



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 3, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: I-2015-2472242, M-2013-2364201

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Reply Brief* above captioned matter. This filing does not contain facts that are not currently in the record. Therefore, a verification is not required.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Gina M. D'Alfonso".

Gina M. D'Alfonso
Senior Counsel in Charge

Enclosure

220/GMD:igl

Cc: Administrative Law Judge David A. Salapa
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Sarah J. Fenton, District Grade Crossing Engineer, District 4-0
Daniel Leonard, Grade Crossing Engineer, Central Office, CKB 7th floor

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bridge structure where State Route 1025 crosses	:	
over a single track of Delaware and Hudson	:	Docket No. M-2013-2364201
Railway Company, Inc. (264 293 K) in Nicholson	:	
Borough, Wyoming County	:	
	:	
Investigation upon the Commission's own motion	:	
to determine the condition and disposition of six	:	Docket No. I-2015-2472242
(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	:	

**REPLY BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

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DATED: July 3, 2018

I. THE ARGUMENTS OF NORFOLK SOUTHERN DO NOT CHANGE THE CONCLUSION THAT IT IS JUST AND REASONABLE FOR THE RAILROAD TO BE RESPONSIBLE FOR THE MAINTENANCE OF THE SUBJECT BRIDGES.

There is no dispute among the parties that the Public Utility Commission (“Commission”) has jurisdiction over rail-highway crossings. 66 Pa.C.S. § 2702. The Commission also has the exclusive authority to allocate the costs related to the creation, maintenance, repair, replacement, or removal of a crossing. 66 Pa.C.S. § 2704(a). In evaluating a rail-highway matter, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999). Further, the Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs. *See, N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

Even though the parties concur with the law above, Norfolk Southern (“NS”) relies heavily upon the *City of Philadelphia v. Conrail*, 560 Pa. 587, 747 A.2d 352 (2000) for its conclusion that the Commonwealth of Pennsylvania, Department of Transportation (“Department”) should be assigned maintenance responsibilities for the subject bridges. The Department’s Main Brief thoroughly briefs this issue and continues to object to the conclusion that the Department owns the subject bridges. The Commission has interpreted this general rule in *City of Philadelphia* as one which can be overcome by specific evidence of ownership. Further, the Commission is not the entity that can decide disputes as to title in the Commonwealth. *See, Fairview Water Company v. Pa. PUC*, 509 Pa. 384, 502 A.2d 162 (Pa. 1985). *In Re: Investigation into Ridge Pike*, 2001 Pa. PUC LEXIS 210 (Commission Order, October 26, 2001). Even if the Commission were to find

sufficient evidence to support a conclusion that the bridges are owned by the Department, it is only one of many factors that the Commission is free to consider.

NS also relies upon the opinion in *Heinlein v. Allegheny County*, 98 A.2d 36, 39 (1953) to support its proposition that the bridges are owned by the Department. What is lost in this reliance is that the Court was interpreting the State Highway Laws wherein specific roadways were transferred to the Commonwealth. This legislation did not supersede the exclusive authority of the Commission for the assignment of maintenance responsibilities where said roadway/bridge crossed the railroad above grade. State Highway Law, while a factor that may be considered by the Commission, is not controlling. See, *PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1164 (Pa. 2002)

NS further states that because the Department has addressed issues with other bridges on this line in the interest of public safety, that it is in a better position to address the bridges currently before the Commission. This argument is nonstarter because NS can hire the same consultants as the Department to design and construct bridges. NS is correct that the Department is mandated to ensure that bridges that meet federal guidelines are inspected. The requirement applies to bridges that carry state and local roads, regardless of ownership or maintenance responsibility. The Department testified that it will share the inspection reports for these bridges with NS.¹ Dep't St. 4, page 8, lines 17-19. The fact that the Department may receive public complaints regarding a bridge as a reason to assign maintenance responsibility is also a nonstarter. That happens all the time - the Department makes sure that the complaint gets to the right party or if necessary, to the Commission.

¹ A complete reading of the record shows that the Department testified that it would do so. In fact, the Department has already taken steps to ensure that NS receives inspection reports for all bridges that it is required to maintain.

Norfolk Southern has skewed the Department's testimony regarding the funding process. As the steward of public funds, the Department has a myriad of laws and regulations that must be applied and satisfied before a project can progress. These same laws and regulations may result in a bridge being rehabilitated rather than replaced. Satisfying these laws and regulations are time consuming. NS is not obligated to follow those same requirements when using private funds. And yes, when NS is using public funding it must comply with the same laws and regulations. Further, NS is free to reach out to members of the planning organizations seeking support for projects just like municipalities must do. NS is well aware that a vote on a planning organization is not always necessary to get public funding. The bottom line is that the Department has limited funding, especially in this region, so any work that it is ordered to perform will come at the expense of another project that has already been prioritized in this region. Federal funding is not an absolute and cannot be relied upon as a factor for consideration-- and certainly no one can predict the level of funding 25 years from now. For these same reasons, the Department is not in the position to perform any work quickly. Dep't St. 3 generally; Dep't St. 6, page 1, lines 11-21.

The record is replete with evidence that the bridges were built by the railroad, for the benefit of the railroad to handle both freight and passenger service. Department Exhibit I. The cut-off construction was such an undertaking rendering this line historic. The rail traffic has diminished over time² but the responsibilities of the railroad should not. The railroad is now saying that at-grade crossings are sufficient for its need. NS Brief at page 11. What NS's witness stated was that an at-grade crossing would not slow down its train movements. Ironically, NS argues that because the Department did not advocate for at grade crossings at these locations that the conclusion would

² Dep't Ex. I, page 3 states that there were 26 passenger and milk trains, 16 manifest freight and 31 slow freight trains daily. NS St. 1, page 4, line 9.

be that the Department wants bridges. It has been the Department's experience that the railroads, NS included, are always looking for reasons to close at-grade crossings, not to open new ones. See e.g., *N. Lebanon Twp. V. Pa. PUC*, 962 A.2d 1237(Pa. Cmwlth. 2008) Case law is clear that the railroad does in fact receive benefits from grade separated crossings. See Department's Main Brief Section I. iii.

II. THE SCOPE OF WORK SHOULD BE CONSISTENT WITH THE RECOMMENDATIONS MADE BY THE DEPARTMENT.

The Department offered exhaustive testimony as to the scope of repair work required for each of the bridges and why the work needed to be done. See generally Dep't Sts. 2A and 4. As Mr. Babinski testified, the scope of work proposed by NS is unclear and he cannot be sure that what has been proposed by NS addresses all the necessary concrete work. Babinski testified that to "effectively add service life of 25 years that NS refers to, the work needs to be as complete as possible to change and slow down, the current deterioration rate. It would not be a prudent use of funds to only do it half way." Dep't St. 4, page 8, lines 5-7. It was not clear to the Department's expert whether the work proposed by NS addressed all priority 1, 2 and 3 concrete work. The Department needs to be sure that the work will be done effectively (by reviewing plans) before it can agree that a 25-year life is possible. Tr. 100, lines 5-14. In laypersons terms, if you put good concrete over bad, the bad continues to deteriorate at an "ever-accelerating pace. Priority 3 items will worsen to priority 2 and 1 bringing us back to this same situation." Dep't St. 4, page 1, lines 23-25. If all the priority 1, 2 and 3 repairs are performed effectively, then it is possible that the

structures will have another 25 years to allow either party to program replacement or reconstruction.³

In its brief, NS tends to use the terms repair and rehabilitation interchangeably. Repairs, like the priority repairs in the inspection report are for specific bridge features. A bridge rehabilitation brings an entire bridge back to near new or like new condition by repairing all the deficient elements, not just critical elements, like a priority repair. One often sees rehabilitation used hand in hand with reconstruction, as in the State Route 4005 project. Dep't St. 2A, page 29, lines 10-12, 22-25. The estimates that are included in the inspection reports, Dep't Exs. E1-E7, are for the priority repairs, not rehabilitation. Mr. Babinski did clarify that the estimates are on the low side by as much as a factor of 10 and do not address difficulty of site access or work required to support the repair. Tr. Page 65, lines 4-9; Dep't. St. 4, page 3, lines 15-18. The Department did provide the estimate for the repair of State Route 2017 which is indicative of what this level of repair would cost. Dep't Ex. H. Based upon the above, NS's argument on page 16 of its Main Brief is flawed. NS is relying upon admittedly low estimates for repair work found in the inspection reports rather than estimates for rehabilitation.

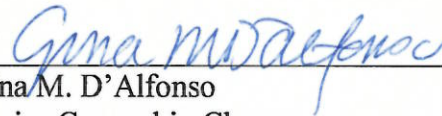
³ Though the preference would be for these structures that are over 100 years old to be replaced in the future, the reality is that the line has been deemed historic and rehabilitation may be the only option. Dep't. St. 2A, page 29, lines 10-12.

CONCLUSION

The Department of Transportation reasserts the relief sought in its main brief. Norfolk Southern Railway Company has not met its burden to support a shift of maintenance responsibilities or the cost thereof.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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Township, Susquehanna County and Benton :	
Township, Lackawanna County :	
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a single track of Canadian Pacific Railroad (264 293 :	
K) in Nicholson Borough, Wyoming County :	Electronically Filed

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's *Reply Brief* was served upon the participants listed below, in accordance with the requirements of 52 Pa. Code § 1.54, by first class mail, postage prepaid this 3rd day of July, 2018.

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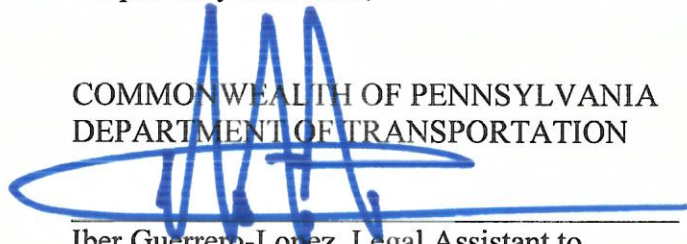
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