



THOMAS, NIESEN & THOMAS, LLC

Attorneys and Counsellors at Law

CHARLES E. THOMAS, III
Direct Dial: 717.255.7611
cet3@tntlawfirm.com

June 15, 2018

Via Hand Delivery

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

Re: Investigation upon the Commission's own motion to determine the condition and disposition of six (6) existing structures carrying various highways above the grade of the tracks of the Canadian Pacific Railroad in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Susquehanna County and Benton Township, Lackawanna County; Docket No. I-2015-2472242.

Dear Secretary Chiavetta:

Enclosed for electronic filing are **Public and Proprietary Versions** of the Main Brief of Great Bend Township in the above-referenced matter.

The Proprietary Version includes confidential information and is being filed under separate seal. We ask that the Commission not allow any public disclosure of the Proprietary Version. The confidential information that is part of the Proprietary Version is redacted from the Public Version consistent with 52 Pa. Code § 1.32.

Copies of the Main Brief are being served in accordance with the attached Certificate of Service.

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

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Charles E. Thomas, III

Enclosure

cc: Certificate of Service
Brian O'Connor, Chairman (via email)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Investigation upon the Commission's own :
motion to determine the condition and :
disposition of six (6) existing structures :
carrying various highways above the grade :
of the tracks of the Canadian Pacific : Docket No. I-2015-2472242
Railroad in Great Bend Township, New :
Milford Township, Brooklyn Township, Hop :
Bottom Borough, Lathrop Township, :
Susquehanna County and Benton Township, :
Lackawanna County :**

**MAIN BRIEF OF
GREAT BEND TOWNSHIP**

PUBLIC VERSION

Charles E. Thomas, III, Esq.
PA Attorney ID # 201014
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101
Tel: 717.255.7611
cet3@tntlawfirm.com

Counsel for Great Bend Township

DATED: June 15, 2018

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I. INTRODUCTION AND STATEMENT OF CASE

This proceeding concerns the Pennsylvania Public Utility Commission's ("Commission") investigation into the condition and disposition of six (6) existing structures carrying various highways above the grade of tracks of Norfolk Southern Railway Company ("Norfolk Southern" or "NS") (formerly the tracks of the Canadian Pacific Railroad) in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, all in Susquehanna County, and Benton Township, Lackawanna County, and a related proceeding involving a bridge structure in Nicholson Borough, Wyoming County, at Docket No. M-2013-2364201.

One of the crossing structures part of this proceeding is located in Great Bend Township, Susquehanna County ("Great Bend" or the "Township"), where Township Road T-821, commonly known as Old Lackawanna Trail (or Old Route 11), crosses above the grade of track of Norfolk Southern (DOT # 263 952 J) (the "T-821 Bridge"). This crossing structure is a steel thru-girder bridge in a state of severe deterioration and has been closed to vehicular and pedestrian traffic since December 2017 due concerns about the bridge's safety and integrity. Old Lackawanna Trail is a road of paramount importance to the Township and Susquehanna County, and, as a result, the bridge's closure has caused a significant disruption to residents, businesses, schools, and emergency services in the area.

Pursuant to a series of Orders relating to the T-821 Bridge which date back to 1915, the Commission has assigned to the railroad, at its *sole* cost and expense, the responsibility to perform all work and furnish all materials necessary to make repairs and maintain the crossing, except for the bituminous roadway wearing surface.¹ There is no dispute among the parties that

¹ *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Aug. 14, 1980) ("T-821 1980 Order"); *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Feb.

Norfolk Southern, consistent with those Orders and as successor railroad in interest, currently bears maintenance and cost responsibility for the T-821 Bridge. Norfolk Southern has admitted as much on record and has agreed to perform and pay for necessary repairs on the T-821 Bridge.²

The primary disagreement over this particular structure arises, however, in regard to the assignment of future maintenance and cost responsibilities. Through this proceeding, Norfolk Southern is attempting to shirk its Commission-mandated responsibilities going forward by taking the position that any and all future maintenance and cost responsibility following completion of the repairs should be assigned to the "owner" of the bridge, which it claims is the Township. Great Bend takes exception to Norfolk Southern's attempt to disclaim ownership and shift future responsibilities for the bridge onto the Township. Accordingly, the Township respectfully submits that the Commission should not release Norfolk Southern from its responsibilities for the T-821 Bridge and should order that Norfolk Southern bears sole responsibility for all present and future repairs, maintenance, and costs associated with the bridge, exclusive of the roadway which traverses the structure.

22, 1985) ("T-821 1985 Order"); *In the Matter of the Abolition of Grade Crossings of the Delaware, Lackawanna and Western Railroad Company's Tracks over the Cohecton and Great Bend Turnpike, and the Construction of a Crossing above Grade in the Township of Great Bend, Susquehanna County*, 1 PA PUC 361, Docket No. A-321, 1914, (Order entered Apr. 8, 1915) ("T-821 1915 Order"). These Orders have been entered into the record as PennDOT Exhs. D-10, D-11, and D-12, respectively.

² Tr. 196. The scope and extent of the repairs which are necessary and should be performed by Norfolk Southern have not been agreed to by the parties.

II. HISTORY OF THE PROCEEDING

By Order entered April 9, 2015 (“*April 9 Order*”), the Commission instituted, upon its own motion, an investigation for purposes of determining all matters relating to the condition and disposition of six (6) existing rail-highway crossings over and above the grade of the tracks of the Canadian Pacific Railroad (“Canadian Pacific”)³ in portions of Susquehanna and Lackawanna County. These structures included:

<u>Highway Name</u>	<u>DOT No.</u>	<u>Municipality/ County</u>
T-821 (Old Lackawanna Trail)	263 952 J	Great Bend Twp., Susquehanna
SR 1018 (Old Lackawanna Trail)	264 028 V	New Milford Twp., Susquehanna
SR 2032 (Depot Street)	264 033 S	Brooklyn Twp., Susquehanna
SR 2041 (Glenwood Street)	264 292 D	Hop Bottom Borough, Susquehanna
SR 2017 (Station Hill Road)	264 291 W	Lathrop Twp., Susquehanna
SR 4005 (Seamans Road)	265 849 D	Benton Twp., Lackawanna

The *April 9 Order* directed, *inter alia*, the Pennsylvania Department of Transportation (“PennDOT”) to perform an in-depth load rating analysis on all six of the subject structures, that Canadian Pacific (or its successors or assigns) pay, at its sole cost and expense, 20% of the total cost of the National Bridge Inspection Standards (“NBIS”) inspection for the T-821 Bridge, and that “any assignments for maintenance previously assigned to any party of record in any prior Commission Orders or Secretarial Letters remain in full force and effect.” *April 9 Order* at 3.

A protective order and modifications to the *April 9 Order* were granted by Order entered December 15, 2017. PennDOT served its NBIS inspection reports and load rating analysis reports for the subject structures on March 2, 2016, which were approved by Secretarial Letter issued April 5, 2016.

By Order dated February 28, 2017, Administrative Law Judge David A. Salapa granted the joint request of the PennDOT and Norfolk Southern to refer to mediation this matter and the

³ Norfolk Southern purchased the line from Canadian Pacific in September 2015 and calls it the “D&H Line.” NS St. No. 1 at 3.

related proceeding at Docket No. M-2013-2364201. A mediation session took place among the parties on June 21, 2017, but proved unsuccessful. Both matters were subsequently transferred back to the Office of Administrative Law Judge for further processing and hearing.

A prehearing conference was held on September 22, 2017, at which time a procedural schedule was established and other matters were discussed, including consolidation of the proceedings at I-2015-2472242 and M-2013-2364201. On September 25, 2017, Judge Salapa issued Prehearing Order #2 confirming the procedural schedule adopted at the prehearing conference and consolidating the proceedings for purposes of hearing and decision.

On December 19, 2017, PennDOT requested that the Commission affirm the closing of the T-821 Bridge to pedestrian and vehicle traffic due to a recent inspection which revealed severe deterioration, particularly in the critical bearing area under the superstructure, on the structure's abutment. The Commission affirmed PennDOT's action to close the bridge by Secretarial Letter issued January 4, 2018.

On January 23, 2018, Judge Salapa issued Corrected Prehearing Order #3 which established a revised litigation schedule pursuant to a request from PennDOT, NS, and the Commission's Bureau of Investigation and Enforcement ("I&E") to allow the completion of scheduled biennial inspections on the bridges at issue.

In accordance with the procedural schedule, various parties submitted direct testimony on March 16, 2018 and rebuttal testimony on April 6, 2018. Great Bend presented the direct and rebuttal testimony of one witness, Brian O'Connor, Chairperson of the Township's Board of Supervisors.⁴ An evidentiary hearing was held in Harrisburg on April 24, 2018, at which time

⁴ See Great Bend St. Nos. 1 and 1-R.

Great Bend's testimony was admitted into the record without objection.⁵ A transcript of 249 pages was created.

Great Bend submits this Main Brief in accordance with the briefing parameters and schedule established by Prehearing Order #2 dated September 25, 2017 and Corrected Prehearing Order #3 dated January 23, 2018. Great Bend limits its discussion to matters related to the T-821 Bridge and takes no position with respect to the other structures at issue in this consolidated proceeding.

⁵ Tr. 16.

III. STATEMENT OF QUESTIONS INVOLVED

1. Which party is responsible for current inspection, maintenance, repair, and rehabilitation of the T-821 Bridge and related costs, and what is the scope of necessary repairs to be performed?

Suggested Answer: Norfolk Southern bears maintenance and cost responsibility for the bridge, and the scope of work to be performed by Norfolk Southern should include all priority code items identified in the December 19, 2017 inspection report for the T-821 Bridge, with the exception of items related to the roadway features.

2. Which party or parties should be assigned responsibility for future inspection, maintenance, repair, and replacement of the T-821 Bridge and related costs?

Suggested Answer: Consistent with prior Commission Orders, Norfolk Southern should be assigned future responsibility to perform, at its sole cost and expense, all work and furnish all materials necessary to inspect, maintain, repair, and replace the T-821 Bridge, except for the bituminous roadway wearing surface which should continue to remain the responsibility of the Township.

IV. SUMMARY OF ARGUMENT

For more than a century, Norfolk Southern and its predecessor railroads have been charged with and assumed maintenance and cost responsibility for the T-821 Bridge. Norfolk Southern's recent acquisition of the D&H Line from Canadian Pacific, including its structures, does not change that responsibility, nor does it warrant a shifting of that responsibility to other parties. Great Bend has never had any ownership interest or maintenance responsibility for the bridge, besides maintaining the roadway surface that traverses the bridge, and that should not change.

A December 2017 PennDOT inspection concluded the T-821 Bridge is severely deteriorating, and, as a result, the bridge has been closed to vehicular and pedestrian traffic since that time. The inspection report identified a significant amount of repair and maintenance work that needs to be undertaken to ensure the bridge's safety and integrity.

Pursuant to the Commission Orders addressing the T-821 Bridge which are controlling, Norfolk Southern bears current responsibility for inspecting, maintaining, repairing, and rehabilitating the bridge and all attendant costs, a responsibility it does not dispute. Concomitantly, it is imperative that any maintenance and repair work include, at a minimum, all priority items identified in the inspection report.

The Commission's prior Orders also resolve the question of future maintenance and cost responsibility. If, however, that question is considered unresolved, Norfolk Southern bears the burden of proof in demonstrating why a change in the current assignment of responsibilities for this bridge is warranted. Based upon a consideration of relevant factors, it is just and reasonable to assign Norfolk Southern all future maintenance and cost responsibilities for the T-821 Bridge, except for the roadway wearing surface which should remain responsibility of the Township.

V. ARGUMENT AND DISCUSSION

A. Overview of the T-821 Bridge and Old Lackawanna Trail

The T-821 Bridge is a steel thru-girder bridge carrying Old Lackawanna Trail (Township Road T-821)⁶ above the grade of Norfolk Southern's track (the D&H Line), located approximately two (2) miles south of the border between the Township and Hallstead Borough.⁷ The bridge has steel sides that rise approximately four (4) feet above the road surface, and there are no sidewalks along this road or on the bridge.⁸

The bridge is severely deteriorating and has been closed since December 2017 to vehicular and pedestrian traffic due concerns about the bridge's safety and integrity.⁹ A PennDOT inspection in late 2017 concluded, among other things, that the bridge abutment was showing signs of severe deterioration, particularly in the critical bearing area under the superstructure.¹⁰ PennDOT witness Babinski elaborated on the inspection's findings and the severity of bridge's condition: **[BEGIN CONFIDENTIAL]**

[REDACTED]

⁶ Old Lackawanna Trail is a Township ordained and maintained roadway and serves as one of the main thoroughfares through the Township. The road runs roughly north/south and parallel to State Route 11 and normally handles a large volume of traffic on a daily basis. The road consists of a two lane paved roadway with smaller dirt shoulders. The posted speed limit on the road and the T-821 Bridge is 40 miles per hour. Great Bend St. No. 1 at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; see also PennDOT St. No. 2A at 32 and Confidential PennDOT Exh. E-7 (T-821 Inspection Report).

¹⁰ Docket No. 1-2015-2472242 (Secretarial Letter dated Jan. 4, 2018); Great Bend St. No. 1 at 4.

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]¹¹

The bridge's present condition is the result of maintenance and repairs that were deferred or avoided by the D&H Line's prior owner, the Delaware and Hudson Railway Company, Inc. (owned by Canadian Pacific).¹² Unfortunately for the Township, the railroad's avoidance of its obligations and duties for the T-821 crossing has led to the closure of the bridge and created a large disruption to the community in and around Great Bend area. Old Lackawanna Trail is a road of paramount importance to the Township and Susquehanna County generally, as a large percentage of the Township's residents live along or immediately off of Old Lackawanna Trail.¹³ The residents living on or along Old Lackawanna Trail have experienced a considerable detour to reach many local amenities such as the grocery store, gas stations, or the local bank, with some residents now saddled with detours of up to ten (10) miles.¹⁴

The T-821 Bridge and Old Lackawanna Trail are also a critical access point for local traffic to access the Blue Ridge School complex, which is located to the south of Great Bend in New Milford Township on one of the side roads.¹⁵ As Great Bend witness O'Connor explained:

¹¹ PennDOT St. No. 2A at 31 and Confidential PennDOT Exh. E-7 (T-821 Inspection Report).

¹² NS St. No. 1 at 3; Tr. 178.

¹³ Great Bend St. No. 1 at 5. Indeed, many of the Township's side roads can only be accessed via Old Lackawanna Trail. *Id.*

¹⁴ *Id.* at 5-6.

¹⁵ PennDOT St. No. 1 at 30; PennDOT St. No. 2 at 22; Great Bend St. No. 1 at 5.

Of the three access routes to Old Lackawanna Trail, two (2) of them have a bridge over Norfolk Southern tracks (one being the Township Bridge in question) and one of them has an "at grade" crossing [*i.e.* T-698]. This is important because school buses are unable to use the "at grade" crossing due to the proximity to State Route 11. As a result, with the closure of the Township Bridge, school buses are now limited to one access route to the school complex. If an issue were to arise at the southern bridge (which is located in New Milford Township) [*i.e.* the State Route 2018 bridge in this proceeding], our area's students would not be able to get to or from the school, which poses significant concerns over safety in emergency situations.¹⁶

Local emergency services now have a significant detour in order to respond to issues in the area. While the Township has worked to coordinate with the local 911 Communication Center and the local State Police Barracks, response times for emergency services have been severely hampered. Mr. O'Connor provided one example where ambulances were dispatched to a "CPR in progress" call, but could not use the quickest and most direct approach via the T-821 Bridge due its closure. Instead, the emergency responders had to use a more circuitous route via the T-968 "at grade" crossing, where one of the responding ambulances lost valuable time waiting for a passing train.¹⁷

Finally, because Old Lackawanna Trail can be used as a bypass/detour route in the event there is an accident or other incident on Route 11 between the points where Old Lackawanna Trail intersects with State Routes 11 and 1018,¹⁸ there is a significant threat to the public safety as long as the T-821 Bridge remains closed.

¹⁶ Great Bend St. No. 1 at 5; *see also* PennDOT St. No. 5 at 9 (raising issues with the alternative routes created by the T-821 Bridge closure); Tr. 242-43 (confirming that the T-698 at-grade crossing does not provide sufficient room for school buses to cross).

¹⁷ Great Bend St. No. 1 at 6.

¹⁸ Great Bend St. No. 1-R at 6; PennDOT St. No. 1 at 30.

B. Norfolk Southern Is Responsible for Current Inspection, Maintenance, Repair, and Rehabilitation of the T-821 Bridge and All Attendant Costs

1. Prior Commission Orders

There are a series of Commission Orders relating to the T-821 Bridge. In 1915, the Commission's predecessor, the Public Service Commission, approved an application of the Delaware, Lackawanna and Western Railroad Company ("DL&W") to abolish two at grade crossings in the Township and construct a new above grade crossing. In approving the application, the Public Service Commission ordered the railroad to bear full responsibility for the construction, maintenance, and repair of the crossing and all attendant costs.¹⁹

In 1979, the Township filed a complaint against Consolidated Rail Corporation ("Conrail") for failure to properly maintain the T-821 Bridge, citing damage to the southwest wing wall of the bridge. The Commission ordered Conrail, at its cost and expense, to reconstruct the southwest wing wall and remove any unsound concrete in the lower portion of the wing wall. The Commission also ordered Conrail, at its sole cost and expense, to perform all work and furnish all materials necessary to maintain the T-821 crossing, including the bridge substructure and superstructure, exclusive of the bituminous roadway wearing surface.²⁰

By Order entered February 22, 1985, the Commission amended its Order entered August 14, 1980 at Docket No. C-79081404 to transfer responsibilities for the rail line and all related maintenance and costs from Conrail to the Delaware and Hudson Railway Company, ordering that "the Delaware and Hudson Railway Company, at its sole cost and expense, do all work and furnish all materials necessary thereafter to maintain its railroad facilities at the crossing, including the bridge substructure and superstructure, exclusive of the bituminous roadway

¹⁹ *T-821 1915 Order*; PennDOT Exh. D-12.

²⁰ *T-821 1980 Order*; PennDOT Exh. D-10.

wearing surface.”²¹ The railroad also was ordered to provide monthly inspection reports to the Commission identifying the width of the crack opening and distance, if any, that the top portion of the wall pushes out from its original position. The Commission specifically denied the railroad’s attempt to have another party assume maintenance responsibility.²²

In its *April 9 Order* initiating the investigation at the instant docket, the Commission reaffirmed the railroad’s ongoing maintenance and cost responsibilities for the T-821 Bridge, ordering that “any assignments for maintenance previously assigned to any party of record in any prior Commission Orders or Secretarial Letters **remain in full force and effect**.”²³ The *April 9 Order* also directed PennDOT to inspect the six bridges at issue in this proceeding and ordered Norfolk Southern’s immediate predecessor, Canadian Pacific, to provide flagging for the inspection at its initial cost.²⁴

Most recently, the Commission affirmed PennDOT’s decision to close the T-821 Bridge to all traffic as of December 19, 2017 and directed PennDOT, at its initial cost and expense, to maintain the closure.²⁵

2. There is No Dispute over Responsibility for Present Repair, Rehabilitation, Maintenance and Costs for the T-821 Bridge

Based on the Commission’s prior Orders, there is no dispute in this proceeding over which party bears sole responsibility for present inspection, repair, rehabilitation, maintenance and costs for the T-821 Bridge – that being Norfolk Southern, as successor to the Delaware and

²¹ *T-821 1985 Order*; PennDOT Exh. D-11.

²² *Id.*

²³ *April 9 Order* at 3 (Order ¶ 7) (emphasis added) (PennDOT Exh. D-1). The prior Commission Orders include the *T-821 1985 Order* (PennDOT Exh. D-11), *T-821 1985 Order* (PennDOT Exh. D-10), and *T-821 1915 Order* (PennDOT Exh. D-12).

²⁴ *Id.*

²⁵ Docket No. I-2015-2472242 (Secretarial Letter dated Jan. 4, 2018).

Hudson Railway Company (owned by Canadian Pacific). In fact, Norfolk Southern has acknowledged and accepted this responsibility and has agreed to perform and pay for repair work on the T-821 Bridge.²⁶ Accordingly, for the avoidance of doubt, the Commission should issue an order affirming that Norfolk Southern is responsible, at its sole cost and expense, for performing all work and furnishing all materials necessary to maintain, repair and rehabilitate the T-821 crossing structure (DOT # 263 952 J) to ensure its structural integrity and safety.

3. The Scope and Extent of Necessary Repairs to be Performed

It is indisputable that considerable repairs to the T-821 Bridge are required to ensure the bridge is adequate for the safety, accommodation, and convenience of railway, highway, and pedestrian traffic. However, the scope and extent of which repairs are necessary and should be performed is unsettled.

Norfolk Southern developed plans to repair the bridge seat and abutment on both sides of the bridge and scale loose concrete off each through girder. No painting of the through girder would be done. The estimated cost for the work is \$200,000, with an estimated completion and bridge reopening date of September 30, 2018.²⁷ Norfolk Southern advised that it would perform additional work on the crossing as a “further incentive,” but only if future maintenance responsibilities are assigned to the Township at this time. This additional work would include “plat[ing] the three areas on the web where there is 100 percent section loss, install[ing] guiderail

²⁶ NS St. No. 1 at 5; Tr. 196.

²⁷ NS St. No. 1 at 9; NS Exh. 1. I&E questioned why NS did not provide an estimate to simply brace the near right corner of the bridge and suggested this alternative approach would allow the bridge to be reopened to vehicular traffic, while a long-term effort to repair and/or replace the bridge was undertaken. I&E argued that NS should be directed to undertake the bracing approach immediately to address the needs of the public. I&E St. No. 1-R at 5. Great Bend supports this alternative approach, so long as it accelerates the reopening of the bridge and is done in conjunction with a full rehabilitation of the bridge in accordance with PennDOT’s December 19, 2017 inspection report.

on each side inside through girder to protect the knee bracing as well as fill[ing] the void and seal[ing] the spalling section loss on the underside of the deck between floor beams 10 and 11.”²⁸

While Norfolk Southern claims this additional work is not necessary at this time, this type of work appears to be the precise kind of maintenance and repairs that Norfolk Southern is already charged with responsibility for under the Commission’s existing Orders to ensure the safety and structural integrity of the bridge and, thus, should be done at this time irrespective of assignment of any future maintenance responsibilities. Otherwise, the Township and general public would be left with the burden of completing work that should have been done by Norfolk Southern in the first place.²⁹ Moreover, as I&E witness DiCarlantonio recognized, “the idea that that NS can ‘incentivize’ the Commission to act in a way favorable to the railroad is inappropriate.”³⁰ The Township also has trouble reconciling how this additional “incentive” work is not necessary when Norfolk Southern specifically includes this work for purposes of estimating the additional useful life of the T-821 Bridge at 20 years.³¹ In fact, Norfolk Southern admitted that the repairs it has proposed (*see* NS Exh. 1.) would merely get the bridge back in service and not achieve the purported useful life.³²

While Norfolk Southern’s plans are a step in the right direction, they are not sufficient to satisfy the findings of PennDOT’s most recent inspection report which was mandated by the

²⁸ NS St. No. 1 at 11-12.

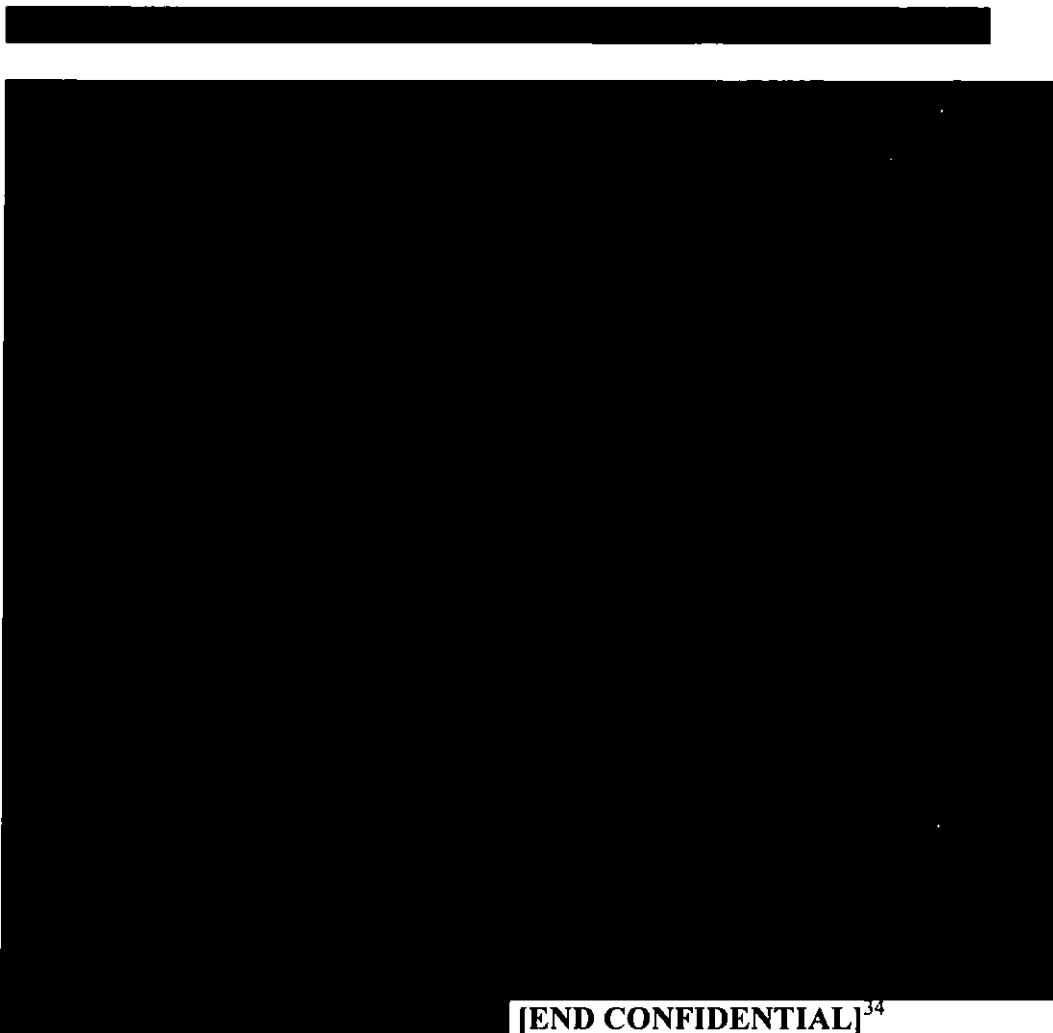
²⁹ PennDOT St. No. 4 at 8.

³⁰ I&E St. No. 1-R at 4.

³¹ *See* NS St. No. 1 at 11-12.

³² Tr. 203-04, 210-11. At hearing, Mr. Hauschildt further admitted that additional work would have to be done in the near future to extend the useful life of the bridge. Tr. 211. However, this is the very same additional work that Norfolk Southern has said it would only be willing to perform should future maintenance responsibilities be assigned to the Township at this time. *See* NS St. No. 1 at 11-12.

Commission as part of this proceeding.³³ PennDOT witness Babinski explained the current priority maintenance items for the T-821 Bridge in light of the recent inspection: **[BEGIN CONFIDENTIAL]**



All of these items, irrespective of their priority code, underscore the significant amount of repair and maintenance work that needs to be undertaken on the T-821 Bridge and which should not and cannot be avoided by Norfolk Southern. The fact that Norfolk Southern's predecessor left a lot of "deferred maintenance" is not an excuse for Norfolk Southern to shirk its

³³ See Confidential PennDOT Exh. E-7.

³⁴ PennDOT St. No. 2A at 32-33; see also Confidential PennDOT Exh. E-7.

responsibilities or to perform only some of the required work. Nor should the Commission be forced to incentivize Norfolk Southern to undertake “additional” work for which it is already charged responsibility. Any maintenance and repairs should be done with the goal of extending the useful life of the bridge as long as possible.

Mr. Babainski elaborated on the shortcomings of Norfolk Southern’s repair plans thusly:

It appears that the work that NS is proposing will address the majority of the priority 1s and 2s from the inspection reports. It’s difficult to be sure given the vague descriptions. They do not address all the structural elements requiring repair that will continue to drive low bridge ratings. Without addressing barrier connection, abutment deterioration and major wing spalls, the structures will continue to deteriorate at an ever-accelerating pace. Priority 3 items in those areas will worsen to the priority 2 and 1 categories bringing us back to this same situation requiring action be taken within the specified time frames.³⁵

Without a full rehabilitation which greatly reduces or even stops deterioration, the work proposed by Norfolk Southern will not result in the anticipated 20 year service life. To achieve that level of useful life, the work needs to be as complete as possible.³⁶ Moreover, any and all work should be discussed with PennDOT, as it volunteered, before construction begins to ensure that the crossing structure is designed to meet state and/or national standards.³⁷

For these reasons, Great Bend submits that the Commission should order Norfolk Southern to perform all Priority 1, 2, and 3 items identified in the T-821 inspection report by September 30, 2018, to be followed by completion of the remaining items (Priority code 4 and above) within a reasonable time frame not to exceed two years. Once Norfolk Southern

³⁵ PennDOT St. No. 4 at 1.

³⁶ *Id.* at 2 and 8.

³⁷ *Id.* at 2.

completes the Priority 1, 2, and 3 items, the Township will address the roadway features for which it has traditionally maintained responsibility.³⁸

C. **The Commission Should Assign Norfolk Southern Responsibility for Future Maintenance and Costs Related to the T-821 Bridge Consistent with Past Practice and Commission Orders**

1. **Future Maintenance and Cost Responsibility Has Already Been Determined**

The primary issue in dispute for the T-821 Bridge concerns the assignment of future maintenance and cost responsibility. This issue, however, has already been determined. In particular, the Commission's *April 9 Order* opening an investigation into the condition and disposition of the six subject rail-highway crossings did not also institute an investigation into the assignment of future maintenance responsibilities of these crossings. The Commission, instead, specifically ordered that "any assignments for maintenance previously assigned to any party of record in any prior Commission Orders or Secretarial Letters **remain in full force and effect.**"³⁹ Indeed, the Commission did not need to include the issue of future responsibility as part of its investigation because the Commission's Orders with respect to the T-821 Bridge clearly assign all future maintenance and cost responsibilities to the railroad,⁴⁰ and these orders remain controlling. This is in direct contrast to other rail-highway crossing investigations instituted by the Commission *sua sponte* where future responsibility was to be investigated.⁴¹

³⁸ See *id.* at 8.

³⁹ *April 9 Order* at 3 (Order ¶ 7) (emphasis added).

⁴⁰ See Section V.B.1., *supra*.

⁴¹ See, e.g., *Investigation upon the Commission's own motion to determine the condition, disposition and responsibility for maintenance of the existing railroad bridge structure at the public grade-separated crossing (DOT 148 962 B) where SR 4035 (Yellow Dog Road) crosses below grade, the abandoned rail line of the Buffalo and Pittsburgh Railroad, Inc. in West Franklin Township, Armstrong County, Docket No. I-2014-2405193 (Order entered Mar. 6, 2014) (ordering an investigation into all matters relating to the condition and disposition of a rail-highway crossing structure, "as well as the assignment of responsibilities for future maintenance of the crossing structure")*; *Investigation upon the Commission's own motion to determine the condition, disposition and*

Accordingly, the Commission, consistent with its prior Orders, should affirm that Norfolk Southern is responsible for all future maintenance and cost responsibilities related to the T-821 Bridge, with the exception of the bituminous roadway wearing surface which should remain the responsibility of the Township.

2. Assuming *Arguendo* the Issue Has Not Been Decided, the Commission Should Nevertheless Assign Future Maintenance and Cost Responsibility to Norfolk Southern

Assuming *arguendo* the issue of future maintenance and cost responsibility is properly at issue in this proceeding (and Great Bend submits that it is not), the Commission, nevertheless, should assign future maintenance and cost responsibility to Norfolk Southern, in accordance with past practice and Commission Orders.

a. Burden of Proof

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the proponent of a rule or order has the burden of proof in that proceeding. It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa.Cmwlt. 1990); 66 Pa.C.S. § 332(a). As the proponent advocating for a change in the current assignment

responsibility for maintenance of the existing crossing structure carrying State Route 0029 (Chestnut Street) above the grade of the tracks of Norfolk Southern Railway Company in Upper Milford Township, Lehigh County (DOT 592 397 V), Docket No. I-2009-2099992 (Order entered Aug. 13, 2009) (same); Investigation upon the Commission's own motion to determine the condition and disposition of the existing crossing structure carrying Rockland Avenue above the grade of the tracks of National Railroad Passenger Corporation in the Borough of Narberth, Montgomery County (DOT 531 276 F), Docket No. I-2008-2055379 (Order entered Aug. 12, 2008) (directing that a hearing be held to receive testimony relating to all matters pertaining to the subject crossing, including the feasibility of any necessary repairs, removal of the bridge and/or future maintenance responsibilities); Investigation upon the Commission's own motion into matters pertaining to the proper service, accommodation, convenience and safety of the traveling public using the roadway where S. R. 3018 (518 087 D, Herr Street) passes below the tracks of Norfolk Southern Railway Company in the City of Harrisburg, Dauphin County, Docket No. I-00070113 (Order entered June 8, 2007) (finding that because adequate assignment of maintenance responsibility for the subject crossing was not established, “an investigation should be instituted and a hearing held to receive testimony relative to any immediate repair, assignment of future responsibilities and allocation of costs”).

of responsibilities for this bridge, Norfolk Southern has the burden of proof in this proceeding and, therefore, the duty to establish facts by a “preponderance of the evidence.”⁴² Norfolk Southern has failed to carry its burden, as there is insufficient evidence establishing that a departure from over 100 years of precedent for this bridge is warranted.

b. Legal Standards

Section 2702 of the Public Utility Code authorizes the Commission to order the construction, reconstruction, alteration, repair, protection, suspension, or abolition of a rail highway crossing, as well as to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. § 2702; *Southeastern Pa. Transp. Auth. v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991). Section 2702(b) further empowers the Commission to determine and prescribe the manner in which a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated, or protected. 66 Pa.C.S. § 2702(b). The Commission also has authority to assess the costs of any work it orders performed upon the concerned public utilities, municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2702(c), 2704(a).

In apportioning costs in rail/highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration, the only requirement being that its order must be just and reasonable. *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, 778 A.2d 785 (Pa. Cmwlth. 2001); *AT&T v. Pa. P.U.C.*, 737 A.2d 201 (Pa. 1999); *East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988). In *Greene Twp. v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995), the Commonwealth Court outlined the following relevant factors consistently

⁴² *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, supra*.

considered by the Commission in cost allocation cases: (1) which party built the crossing and whether the roadway existed before or after the construction of the crossing; (2) the party that owned and maintained the crossing; (3) the relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. *Id.* at 619 (citations omitted). The Commission also has considered: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation. *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered Apr. 9, 1981).

While the Commission has considered the foregoing factors in prior cases, the Commission has discretion in determining which factors are relevant in assessing costs within the context of the particular case before it. *See PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1163 (2002) (citing *AT&T, supra*).

c. Analysis of Relevant Factors

Party that built the crossing and whether the roadway existed before or after the construction of the crossing

The evidence of record clearly establishes that Norfolk Southern's predecessor railroad, DL&W, designed and built the T-821 Bridge.⁴³ Moreover, the *T-821 1915 Order* confirms that Old Lackawanna Trail did not exist until after the construction of the crossing structure.⁴⁴

Party that owned and maintained the crossing

Although Norfolk Southern contends that the owner of the T-821 Bridge is the

⁴³ NS St. No. 1 at 3; PennDOT St. No. 3 at 6; PennDOT Exh. D-12.

⁴⁴ *T-821 1915 Order*, 1 PA PUC at 362 ("A new public highway is to be laid out to connect the Upper Road and Lower Road with this above grade crossing.).

Township,⁴⁵ the Township has never had any ownership or management interest in this bridge.⁴⁶ The T-821 crossing structure was built by Norfolk Southern's predecessor, DL&W, pursuant to Commission approval at Docket No. 321, 1914.⁴⁷ Conrail, Delaware and Hudson Railway Company (owned by Canadian Pacific), and, most recently, Norfolk Southern were successors in interest to DL&W and its rail line and crossing structures.⁴⁸ For more than 100 years, the railroads have maintained the D&H Line and the crossing structures along it.⁴⁹ As such, the Township submits that Norfolk Southern is the owner of the T-821 Bridge.

More significantly and irrespective of ownership, Norfolk Southern and its predecessors have always been assigned and charged, at their sole cost and expense, the responsibility to perform all work and furnish all materials necessary to make repairs and maintain the crossing, except for the bituminous roadway wearing surface.⁵⁰ Nothing has changed to warrant a departure from that practice. Consistent with its prior Orders concerning this structure, the Commission should assign future maintenance and cost responsibility to Norfolk Southern.

Relative benefit conferred on each party with the construction of the crossing

Norfolk Southern receives the greatest benefit from the construction of the crossing structure. The T-821 Bridge unquestionably is "used and useful" to Norfolk Southern because it provides the railroad with all the attendant benefits of a grade separated crossing. The railroad built these structures to increase efficiency and decrease costs and to realize a safer crossing at

⁴⁵ See NS St. No. 1 at 10.

⁴⁶ Great Bend St. Nos. 1 at 7 and 1-R at 3.

⁴⁷ See *T-821 1915 Order*, PennDOT Exh. D-13.

⁴⁸ See Great Bend St. Nos. 1 at 7 and 1-R at 3.

⁴⁹ Great Bend St. No. 1 at 6-7.

⁵⁰ *April 9 Order* at 3 (Order ¶ 7); *T-821 1985 Order* (PennDOT Exh. D-11), *T-821 1985 Order* (PennDOT Exh. D-10), and *T-821 1915 Order* (PennDOT Exh. D-12).

the highway,⁵¹ and this continues to be the case today. The above grade crossing permits Norfolk Southern to enjoy the benefit of running, without interruption or detour, 6-8 trains per day on the track at 40 mph through this crossing,⁵² a benefit it continues to receive even with the current closure of the bridge. For these same reasons, Norfolk Southern would also be the prime benefactor if the bridge were removed and/or converted to an at-grade crossing (something that would be a detriment to the Township and traveling public).⁵³ The bridge also relieves Norfolk Southern of the burden and costs associated with maintaining gates, warning devices, and lights that would be present an at-grade crossing.⁵⁴ Lastly, the railroad benefits because use of the bridge precludes any possibility for accidents which would occur if an at-grade crossing existed. Tr. 212.

For the Township, the T-821 Bridge serves as a critical access point for local traffic to access the aforementioned Blue Ridge School complex coming from the north.⁵⁵ For the public, it provides a convenience to local vehicular traffic. All parties, however, benefit from the above grade T-821 Bridge in that it is the safest type of rail-highway crossing and eliminates the chance of a train-vehicle collision.⁵⁶

Moreover, the condition and closure of the bridge – due to the deliberate inaction of the prior railroad – has significantly harmed the Township and public at large for the reasons discussed in Section V.A. above. It has also disadvantaged the Township and the traveling

⁵¹ PennDOT St. No. 3 at 7.

⁵² NS St. No. 1 at 4.

⁵³ Tr. 213 (confirming train performance would stay exactly the same).

⁵⁴ Tr. 202.

⁵⁵ PennDOT St. No. 1 at 30; PennDOT St. No. 2 at 22.

⁵⁶ PennDOT St. No. 2 at 12; Tr. 201.

public by creating significant detours that must now be undertaken.⁵⁷

Because the railroads have been the primary benefactors of the T-821 Bridge, it is just and reasonable to assign future maintenance and costs to Norfolk Southern.

· *Party responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal*

The record evidence conclusively demonstrates that the railroad is solely responsible for the deterioration of the T-821 crossing structure which has led to the need for the existing repair work. As Mr. Hauschildt candidly stated, when Norfolk Southern purchased the D&H Line from Canadian Pacific in September 2015, there was “a lot of deferred maintenance.”⁵⁸ While Norfolk Southern claims it did not receive much information from its predecessor regarding the work performed on the rail line and structures along it,⁵⁹ that appears to be a failure on Norfolk Southern’s part in conducting its due diligence and certainly not the fault of the Township or any other party to this proceeding, and should not serve to shield Norfolk Southern from its maintenance and cost responsibilities for the T-821 Bridge. Consequently, it is wholly appropriate to place maintenance and cost responsibilities squarely on the shoulders of Norfolk Southern.

· *Availability of state or federal funding for the project*

There is no state or federal funding available for maintenance and repairs related to the T-821 Bridge. While Great Bend could apply to the Regional Planning Commission to request the addition of the T-821 Bridge into a transportation improvement plan, there is no guarantee that

⁵⁷ Great Bend St. Nos. 1 at 5-6 and 1-R at 5-6.

⁵⁸ NS St. No. 1 at 3; *see also* Tr. 178.

⁵⁹ *Id.*

funding would be made available.⁶⁰ Instead, the Township would have to compete for funding among all the other local-owned *and* state-owned structures.⁶¹ Moreover, there is typically less state and federal funding dispersed to rural communities, like Great Bend.⁶²

Aside from state or federal funding, the Township does not have any funds budgeted or available to it for any potential cost allocation related to future repair and maintenance of the Township Bridge. Mr. O'Connor explained that:

In the event the Township was to be assigned future cost and maintenance responsibility for the bridge, it lacks the wherewithal to carry out that responsibility. Our yearly road budget for line items such as equipment, machinery, and road maintenance is approximately \$354,000, of which \$198,000 is from Impact Fee money that cannot be guaranteed from year-to-year. The budget is extremely tight, and we often have to push road paving and other projects off because there are insufficient funds available during a given year. If we were to no longer receive money from Impact Fees, we would be in further financial peril. Simply put, we could not and cannot take on the added responsibility of ongoing cost and maintenance for the Township Bridge. It would easily become one of the largest budget line items and place the Township into financial distress.⁶³

Equities of a particular situation

Equity also dictates that Norfolk Southern should bear responsibility for future maintenance and costs, as it appears Norfolk Southern is trying to wash its hands of the responsibilities it acquired as part of its purchase of the D&H Line from Canadian Pacific in September 2015. As part of that transaction, Norfolk Southern acquired not just the track itself, but also all of the structures, including the T-821 Bridge, that were owned by Canadian Pacific and its predecessors on this line, as well as all attendant responsibilities related thereto. It also accepted the line in its present condition, including any deferred or avoided maintenance and

⁶⁰ Tr. 121-22, 135.

⁶¹ Tr. 135.

⁶² Tr. 133.

⁶³ Great Bend St. No. 1 at 8-9.

repairs.⁶⁴ One would have to assume that Norfolk Southern conducted sufficient due diligence and was satisfied with the general condition of the line and the added responsibilities tied thereto when it agreed to purchase the line. Otherwise, it should not have closed on the transaction.

It would be patently unfair and unjust for Norfolk Southern to purchase the D&H Line and now attempt to disclaim ownership of the T-821 Bridge and future maintenance and cost responsibilities related to it. In the same vein, it would be completely inequitable to saddle the Township with responsibility for future maintenance and costs in light of all the factors discussed above, including the more than a century's worth of practice and precedent to the contrary, the inaction and dilatory conduct of Norfolk Southern's predecessor, and the Township's lack of resources. Due to its extremely limited budget and resources, Great Bend is simply not equipped either fiscally or operationally to perform large scale tasks, including bridge repairs and rehabilitation projects,⁶⁵ which could jeopardize the public safety if it were to be assigned future maintenance and cost responsibility. Moreover, the Township and the general public would be left with the burden of completing work that should have been done by the railroad in the first place.⁶⁶

Conclusion

In conclusion, a review of the relevant factors the Commission has considered in prior rail-highway crossing assignment cases still leads to the same just and reasonable conclusion – *i.e.*, that Norfolk Southern should be assigned future maintenance and cost responsibility for the T-821 Bridge, including those related to the substructure and superstructure, and the Township's

⁶⁴ Tr. 178-79.

⁶⁵ Great Bend St. No. 1 at 3. The Township only employs two (2) full-time individuals and one (1) part-time individual for the purpose of road work, and these employees, to keep costs down, often perform their own maintenance rather than using Township money to pay an outside agency. *Id.*

⁶⁶ PennDOT St. No. 4 at 8.

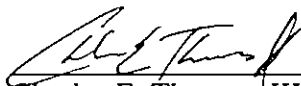
only responsibility should be for the maintenance of the roadway wearing surface on the bridge.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, Great Bend Township respectfully requests that the Pennsylvania Public Utility Commission:

- (1) Affirm Norfolk Southern is responsible, at its sole cost and expense, for performing all work and furnishing all materials necessary to repair and rehabilitate the T-821 crossing structure (DOT # 263 952 J) to ensure its structural integrity and safety;
- (2) Direct the scope of work to be performed by Norfolk Southern shall include all priority code items identified in the December 19, 2017 inspection report for the T-821 Bridge, with the exception of items related to the roadway features; *provided* that all Priority 1, 2, and 3 items shall be completed in a manner satisfactory to the Commission and the bridge reopened to vehicular and pedestrian traffic no later than September 30, 2018, with all remaining priority items (Priority codes 4 and above), with the exception of the roadway features, to be completed in a manner satisfactory to the Commission on or before September 30, 2020;
- (3) Assign (or affirm assignment to) Norfolk Southern all future maintenance and cost responsibility related to the T-821 Bridge, except for the bituminous roadway wearing surface which should remain the responsibility of the Township.
- (4) Grant any additional relief deemed appropriate and consistent with the foregoing.

Respectfully submitted,



Charles E. Thomas, III (PA ID # 201014)
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101
Tel: 717.255.7611
cet3@tntlawfirm.com

Counsel for Great Bend Township

DATED: June 15, 2018

PROPOSED FINDINGS OF FACT

1. Norfolk Southern operates the D&H Line. This rail line and the bridges on it were originally constructed about 1915 by the Delaware, Lackawanna and Western Railroad Company and have had several owners since then, most recently the Delaware and Hudson Railway Company, Inc., owned by Canadian Pacific. NS St. No. 1 at 3.

2. Norfolk Southern purchased the line from Canadian Pacific in September 2015. NS St. No. 1 at 3.

3. Great Bend Township is a small rural township with approximately 1,800 residents, encompassing a large area of land in northern Susquehanna County surrounding the Boroughs of Hallstead and Great Bend. Great Bend St. No. 1 at 4.

The T-821 Crossing

4. The T-821 Bridge is a steel thru-girder bridge carrying Old Lackawanna Trail (Township Road T-821) above the grade of Norfolk Southern's track (the D&H Line), located approximately two (2) miles south of the border between the Township and Hallstead Borough. The bridge has steel sides that rise approximately four (4) feet above the road surface, and there are no sidewalks along this road or on the bridge. Great Bend St. No. 1 at 4.

5. Old Lackawanna Trail is a Township ordained and maintained roadway and serves as one of the main thoroughfares through the Township. The road runs roughly north/south and parallel to State Route 11, normally handles a large volume of traffic on a daily basis, and consists of a two lane paved roadway with smaller dirt shoulders and a posted speed limit of 40 miles per hour. Great Bend St. No. 1 at 4.

6. The T-821 crossing structure was built by Norfolk Southern's predecessor, DL&W, pursuant to Commission approval at Docket No. 321, 1914 NS St. No. 1 at 3.

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PennDOT St. No. 3 at 6; PennDOT Exh. D-12.

7. Old Lackawanna Trail did not exist until after the construction of the crossing structure.

8. A PennDOT inspection on December 19, 2017 concluded that the T-821 bridge abutment was showing signs of severe deterioration, particularly in the critical bearing area under the superstructure. PennDOT subsequently closed the bridge to vehicular and pedestrian traffic, an action which the Commission affirmed in early January 2018. Secretarial Letter dated Jan. 4, 2018; PennDOT St. No. 2A at 32 and Confidential PennDOT Exh. E-7 (T-821 Inspection Report).

9. The inspection report found that the T-821 Bridge: **[BEGIN CONFIDENTIAL]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END CONFIDENTIAL]** PennDOT

St. No. 2A at 31 and Confidential PennDOT Exh. E-7 (T-821 Inspection Report).

10. The bridge's present condition is the result of maintenance and repairs that were deferred or avoided by the D&H Line's prior owner, the Delaware and Hudson Railway Company, Inc. (owned by Canadian Pacific). NS St. No. 1 at 3; Tr. 178.

APPENDIX A

11. The closure of the bridge has created a large disruption to the community in and around area of the Township. Great Bend St. No. 1 at 5.

12. The residents living on or along Old Lackawanna Trail have experienced detours of up to ten (10) miles to reach many local amenities such as the grocery store, gas stations, or the local bank. Great Bend St. No. 1 at 5-6.

13. The T-821 Bridge and Old Lackawanna Trail are a critical access point for local traffic to access the Blue Ridge School complex, which is located to the south of Great Bend in New Milford Township on one of the side roads. PennDOT St. No. 1 at 30; PennDOT St. No. 2 at 22; Great Bend St. No. 1 at 5.

14. As a result, with the closure of the Township Bridge, school buses for the complex are now limited to one access route to the school complex. Great Bend St. No. 1 at 5. Local emergency services also are facing a significant detour in order to respond to issues in and around the Township. Great Bend St. No. 1 at 6.

15. Old Lackawanna Trail can be used as a bypass/detour route in the event there is an accident or other incident on Route 11 between the points where Old Lackawanna Trail intersects with State Routes 11 and 1018. Great Bend St. No. 1-R at 6; PennDOT St. No. 1 at 30.

16. The Township has never had any ownership or management interest in this bridge. Great Bend St. Nos. 1 at 7 and 1-R at 3.

17. Norfolk Southern, as successor to the Delaware and Hudson Railway Company, owns the T-821 Bridge.

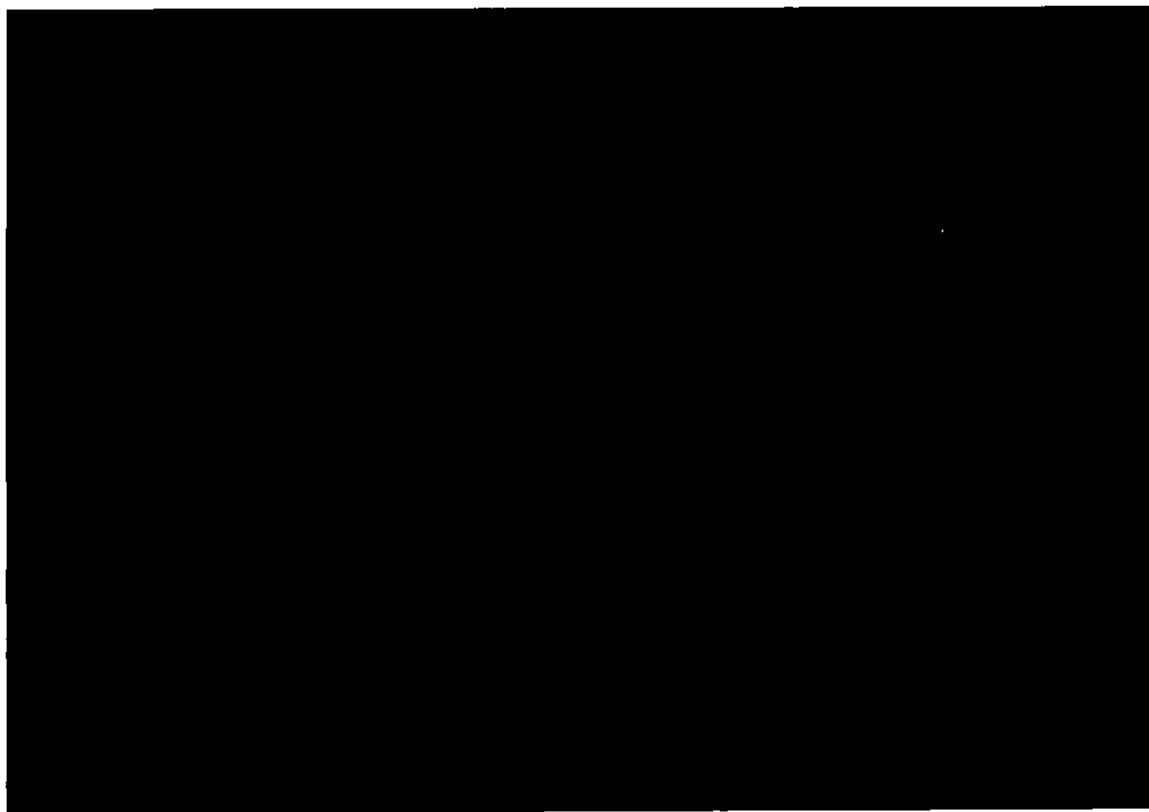
18. Norfolk Southern accepts that it bears sole responsibility for present inspection, repair, rehabilitation, maintenance and costs for the T-821 Bridge and has agreed to perform and pay for repair work on the T-821 Bridge. NS St. No. 1 at 5; Tr. 196.

APPENDIX A

19. Norfolk Southern developed plans to repair the bridge seat and abutment on both sides of the bridge and scale loose concrete off each through girder at an estimated cost of \$200,000 and an estimated completion and bridge reopening date of September 30, 2018. NS St. No. 1 at 9; NS Exh. 1.

20. Norfolk Southern advised that it would perform additional work on the crossing as a "further incentive," but only if future maintenance responsibilities are assigned to the Township at this time. This additional work would include plating the three areas on the web where there is 100 percent section loss, installing a guiderail on each side inside through girder to protect the knee bracing as well as filling the void and sealing the spalling section loss on the underside of the deck between floor beams 10 and 11. NS St. No. 1 at 11-12.

█ The current priority maintenance items for the T-821 Bridge include [BEGIN
CONFIDENTIAL] █



[REDACTED] [END CONFIDENTIAL] PennDOT St. No. 2A at 32-33; *see also* Confidential PennDOT Exh. E-7.

22. Without a full rehabilitation which greatly reduces or even stops deterioration, the work proposed by Norfolk Southern will not result in the anticipated 20 year service life. PennDOT St. No. 4 at 2 and 8.

23. Conrail, Delaware and Hudson Railway Company (owned by Canadian Pacific), and, most recently, by Norfolk Southern were successors in interest to the DL&W and its rail line and crossing structures.

24. The railroad has always owned and maintained the D&H Line and the crossing structures along it.

25. The railroad built these structures to increase efficiency and decrease costs and to realize a safer crossing at the highway, and this continues to be the case today. PennDOT St. No. 3 at 7.

26. The above grade crossing permits Norfolk Southern to enjoy the benefit of running, without interruption or detour, 6-8 trains per day on the track at 40 mph through this crossing, a benefit it continues to receive even with the current closure of the bridge. NS St. No. 1 at 4.

27. The bridge relieves Norfolk Southern of the burden and costs associated with maintaining gates, warning devices, and lights that would be present at an at-grade crossing. Tr. 202.

28. The bridge provides a convenience to vehicular traffic.

29. All parties benefit from the T-821 Bridge in that it is the safest type of rail-highway crossing and eliminates the chance of a train-vehicle collision. PennDOT St. No. 2 at

APPENDIX A

12; Tr. 201.

30. When Norfolk Southern purchased the D&H Line from Canadian Pacific in September 2015, there was a lot of deferred maintenance. NS St. No. 1 at 3; see also Tr. 178.

31. There is no state or federal funding available for maintenance and repairs related to the T-821 Bridge.

32. While Great Bend could apply to the Regional Planning Commission to request the addition of the T-821 Bridge into a transportation improvement plan, there is no guarantee that funding would be made available. Tr. 121-22, 135. The Township would have to compete for funding among all the other local-owned *and* state-owned structures. Tr. 135.

33. There is typically less state and federal funding dispersed to rural communities, like Great Bend. Tr. 133.

34. Great Bend lacks the financial wherewithal to shoulder ongoing costs for the T-821 Bridge due to its tight budget and perilous financial position. Great Bend St. No. 1 at 8-9.

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa. C.S. §§ 2702 and 2704.

2. The Commission has authority, pursuant to 66 Pa.C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension, or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. *Southeastern Pa. Transp. Auth. v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlt. 1991).

3. The Commission is empowered to determine and prescribe the manner in which a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated, or protected. 66 Pa.C.S. § 2702(b).

4. The Commission has authority to assess the costs of any work it orders performed upon the concerned public utilities, municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2702(c), 2704(a).

5. In apportioning costs in rail/highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration, the only requirement being that its order must be just and reasonable. *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, 778 A.2d 785 (Pa. Cmwlt. 2001); *AT&T v. Pa. P.U.C.*, 737 A.2d 201 (Pa. 1999); *East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa.Cmwlt. 1988).

6. Relevant factors to be considered for cost allocation include: (1) which party built the crossing and whether the roadway existed before or after the construction of the crossing; (2) the party that owned and maintained the crossing; (3) the relative benefit conferred

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APPENDIX B

on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. *Greene Twp. v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995).

7. The Commission also has considered (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation. *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered Apr. 9, 1981).

8. A series of Commission Orders addressing the T-821 Bridge assign responsibility for maintenance and costs to the existing railroad, exclusive of the roadway. *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Aug. 14, 1980); *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Feb. 22, 1985); *In the Matter of the Abolition of Grade Crossings of the Delaware, Lackawanna and Western Railroad Company's Tracks over the Cochection and Great Bend Turnpike, and the Construction of a Crossing above Grade in the Township of Great Bend, Susquehanna County*, 1 PA PUC 361, Docket No. A-321, 1914, (Order entered Apr. 8, 1915); *see also* Docket No. I-2015-2472242 (Order entered Apr. 9, 2015).

9. Norfolk Southern, at its sole cost and expense, bears current responsibility to perform all work and furnish all materials necessary to repair and rehabilitate the T-821 crossing structure (DOT # 263 952 J), in compliance with the Commission's Order entered on April 9, 2015 in this proceeding and Order entered February 22, 1985 in *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404.

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10. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa.P.U.C.*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990); 66 Pa.C.S. § 332(a).

11. As the proponent advocating for a change in the current assignment of responsibilities for this bridge, Norfolk Southern has the burden of proof in this proceeding and, therefore, the duty to establish facts by a “preponderance of the evidence.” *Se-Ling Hosierey, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600 (Pa. Cmwlth. 1990).

12. Norfolk Southern has failed to carry its burden, as there is insufficient evidence establishing that a departure from over 100 years of precedent for this bridge is warranted.

13. Based upon consideration of relevant factors, it is just and reasonable to assign to Norfolk Southern all future maintenance and cost responsibilities for the T-821 Bridge, except for the bituminous roadway wearing surface which shall be the responsibility of the Township.

14. The assignment of present and future maintenance and cost responsibilities for the T-821 Bridge are fair, just and equitable to each party.

PROPOSED ORDERING PARAGRAPHS

THEREFORE, IT IS ORDERED:

1. That Norfolk Southern, at its sole cost and expense, perform all work and furnish all materials necessary to repair and rehabilitate the T-821 crossing structure (DOT # 263 952 J), in compliance with the Commission's Order entered on April 9, 2015 in this proceeding;

2. That said repairs shall include all priority items outlined in PennDOT's Inspection Report for the T-821 crossig structure, dated December 19, 2017, as follows:

a. All Priority 1, 2, and 3 items shall be completed in a manner satisfactory to the Commission and the bridge reopened to vehicular and pedestrian traffic no later than September 30, 2018;

b. All remaining priority items (Priority codes 4 and above), with the exception of the roadway features, shall be completed in a manner satisfactory to the Commission on or before September 30, 2020;

3. That upon completion of said repairs, Norfolk Southern, at its sole cost and expense, do all work and furnish all materials necessary thereafter to maintain the T-821 crossing structure, including the bridge substructure and superstructure, exclusive of the bituminous roadway wearing surface which shall remain the sole responsibility of Great Bend Township.

4. That in all other respects not inconsistent herewith, all previous Orders of the Commission pertaining to the T-821 crossing shall remain in full force and effect.

5. That this Order is binding upon the parties hereto and all affected utilities and municipalities, their respective successors, and assigns.

6. That the Commission's own investigation at Docket No. I-2015-2472242 is discontinued, and the Secretary shall mark the docket as closed.

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JUN 15 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of June, 2018, served a true and correct copy of the foregoing document upon the upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54:

Via Email and First Class Mail

Honorable David A. Salapa
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
dsalapa@pa.gov

Benjamin C. Dunlap, Jr., Esq.
Nauman, Smith, Shissler & Hall, LLP
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
bdunlapjr@nssh.com

Tori L. Giesler, Esq.
Teresa K. Harrold, Esq.
First Energy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
tgiesler@firstenergycorp.com
tharrold@firstenergycorp.com

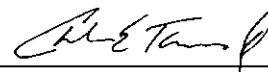
Gina M. D'Alfonso, Esq.
Jennifer Brown-Sweeney, Esq.
Pennsylvania Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
gdalfonso@pa.gov
jbrownswee@pa.gov

Bradley R Gorter, Esq.
Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
bgorter@pa.gov

Donald J. Frederickson, Jr., Esq.
Lackawanna County Administrative Building
200 Adams Avenue, 6th Floor
Scranton, PA 18503
Donald.Frederickson@yahoo.com Michael J.

Anthony P. Litwin, Esq.
24 East Tioga Street
Tunkhannock, PA 18657
plitwin@epix.net

Giangrieco, Esq.
Giangrieco Law, PC
60 Public Avenue
P.O. Box 126
Montrose, PA 18801-0126
judy@giangriecolaw.com



Charles E. Thomas, III (PA ID # 201014)

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