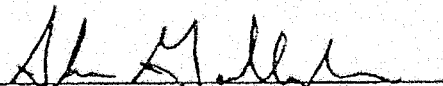
15. Finding of Fact No. 67 on page 11 of the Recommended Decision should be sustained as it is supported by the evidence of record (Tr. pp. 110-111; Norfolk Exh. 1). Norfolk's assertion that "the elevation change is about six feet in a seven-foot distance on the Freeport Road side of the crossing" is irrelevant and self-serving (Norfolk Exc. No. 15 at p. 14). As explained in the Township's Main Brief at pp. 21-22 and Reply Brief at pp. 12-13, the reason for the elevation change is due to Norfolk's and its predecessors in interests own actions which

were in contravention of the 1930 Order and were not contemplated or approved by the PSC in granting the alteration of the Guys Run Road Crossing (Tr. p. 100; Twp. Exh. No. 4).

16. Findings of Fact Nos. 84 and 85 on page 13 of the Recommended Decision should be sustained. These Findings of Fact are not "in effect legal argument," as Norfolk asserts; they are facts (Norfolk Exc. No. 16 at p. 15). It is a fact that the Commission, by Order entered August 10, 1993 at Docket No. C-00913746, has assigned maintenance responsibilities for a pedestrian crossing in at least one other proceeding (Tr. pp. 135-36; BTS Exh. 1). It is also a fact that the case at Docket No. C-00913746 involved a below-grade pedestrian tunnel of approximately eight feet in width that spanned the width of the railroad right-of-way (Tr. pp. 137-38, BTS Exh. 1).

Respectively Submitted,

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Dated: August 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, pursuant to 52 Pa. Code §1.54.

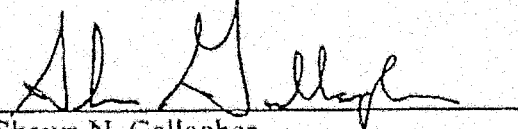
Service by first class mail addressed as follows:

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