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July 3, 2018

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> 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 is the Reply Brief of Great Bend Township in the above-referenced matter. Copies of the Reply 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)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**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 :**

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**REPLY BRIEF OF  
GREAT BEND TOWNSHIP**

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DATED: July 3, 2018

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## **I. INTRODUCTION**

Great Bend Township (“Great Bend” or the “Township”) submits this Reply Brief in further support of the arguments advanced in its Main Brief, filed on June 15, 2018, and in response to matters raised in the Main Brief of Norfolk Southern Railway Company (“Norfolk Southern”) which warrant further discussion. Great Bend’s interest in this proceeding, and thus its discussion herein, is limited to the crossing structure that carries Township Road T-821 (or Old Lackawanna Trail) over the tracks of Norfolk Southern (DOT # 263 952 J) in the Township (the “T-821 Bridge”).

In its Main Brief, Norfolk Southern accepts its responsibility for current repairs and costs for the T-821 Bridge, but contends that future cost and maintenance responsibility for the bridge should be reassigned to the Township following the completion of those repairs. The crux of Norfolk Southern’s argument for cost and maintenance reassignment is premised on the notion that, under Pennsylvania case law, the Township owns the bridge and, thus, has the obligation to maintain it. Norfolk Southern also argues that any current repairs should be ordered in accordance with its assessment of what is necessary, as opposed to the recommendations and findings found in PennDOT’s inspection report for the bridge.

Despite its arguments, reassignment is neither just nor reasonable and Norfolk Southern has failed to carry its burden to prove otherwise. Norfolk Southern has a legal obligation, at its sole cost and expense, for all *present* and *future* repair and maintenance of the T-821 Bridge, exclusive of the roadway features. With respect to present repairs, Norfolk Southern should be ordered to address all priority code items identified in PennDOT’s December 19, 2017 inspection report for the T-821 Bridge (aside from the roadway surface items) regardless of future maintenance and cost responsibility. As for future responsibility, irrespective of the bridge’s

ownership, a consideration and balancing of all relevant factors for allocating responsibilities in rail-highway crossing cases tips the scales heavily in favor of continued assignment of maintenance and cost responsibility to Norfolk Southern.

Except for the limited matters addressed below which warrant supplemental discussion, all of the arguments and matters presented in Norfolk Southern’s Main Brief were thoroughly addressed by Great Bend in its Main Brief. Accordingly, Great Bend refers the presiding Administrative Law Judge and the Public Utility Commission (“Commission”) to Section V of its Main Brief (Great Bend M.B. at 8-25), incorporating by reference the discussion and arguments contained therein, in reply to Norfolk Southern’s Main Brief.

## **II. REPLY TO MAIN BRIEF OF NORFOLK SOUTHERN**

For over 100 years, the Commission has ordered and assigned permanent maintenance and cost responsibility for the T-821 Bridge to Norfolk Southern’s predecessor-in-interest railroads.<sup>1</sup> The Commission’s Order entered April 9, 2015 reaffirmed that the Commission’s prior orders and secretarial letters assigning maintenance for the T-821 Bridge “**remain in full force and effect.**”<sup>2</sup> The *T-821 1985 Order* specifically assigned permanent maintenance and cost responsibility for the bridge to Norfolk Southern’s predecessor-in-interest, Delaware and Hudson Railway Company, and denied the railroad’s petition seeking to have another party assume maintenance responsibility.<sup>3</sup> That assignment remains controlling and is barred by *res*

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<sup>1</sup> Docket No. I-2015-2472242 (Order entered Apr. 9, 2015) (“*April 9 Order*”); *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Feb. 22, 1985) (“*T-821 1985 Order*”); *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Aug. 14, 1980) (“*T-821 1980 Order*”); *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).

<sup>2</sup> *April 9 Order* at 3 (Ordering ¶ 7) (emphasis added); *see also T-821 1985 Order; T-821 1980 Order.*

<sup>3</sup> *T-821 1985 Order.* Future maintenance responsibility for the bridge was a litigated issue among the parties (which

*judicata*. See *Norfolk Southern Railway Co. v. Pa. P.U.C.*, 875 A.2d 1243 (Pa. Cmwlth. 2005) (holding that the validity of 75-year old order requiring a railroad to maintain pedestrian crossing was entitled to res judicata effect). Thus, future maintenance responsibility for the T-821 Bridge is not subject to adjudication as part of the Commission’s investigation at the instant docket.<sup>4</sup>

Even if the issue is ripe for consideration (and Great Bend submits it is not), Norfolk Southern, as the party advocating for a reassignment of responsibility, has the affirmative burden of proving why reassignment should be ordered.<sup>5</sup> Norfolk Southern has failed to carry that burden, as it has failed to provide any evidence of a recent change of circumstances – aside from its purchase of the D&H Line from Canadian Pacific – that justifies the reassignment of its legal obligations to maintain and repair the T-821 Bridge. To the contrary, the record evidence clearly demonstrates that it is just and reasonable to continue to assign maintenance and cost responsibility for this bridge to Norfolk Southern.

**A. Present Maintenance and Repair of the T-821 Bridge**

In its brief, Norfolk Southern argues that any current repairs should be ordered pursuant to its assessment of what it considers necessary, as opposed to the recommendations and findings found in PennDOT’s inspection report for the bridge.<sup>6</sup> Great Bend provided a thorough discussion of this issue in Section V.B.3. of its Main Brief, which it incorporates herein in reply to Norfolk Southern’s Main Brief. As discussed therein, the repair plans developed by Norfolk Southern fail to address or satisfy all of the priority maintenance items identified in PennDOT’s most recent inspection report for the T-821 Bridge which was mandated by the Commission as

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included Great Bend and Norfolk Southern’s predecessor-in-interest) at Docket No. C-79081404.

<sup>4</sup> See Great Bend M.B. at 17-18.

<sup>5</sup> *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990); *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); 66 Pa.C.S. § 332(a).

<sup>6</sup> NS M.B. at 13-17.



part of this proceeding.<sup>7</sup> The contemplated repairs certainly are not “extensive,” as Norfolk Southern would have the Commission believe, but rather only achieve the bare minimum. By Norfolk Southern’s own admission, the repairs would only put the bridge back into service and would not ensure the purported 20-year useful life.<sup>8</sup>

It is imperative that the present repairs on the T-821 Bridge be as comprehensive as possible, while being undertaken as soon as practical in light of the closure and its impact on the surrounding area.<sup>9</sup> The priority maintenance items in the PennDOT inspection report address deficiencies in the bridge that, if left unaddressed, will continue to deteriorate at an ever-accelerating pace and will lead to further action and repairs in the future.<sup>10</sup> Moreover, regardless of how minor or “unnecessary” Norfolk Southern may deem the priority maintenance items to be, the Commission’s directive to Norfolk Southern’s predecessor-in-interest was crystal clear – the railroad shall, “at its sole cost and expense, furnish **all materials** and perform **all work** to maintain” the crossing structure.<sup>11</sup>

Norfolk Southern should not be permitted to evade its duties for work it is already charged with doing. It is equally inappropriate for Norfolk Southern to “incentivize” the Commission to assign future maintenance responsibility to the Township in exchange for completing “additional” work it considers unnecessary at this time.<sup>12</sup> If anything, Norfolk Southern’s position on the scope of appropriate repairs only reinforces the fact that Norfolk Southern should retain future maintenance responsibility for the bridge, so that it can perform the

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<sup>7</sup> See Great Bend M.B. at 13-15

<sup>8</sup> Tr. 203-04, 210-11.

<sup>9</sup> See Great Bend M.B. at 9-10.

<sup>10</sup> PennDOT St. No. 4 at 1.

<sup>11</sup> *T-821 1985 Order* at 2 (emphasis added).

<sup>12</sup> See Great Bend M.B. at 13-14.

“additional” maintenance and repair work when it ostensibly becomes “necessary.” Nonetheless, Norfolk Southern should be ordered to address all priority code items identified in PennDOT’s December 19, 2017 inspection report for the T-821 Bridge (aside from the roadway surface items), regardless of future maintenance responsibilities.

**B. Ownership of the T-821 Bridge**

Norfolk Southern’s main argument for reassignment of future maintenance responsibility is the presumption that Great Bend owns the T-821 Bridge and is, thus, in the best position to maintain the bridge.<sup>13</sup> In support, Norfolk Southern cites the common law rule that ownership of a bridge carrying a public street belongs to the entity which owns the street. *City of Philadelphia v. Consolidated Rail Corp.*, 747 A.2d 352 (Pa. 2000). This rule, however, is only a “general proposition, but by no means universal[.]” *Heinlein v. Allegheny County*, 98 A.2d 36, 39 (Pa. 1953); *see also City of Philadelphia*, 747 A.2d at 355 (Saylor, J., concurring). In a concurring opinion in *City of Philadelphia*, Justice Saylor recognized the problems associated with overcoming the common law rule with respect to older bridges, noting that a party should not be required to produce evidence in the form of a “written deed reflecting title.” *Id.*

It is undisputed that the road traversing the T-821 Bridge (*i.e.*, Old Lackawanna Trail or T-821) is a public road owned by the Township.<sup>14</sup> However, other record evidence demonstrating that the bridge is presumptively owned by Norfolk Southern can be drawn from the following facts: (i) Norfolk Southern’s predecessor-in-interest built the bridge the bridge pursuant to Commission approval, (ii) the Commission ordered the predecessor-in-interest railroads to maintain the bridge at their sole cost, (iii) the railroads have maintained the bridge

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<sup>13</sup> NS M.B. at 18. As discussed below, Norfolk Southern also erroneously contends that Pennsylvania case law provides that maintenance generally falls on the same entity owning the highway. *Id.*

<sup>14</sup> Great Bend St. No. 1 at 4.

since its construction, and (iv) the bridge is “used and useful” to the railroad because it provides, *inter alia*, all the benefits attendant to a grade separated crossing.<sup>15</sup> If anything, given the difficulties in ascertaining title for bridges as old as the T-821 Bridge, there is insufficient evidence on record to verify that any particular party owns the bridge. Absent definitive proof that the Township owns the bridge, the Commission cannot find that the Township is the owner<sup>16</sup> and, thus, should base its decision about future maintenance and cost allocation on other relevant factors.<sup>17</sup>

**C. Relevant Factors for Allocation of Future Maintenance and Cost Responsibility**

Assuming *arguendo* the bridge is owned by the Township, that fact does not shield Norfolk Southern from future maintenance responsibility for the bridge, nor does it mean that responsibility should be reassigned to the Township. It is well within the Commission’s authority to allocate maintenance costs to parties other than the owner of a rail-highway bridge. *Borough of Narberth v. National Railroad Passenger Corp. and Consolidated Rail Corp.*, Docket No. C-77090008, 2003 WL 21135670 (Order entered Apr. 21, 2003). Indeed, ownership of a bridge is not determinative or controlling in the allocation of costs and maintenance responsibilities<sup>18</sup> and is just one of several relevant factors that can be considered by the

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<sup>15</sup> See *Re National Railroad Passenger Corp.*, 75 PA PUC 110, Docket No. I-880077 (Tentative Opinion and Order entered Sept. 20, 1991) (adopting the Recommended Decision of ALJ Herbert S. Cohen dated July 13, 1990, which found a rail-highway crossing bridge was owned by the railroad for similar reasons).

<sup>16</sup> *Investigation upon the Commission's own motion into matters pertaining to the proper service, accommodation, convenience and safety of the travelling public using the bridge carrying Ridge Pike (AAR 532 108 D) over and above the tracks of Consolidated Rail Corporation in Plymouth Township, Montgomery County*, Docket No. I-00980077 (Order entered Oct. 26, 2001) (“*Ridge Pike Investigation*”) (concluding that the *City of Philadelphia* “does not mandate a finding that the owner of the highway which crosses over the bridge is in fact the owner of the bridge in question” and also noting that the Commission is not the tribunal empowered to decide title disputes).

<sup>17</sup> *Id.* (stating that if ownership is not known, the Commission must base its decision on other relevant factors).

<sup>18</sup> *Ridge Pike Investigation, supra.*

Commission, so long as its order is just and reasonable.<sup>19</sup> The Commission typically considers the factors outlined in *Greene Twp. v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995) and *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered Apr. 9, 1981), but has discretion in determining which factors are relevant within the context of the particular case before it.<sup>20</sup>

The Township provided a thorough analysis of relevant factors in Section V.C.2.c. of its Main Brief, to which it refers the Commission and which it incorporates herein by reference in specific response to Norfolk Southern's discussion on pages 18 and 19 of its Main Brief. By way of further reply, Great Bend takes exception to Norfolk Southern's assertion that the entities responsible for maintaining the roads are in a "much better position" to provide maintenance for the bridges which are a part of the same roadways.<sup>21</sup> Norfolk Southern failed to provide any evidence, let alone sufficient evidence, to support this claim as it relates to the T-821 Bridge. In actuality, the record evidence demonstrates that the Township is in a much *worse* position than the railroad, as Great Bend lacks the financial wherewithal and operational resources and expertise to assume bridge maintenance, repair, and rehabilitation projects.<sup>22</sup> Moreover, contrary to Norfolk Southern's contention, there is no state or federal funding available for maintenance and repairs related to the T-821 Bridge, nor is there any assurance that Great Bend would be successful applying for funding even if it were available.<sup>23</sup> Norfolk's Southern's statement about

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<sup>19</sup> *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).

<sup>20</sup> See *PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1163 (2002) (citing *AT&T*, *supra*).

<sup>21</sup> NS M.B. at 7-8, 18.

<sup>22</sup> Great Bend St. No. 1 at 3 and 8-9; Great Bend M.B at 24-25.

<sup>23</sup> Tr. 121-22, 135; Great Bend M.B. at 23-24.

the Township having “more contact with the structure” is equally misplaced, when Norfolk Southern is running 6-8 trains daily through this crossing.<sup>24</sup>

Ultimately, a consideration of relevant factors and the evidence of record leads to the same conclusion – that future maintenance responsibility for the T-821 Bridge should remain with Norfolk Southern. It is imperative, however, that the Commission not overlook the most relevant and compelling factor for not reassigning Norfolk Southern’s maintenance responsibility to Great Bend – *i.e.*, had Norfolk Southern’s predecessor fulfilled its Commission-mandated obligations and maintained and repaired the T-821 Bridge in an appropriate and diligent manner, the bridge never would have deteriorated to its current condition, never would have had to be closed, and likely never would have been subject to the instant investigation by the Commission. Due to the railroad’s deliberate refusal to obey its duties, Norfolk Southern, as successor-in-interest, is responsible for the deterioration of the structure and its need for repairs<sup>25</sup> and, therefore, must be held accountable. *See Wheeling & Lake Erie Ry. Co.*, 778 A.2d at 793 (concluding that it was just and reasonable to assign all reconstruction costs to a successor railroad where the predecessor railroad had failed to maintain the crossing in accordance with its Commission-ordered responsibility to maintain the bridge at its sole costs). To conclude otherwise would let Norfolk Southern off the hook, while unjustly and unreasonably punishing the Township and the general public for the misdeeds of the railroad.

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<sup>24</sup> NS St. No. 1 at 4.

<sup>25</sup> *Greene Twp., supra* (the party responsible for the deterioration of the crossing is a factor to be considered); *see also* Great Bend M.B. at 23.

### **III. CONCLUSION**

For all the reasons set forth above and in its Main Brief, Great Bend respectfully requests that the Commission reaffirm Norfolk Southern's responsibility, at its sole cost and expense, to perform all work and furnish all materials necessary to maintain, repair and rehabilitate the T-821 Bridge in accordance with all priority maintenance items identified in PennDOT's December 19, 2017 inspection report for the T-821 Bridge (except for the roadway features); assign (or affirm assignment of) all future maintenance and cost responsibility related to the T-821 Bridge to Norfolk Southern, except for the bituminous roadway wearing surface which should remain the responsibility of the Township; and grant all other relief deemed necessary and appropriate.

Respectfully submitted,



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DATED: July 3, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 3<sup>rd</sup> day of July, 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

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