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July 3, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
400 North Street, 2nd Fl
Harrisburg, PA 17105-3265

RE: Bridge structure where State Route 1025 crosses over a single track of Delaware and Hudson Railway Company, Inc. (264 293 K) in Nicholson Borough, Wyoming County
Docket No.: M-2013-2364201

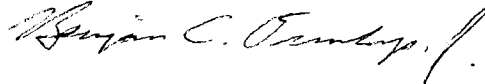
Investigation upon the Commission's own motion to determine the condition and disposition of six (6) existing structures carrying various highways above the grade of the tracks of the Canadian Pacific Railroad in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop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

Dear Secretary Chiavetta:

I am enclosing a Reply Brief for filing on behalf of Norfolk Southern Railway Company in the above-referenced matter. In accordance with the accompanying Certificate of Service, we are providing a copy of the Reply Brief to all interested parties.

If you should have any questions regarding the enclosed, please do not hesitate to contact me.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCDjr/klg
Enclosures

cc: All Interested Parties of Record (per attached service list)
David A. Salapa, Administrative Law Judge

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Bridge Structure where State Route 1025	:	M-2013-2364201
crosses over a single track of Delaware and	:	
Hudson Railway Company, Inc. (264 293 K)	:	
in Nicholson Borough, Wyoming County	:	
	:	
Investigation upon the Commission's own	:	I-2015-2472242
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	:	

REPLY BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

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Date July 3, 2018

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I. INTRODUCTION

A correct and fair application of the Greene Twp. factors and corresponding equitable arguments shows that maintenance responsibilities for the three unassigned structures carrying SR 1018, SR 2017 and SR 4005 should be assigned to the Pennsylvania Department of Transportation (“PennDOT”). PennDOT owns the structures and has voluntarily assumed rehabilitation of the structure carrying SR 4005. It conducts bi-annual inspections of these structures and has known of their deteriorating condition for years, long before Norfolk Southern’s involvement with the line.

This is especially true for the bridge carrying SR 2017, which has been damaged by a vehicular collision. PennDOT has done nothing to remedy the dangerous situation to date, despite the issuance of a Public Safety Advisory directed to PennDOT on March 14, 2018. See Exhibit “A” attached hereto.¹

PennDOT has delayed taking action, presumably in the hope that the bridges will be assigned to the railroad. Despite denying its own responsibility, PennDOT did not act to have maintenance of these three bridges assigned nor did it perform repairs and seek to have the costs assigned later. Thus, PennDOT has contributed to the deterioration of the structures. PennDOT, while twice calling Norfolk Southern “feckless” in its Main Brief, has been irresponsible as to the safety of these structures located on state highways

PennDOT likewise cites the lengthy processes involved with NEPA as a reason for its procrastination. However, NEPA is not involved with mere repairs and only becomes relevant

¹ This Public Safety Advisory was filed of record in this case by the Commission’s Rail Safety Section. Norfolk Southern requests that the Administrative Law Judge take judicial notice of this Advisory.

when the structures are fundamentally changed in a reconstruction or major rehabilitation project.

If PennDOT is not assigned maintenance responsibilities for these currently unassigned structures, there will be no incentive for reconstruction or major rehabilitation funding to be allocated to them through the federal programs over which PennDOT wields partial control. PennDOT's constituency benefits from the structures both today and historically, and a highway authority is in the best position to maintain highway bridges.

Similarly, the four assigned bridges carrying SR 1025, SR 2032 and SR 2041 should be assigned or reassigned to PennDOT and T-821 should be assigned to Great Bend Township ("Township"). Again, the factors show that Norfolk Southern is not the appropriate entity to maintain the structures. The Commission within its authority changed language in its orders to allow for reassignment of the bridges carrying SR 2032 and SR 1025. The language was changed in these two orders from the railroad performing maintenance at its *sole* cost and expense to doing so at its *initial* cost and expense, explicitly leaving open the option of reassignment.

Norfolk Southern has agreed to perform priority repairs to buy PennDOT 25 years and the Township 20 years to replace the structures, eliminating the urgency of the situation. The four assigned bridges are not yet at the end of their useful lives if appropriate work is performed. Norfolk Southern's recommended repairs are appropriate, economical and time sensitive to allow for maintenance reassignment to PennDOT and Great Bend Township and planning for reconstruction or major rehabilitation in an orderly manner.

As Norfolk Southern has agreed to perform priority repairs on the four structures where its predecessor was assigned maintenance responsibilities, assigning priority repairs on the two

unassigned structures, SR 1018 and SR 2017, would be neither just and reasonable nor in the public interest. Placing all responsibility for priority repairs for six structures upon one entity within the very short time span of six months, as the Commission's Bureau of Investigation and Enforcement ("BI&E") suggests, would not be conducive to ensuring the work could be completed within that or even a more realistic time span.

II. ARGUMENT

A. Assignment of the Three Unassigned Bridges

PennDOT asserts in that considering all relevant factors, maintenance responsibility for the three unassigned bridges carrying SR 1018, SR 2017 and SR 4005 should be assigned to Norfolk Southern. PennDOT Main Brief at 9, citing to AT&T v. Pa. Pub. Util. Comm'n, 737 A.2d 201 (Pa. 1990). Norfolk Southern does not disagree with the authority cited, but does disagree with PennDOT's application of the authority under the circumstances of this case. Norfolk Southern counters PennDOT's application of the relevant factors below.

1. Application of the Greene Twp. factors leads to maintenance being assigned to PennDOT.

PennDOT focuses its argument for allocating responsibility to Norfolk Southern on claiming that doing so is "just and reasonable." PennDOT Main Brief at 8. It supports this claim by analyzing factors found in the Greene Twp. and North Lebanon Twp. cases. Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n, 668 A.2d 615, 619 (Pa. Commw. Ct. 1995); N. Lebanon Twp. v. Pa. Pub. Util. Comm'n, 962 A.2d 1237, 1247 (Pa. Commw. Ct. 2008). A careful analysis shows that under this precedent, it is instead just and reasonable for maintenance responsibilities to be assigned to PennDOT.

i. *The Party that Originally Built the Structure*

The first factor PennDOT analyzes concerns the party that built the structures. PennDOT Main Brief at 10. PennDOT is correct in pointing out that Norfolk Southern's predecessor was the entity that built the bridges at issue, but it neglects to apply the context of the original construction. When the bridges were built, the predecessor railroad had a much more active rail line, including carrying passengers, as opposed to today's six to eight freight trains per day. PennDOT Exhibit I; Norfolk Southern Statement No. 1 at 4.

Using a predecessor railroad's construction of separated-grade crossings for the benefit of the traveling public, which were a consequence of improving the engineering of the underlying line, as a reason to assign Norfolk Southern maintenance responsibilities of the bridges is no longer applicable. While this factor was important 100 years ago, it is not a benefit to the railroad now and has not been for a long time.

ii. *Party that Owns and Maintains the Structure*

a. Ownership

As discussed at length in Norfolk Southern's Main Brief, the railroad does not own the bridges. Norfolk Southern Main Brief at 4-7. Instead, Pennsylvania precedent has long held that the entity owning the highway carried by the bridge is the owner of the bridge. N. Pa. R. Co. v. Inland Traction Co., 205 Pa. 579 (1903).² Upon completion of a bridge, it becomes part of the road it carries, and ownership becomes vested in the authority which owns the road absent definitive proof to the contrary. City of Phila v. Consol. Rail Corp., 747 A.2d 352 (Pa. 2000).

² See also Pa. R. Co. v. Greensburg, J. & P. St. Ry. Co., 176 Pa. 559 (1896).

PennDOT attempts to argue that there is definitive proof to the contrary, but there is not. PennDOT Main Brief at 12-13. It cites to the predecessor railroad's construction of the bridges and existing maintenance orders for other bridges as evidence of ownership of the unassigned bridges. Id. The railroad's construction of the bridge and a maintenance agreement were not deemed sufficient indicia of ownership by the Supreme Court in the City of Phila. case. Here, not only is there no definitive proof of ownership in the railroad, there is no evidence of railroad ownership whatsoever.

PennDOT cites Norfolk Southern v. PUC to try to distinguish the present situation from the City of Philadelphia case. Norfolk Southern Ry. Co. v. Pa. Pub. Util. Comm'n, 870 A.2d 942, 949 (Pa. Cmmw. Ct. 2005); City of Phila at 354. PennDOT misconstrues what the Norfolk Southern case held, asserting that "the default rule only applied [in City of Philadelphia] because there was *no* evidence presented to establish that the railroad owned the subject bridge." PennDOT Main Brief at 13. As noted above, the Supreme Court instead found the evidence proffered in City of Philadelphia, railroad construction of the bridges and a maintenance agreement, to be insufficient. While the Commonwealth Court in Norfolk Southern stated there was some evidence, in the form of unspecified language in a construction and maintenance agreement for the bridges "that indicates" the railroad owns them, it noted the PUC made no determination in that regard. Instead, the Court agreed with the Commission that "the costs of maintenance could be adjudicated separately from ownership." Thus, assignment of maintenance responsibilities by the Commission does not equate with ownership, contrary to PennDOT's assertion. Norfolk Southern, 870 A.2d at 948-949.

In regard to the SR 1025 structure, PennDOT points to the mere mention in passing in the introduction for a completely unrelated alteration of that bridge where the PUC refers to it as

being “owned and maintained” by Norfolk Southern’s predecessor. PennDOT Exhibit D4 at 2. This order allows the Department of Highways to make improvements to the bridge at its own expense, and ownership of the bridge was not at issue or decided. Id.

A mention of ownership in passing by the PUC when describing the parties involved in an application for bridge improvements certainly cannot be what the City of Phila. Court had in mind when it required “evidence to the contrary” of its general rule. PennDOT then stretches this argument to include Norfolk Southern ownership of all the other bridges currently at issue, because the crossings have similar characteristics to SR 1025. PennDOT Main Brief at 13. Under the Supreme Court’s precedent, this is highly unpersuasive.

There is *no* evidence that ownership of the three bridges without maintenance assignments, SR 1018, SR 2017 and SR 4005, lies with the railroad. And there is no evidence of railroad ownership of any of the four other structures either. Therefore, under City of Philadelphia and its precursors for over a hundred years, PennDOT owns these structures.

b. Maintenance

The bridges on SR 1018, SR 2017 and SR 4005 are without maintenance orders, and therefore Norfolk Southern has not been maintaining them. As stated in Norfolk Southern’s Main Brief, in Pennsylvania bridges become part of the highways that traverse them. Heinlein et al. v. Allegheny Cnty., 374 Pa. 496, 500, 98 A. 2d 36, 43 (1983). The Heinlein case further articulates that in Pennsylvania there is a trend where “the progressive and undeviating policy of the Commonwealth has been to assume more and more of the responsibility for [state highway] bridges...” Id. at 510.

The advancement of this policy can be seen by PennDOT assuming responsibility for SR 4005 and beginning the rehabilitation of that structure. Hearing Transcript at 132, line 5.

PennDOT explained that it was “being responsible” by seeking funding and commencing repairs on the unassigned bridge, but this type of responsibility is exactly what one would expect to see for all of Pennsylvania’s bridges that are PennDOT owned and in need of repair. PennDOT Statement No. 3 at 4, line 12. PennDOT attempts to argue that despite its current rehabilitation of the structure, this bridge’s maintenance should also be allocated to Norfolk Southern now and in the future. PennDOT Brief at 44-46. In fact, this responsibility that it has assumed for one unassigned structure should extend to the other two unassigned bridges as well.

The maintenance of bridges carrying highways is typically a function performed by the authority responsible for the road. Mr. Hauschildt was most articulate in stating that “just as railroads are generally responsible for the bridges carrying rail lines over highways, the respective highway authority is generally responsible for bridges carrying highways over railroads.” Norfolk Southern Statement No. 1 at 4, line 20. Coupled with the fact that PennDOT has already rehabilitated other bridges carrying its highways over the same rail line, the maintenance should fall to PennDOT for these bridges. PennDOT Statement No 3 at 8, line 19.

iii. *Relative Benefit Conferred on Each Party When Built*

PennDOT asserts that the primary benefit of the bridges when they were built was realized by the predecessor railroad. PennDOT Brief at 19. However, the initial benefits were shared. The improvements to the line did indeed come attendant with improvements to the crossings in the form of separated grade bridges. PennDOT Exhibit I. It is a certainty that the straightening of the line and the decrease in the grades primarily benefitted the railroad. It is also a certainty that the public benefitted in having access to a passenger railway. *Id.* The public was the primary beneficiary of the improved grade separated crossings, which not only lessened the chance of accidents, but also provided improved convenience by vehicles not having to stop for

passing trains. Hearing Transcript at 144-145. In fact, the mayor himself at the time expressed appreciation on behalf of all the citizens to the railroad. PennDOT Exhibit I. Therefore, it is not clear, as PennDOT asserts, that the initial benefit was to the railroad, but instead it is logical that both parties received significant benefits, paid for at the time by the railroad.

PennDOT attempts to bolster its argument that the predecessor railroad benefitted from the separated grade crossings with two cases, Consolidated Rail Corp. and Pittsburgh and Lake Erie Railroad. Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n, 671 A.2d 248 (Pa. Cmmw. Ct. 1995); Pittsburgh & Lake Erie R.R. Co. v. Pa. Pub. Util. Comm'n, 556 A.2d 944 (PA. Cmmw. Ct. 1989). Norfolk Southern, however, does not argue the benefit it receives from the crossings, but instead argues that so does the traveling public. Neither of these cases state that the railroad is the only party which benefits from separated grade crossings. Id. In fact, in Consolidated Rail Corp., the court makes it a point to articulate that the holding should not be advanced to prevent parties who benefit from sharing costs: “Nothing in [the relevant statute or the previous case law exempting Amtrak from costs] suggests that another party, who benefits from a separated crossing but does not provide rail passenger service and who is neither Amtrak nor a governmental unit, may not be required to contribute a fair share to the necessary maintenance of a crossing.” Consolidated Rail Corp. at 252. This again reinforces the concept that the initial benefits were shared, and thus this particular factor is not dispositive.

iv. *Party Responsible for Deterioration Leading to Necessary Repairs*

When Norfolk Southern bought the line a mere three years ago, it did know there was deferred maintenance, as Mr. Hauschildt testified. Hearing Transcript at 178. But that is not the equivalent of being responsible for the deterioration necessitating the repairs. PennDOT emphasizes that Norfolk Southern has “yet to take initial steps to begin any repairs continuing

the trend of deferred maintenance,” PennDOT Main Brief at 23, but this is both incorrect and a mischaracterization of Norfolk Southern’s statements. Just as PennDOT requires time to assess and plan repairs, so does Norfolk Southern. Hearing Transcript at 199-200. Additionally, Norfolk Southern is not responsible for maintenance on the unassigned bridges where PennDOT has done nothing, and on the bridges where maintenance is currently assigned to Norfolk Southern’s predecessor, the repair process has either begun or is being planned through this proceeding which began prior to Norfolk Southern’s acquisition of the line. Norfolk Southern Statement No. 1 at 6-9, 11-12; Hearing Transcript at 186.

To elaborate, Norfolk Southern has begun the repair process for the bridge carrying T-821. Norfolk Southern Statement No. 1 at 9. It has completed plans to repair the bridge seats and abutments, as well as scale loose concrete off the through girders. Id. Construction is scheduled to begin in July 2018 and be completed by September 2018. Id.

The other bridge currently assigned to the predecessor railroad, carrying SR 2041, is a bridge which is in need of minimal work. Norfolk Southern Statement No. 1 at 7. This bridge is structurally sound with excellent concrete. Id. The other two bridges on SR 1025 and 2032 have maintenance assigned at the predecessor railroad’s *initial* cost and expense, but even so Norfolk Southern has agreed to perform and fund priority repairs as long as future maintenance is assigned to PennDOT.

PennDOT goes on to assert that since Norfolk Southern knew that the four bridges where at least some maintenance was assigned required work, that it should have preemptively begun work on the three bridges not assigned to it as well, speculating that if the PUC would have addressed the issue it would have assigned maintenance to the railroad. PennDOT Brief at 23, 25. The idea that Norfolk Southern would maintain highway bridge structures not assigned to it

on the mere “possibility of exposure,” is unreasonable. *Id.* at 23. That is the equivalent of saying PennDOT should unilaterally make repairs on a railroad bridge structure not assigned to a party. This is especially telling when contrasted with PennDOT not having begun repair work on the unassigned bridges on SR 1018 or SR 2017, which PennDOT owns and which it has known for long before Norfolk Southern’s involvement were in need of repair.

None of these actions can be construed as Norfolk Southern being responsible for the deterioration of the bridges leading to the necessary repairs. PennDOT, however, through its own inspection reports, has known for a long time that the unassigned bridges were in need of work and has done nothing. See Public Safety Advisory attached hereto as Exhibit “A”. Significantly, this Public Safety Advisory names PennDOT as the “primary party responsible to mitigate these hazards.”

Although this firm will not utilize pejorative terms in describing an opposing party as does PennDOT,³ Norfolk Southern does believe that PennDOT was irresponsible in delaying necessary maintenance on the unassigned bridges. Norfolk Southern also objects to PennDOT’s supposition that the condition of the bridges allowed it to pay a discounted rate in its acquisition of the line, and even more speculatively, that the PUC would have assigned the three unassigned bridges to Norfolk Southern had the issue arisen.⁴ PennDOT Brief at 25.

Finally, on the responsibility for the deterioration necessitating the repairs, Norfolk Southern notes that its trains do not actually come into contact with any of the bridges, but the traveling public continuously does by driving over them. PennDOT examines responsibility for

³ See PennDOT Brief at 24, 43.

⁴ Again, it is to be noted that PennDOT did not seek to have maintenance responsibilities for these three bridges assigned while its inspection reports detailed increasing unmet maintenance needs in the years prior to Norfolk Southern’s involvement with the line.

deterioration from a maintenance standpoint, but not a physical wear and tear or damages standpoint. PennDOT Main Brief at 21-27. The Commission should consider the fact that it is vehicular traffic that continuously utilizes the structures, since these bridges are *highway* bridges over railroads.

There is also evidence of vehicular collisions causing damage to the structures. BI&E testified that there was a vehicular collision on the unassigned structure carrying SR 2017. BI&E Statement No. 1 at 3. BI&E's witness testified that due to the compromised guiderail, a future vehicular collision could prove "catastrophic" due to the guiderail being "unlikely to prevent a vehicle from falling to the railbed if struck" and "[a]ny additional vehicle strike here is likely to result in significant injury or death." *Id.* Certainly, this type of deterioration must be attributed to PennDOT by way of its constituency, and not Norfolk Southern. For these reasons, this factor weighs in favor of Norfolk Southern, since PennDOT or its constituency is primarily responsible for the deterioration of the unassigned structures.

v. *Relative Benefit Each Party Will Receive from Repairs*

The discussion of the relative benefit each party will receive from the repairs is dispatched with quickly in PennDOT's brief because this factor, again, cuts toward PennDOT being responsible for maintenance of the bridges. PennDOT Main Brief at 26-27. Undoubtedly, both parties benefit from separated grade crossings in terms of safety, but the relative benefit to the railroad pales in comparison to the relative benefit the traveling public will receive from these repairs.

As was explained in Norfolk Southern's brief, these bridges exist for the convenience of the local traveling public. Norfolk Southern Main Brief at 10-12. Not only are these bridges on roads with low average daily traffic volumes, but also the elimination of such bridges would

have a minimal impact on the ability of the local roadway network to handle these low volumes. Norfolk Southern Statement No. 2 at 5, 12. These bridges are part of limited use local roads, and their utility is primarily to the local traveling public. Id.

Furthermore, the railroad's operations are not hampered when crossings are changed. Norfolk Southern Statement No. 1R at 4, line 19. If these crossings were eliminated, or for some reason changed to at-grade crossings, the railroad would not change its operations. Id. The trains would not slow, and "train performance would stay exactly the same." Hearing Transcript at 213, line 4. The presence of the bridges in this regard serves only to benefit the traveling public, which does not need to stop and wait for passing trains as with at-grade crossings. Id. PennDOT urges that these crossings are not redundant and are integral to its highway system, which further proves that the traveling public receives the greater benefit from these structures, as their elimination would have no effect on Norfolk Southern operations. Id.; PennDOT Main Brief at 39-41.

vi. *Availability of Government Funds*

It is a mischaracterization to assert that "there are no funds *available* for six of the seven crossings," as PennDOT asserts at page 27 of its Main Brief. Instead, the correct assertion would be that there is no funding *allocated* at this time to six of the seven crossings. PennDOT claims that "in the interest of public safety," it has secured funding for the bridge on SR 4005. Id. It also claims that "in the spirit of cooperation and for the safety of the community, as well as the health and welfare of the traveling public..." it has exceeded its responsibility by beginning projects on other bridges spanning the same railroad line. Id.; PennDOT Statement No. 3 at 8-9. In fact, these types of projects are encompassed by the purpose of PennDOT. It should not be

lauded for handling its necessary responsibilities, but instead the fact that it has done nothing with the bridges carrying SR 2017 and SR 1018 should weigh against it.

All bridges at issue are potentially eligible for inclusion in the regional planning commission's 12-year plans, contrary to the picture PennDOT paints. Federal funding may be allocated to the reconstruction of these structures in this manner. In fact, federal law requires that the prioritization be reviewed at least every five years, highlighting the fact that although funds may not be allocated at this time, that does not mean that they are permanently unavailable. 23 U.S.C. § 134 (i)(1)(b)(ii).

PennDOT enjoys a voting membership, and therefore influence over the ability for these projects to be funded, on the regional planning commission. Hearing Transcript at 129-131. By PennDOT's own admission, this is a perk no private railroad shares. *Id.* This means that unless maintenance responsibilities are given to PennDOT, it is highly unlikely that federal funds will be allocated to these bridge repair projects. Norfolk Southern argues that because of these considerations, the Greene Twp. factor concerning government funding strongly tips in favor of maintenance responsibilities being assigned to PennDOT, even if Norfolk Southern is allocated some level of cost sharing for the unassigned structures.

vii. *Equities of the Situation*

PennDOT rehashes many of the reasons it previously stated in its discussion of the previous Greene Twp. factors concerning the equities of the situation, but the bottom line is that PennDOT is in the best position to maintain the bridges at issue. This is in part because it provides maintenance for the roadways of which the bridges have become a part. The 1953 Heinlein case explained that, "As a general proposition, but by no means universal, bridges are treated as portions of the highways which cross them, and are to be maintained by the same

persons to whom the duty of repairing the highways is committed.” Heinlein at 500.

Furthermore, as discussed earlier, highway authorities are generally responsible for highway bridges over railroads, and railroads are generally responsible for railroad bridges over highways. Norfolk Southern Statement No. 1 at 4, line 20.

It is equitable to divide maintenance responsibilities in this fashion, particularly for the unassigned bridges, because PennDOT has more interaction with both the bridges and the traveling public which uses them. Norfolk Southern Brief at 7. It also has a familiarity with the type of work required on these bridges since it maintains other bridges along the same line. PennDOT Statement No.3 at 8-9. Similarly, it has more familiarity with the historic preservation procedure, putting it in the better position to navigate the process faster upon reconstruction or major rehabilitation. Hearing Transcript at 85-86. Finally, Norfolk Southern is subject to similar procedures in bridge reconstructions as is PennDOT. PennDOT Statement No. 3 at 10-11. For these reasons, it is equitable to assign maintenance responsibilities to PennDOT for the three unassigned bridges.

B. Reassignment of the Four Assigned Bridges

There are four bridges in this case which have maintenance assignments to Norfolk Southern’s predecessor at either its initial or sole cost and expense. These bridges are those carrying SR 2032, SR 1025, SR 2041 and T-821. PennDOT Exhibits D3, D4, D6, D7, and D11. The bridges carrying SR 2032 and SR 1025, however, have only been assigned to Norfolk Southern’s predecessor at its initial cost and expense, explicitly leaving open the reassignment of maintenance responsibilities for these structures. PennDOT Exhibits D3 at 5, Ordering

Paragraph 20, and D6 at 3, Ordering Paragraph 10. The maintenance of those two bridges should be permanently assigned to the owner of the structures, PennDOT.

The maintenance of the bridges carrying SR 2041 and T-821 have not expressly been left open for reassignment but have been included in this docket determining maintenance responsibilities. These bridges should be reassigned to the owners of the structures, PennDOT and Great Bend Township, respectively. Even if some level of cost responsibility for the ongoing maintenance of these structures is assigned to Norfolk Southern, it makes sense to assign the actual work responsibilities to the respective highway authority, for the reasons discussed above.

PennDOT and Great Bend Township both argue that Norfolk Southern should bear all costs associated with the maintenance, repairs, inspections, flagging costs, insurance costs and/or removal costs. PennDOT Main Brief at 30; Township Main Brief at 18. This allocation, however, is not in accordance with the factors discussed in this Reply Brief and would be neither just nor reasonable. An allocation of all costs to Norfolk Southern would not be equitable. Instead, Norfolk Southern urges that maintenance responsibilities be assigned to the owners of the bridges, PennDOT and the Township, after the priority repairs are completed at Norfolk Southern's sole cost and expense on the four bridges currently assigned to Norfolk Southern's predecessor. Norfolk Southern Brief at 20.

In order for the PUC to rule for a change in the maintenance orders for the two currently assigned structures, Norfolk Southern must establish the facts by a preponderance of the evidence, as was pointed out by Great Bend Township. Se-ling Hosiery, Inc. v. Margulies, 70 A.2d 854 (Pa. 1950); Township Main Brief Appendix B, Proposed Conclusion of Law ¶ 11. After a careful analysis of the Greene Twp. factors, a discussion of the equities of the situation

establishing what is just and reasonable, along with an examination of other considerations regarding highway bridges over railroads discussed below, Norfolk Southern has met this burden.

1. The analysis of the Greene Twp. factors as to the unassigned bridges also applies to the currently assigned bridges and leads to maintenance being assigned to PennDOT.

The discussion of the Greene Twp. factors as to the unassigned structures in this Reply Brief also applies to the assigned structures.⁵ The specificities of each of the four assigned bridges, however, are briefly analyzed here in terms of the applicable Greene Twp. factors.

With respect to ownership, Great Bend Township argues that since the predecessor railroad was there first, and the Township has never taken an ownership or maintenance interest in the bridge, that Norfolk Southern owns the structure. Township Main Brief at 20-21. To the contrary, if the railroad was there first, Norfolk Southern contends that the bridge was constructed solely for the benefit of the Township. The testimony of the Township's witness makes it plain that the Township was very interested in the continued existence of the structure. Township Statement 1 at 2, line 18 and at 5, line 5; Township Statement 1R at 3, line 8. Of course, the Township did not express an interest in paying for its upkeep; nonetheless, its interest in the structure continues.

Norfolk Southern is currently undertaking repairs on T-821, as its predecessor does have maintenance responsibilities per the standing PUC orders. Norfolk Southern Statement No. 1 at 9. Absent additional orders, however, Norfolk Southern has not voluntarily adopted maintenance responsibilities in the cases of the two bridges which were not permanently assigned to it.

⁵ See Section A of this Reply Brief.

PennDOT asserts that Norfolk Southern is primarily responsible for the deterioration leading to the necessary repairs, but with respect to the bridges not permanently assigned, Norfolk Southern's predecessor already performed the prior ordered repairs. PennDOT Statement No. 3 at 7-8. With respect to the bridges the predecessor railroad had been assigned, Norfolk Southern is either commencing work (T-821) or has proposed work it deems necessary. Norfolk Southern Statement No. 1 at 6-9, 11-12. None of this behavior amounts to a "pawing off of its duties"⁶ for bridges on a line it has owned for less than three years.

As discussed previously, the availability of government funds for these structures exists through the regional planning commission. Hearing Transcript at 121-22; PennDOT Statement No. 3 at 4. Great Bend Township may also apply for these funds. Hearing Transcript at 135. Similar to the analysis performed on the three unassigned bridges, the analysis for the four assigned bridges leads to the conclusion that the two structures where maintenance has been assigned to the predecessor railroad at its "initial" cost and expense should be assigned to PennDOT and the two bridges where maintenance was assigned to the predecessor at its "sole" cost and expense should be reassigned to PennDOT and Great Bend Township, following priority repairs by Norfolk Southern.

2. The change from *sole* cost and expense to *initial* cost and expense in the PUC Orders was appropriate and within bounds of Pennsylvania precedent for the structures carrying SR 2032 and SR 1025.

The PUC properly changed the maintenance orders for the bridges carrying SR 1025 and SR 2032 from Norfolk Southern's predecessor's *sole* cost and expense to *initial* cost and expense. PennDOT Exhibits D3 and D6. These orders were entered to allow for the reassignment of maintenance responsibilities and were "granted judiciously and under

⁶ See PennDOT Brief at 39.

appropriate circumstances.” City of Pittsburgh v. Dept. of Transp., 416 A.2d 461, 465 (Pa. 1980). In that case the court stated that “the PUC has the power to amend or rescind its own orders at any time subject only to the requirements of due process,” which was a reiteration of a prior holding in Dept. of Highways v. PUC. Id., citing Dept. of Highways v. Pub. Util. Comm’n, 138 A.2d 143 (1958). PennDOT argues that the PUC did not follow this precedent.

PennDOT argues that there was insufficient due process. PennDOT Main Brief at 15. PennDOT then proceeds to explain how with respect to the structure carrying SR 1025 the PUC granted PennDOT’s petition for reconsideration, which PennDOT later withdrew. Id. The PUC then granted PennDOT a hearing to determine maintenance responsibilities which PennDOT then continued until that M docket was consolidated into the present matter. Id. at 16. Thus, the matter of permanent maintenance assignment of SR 1025 is squarely before the Commission at this time, and PennDOT is afforded due process through this proceeding.

With respect to the structure carrying SR 2032, the predecessor railroad stated that it currently maintained the bridge, but not that it had formal PUC maintenance responsibility. PennDOT Exhibit D6 at 1. Then the PUC ordered the predecessor railroad to perform repairs at its initial cost and expense. Id. at 3. If anything, the imposition of a formal PUC order to maintain the bridge at the predecessor railroad’s initial cost and expense was more than what PennDOT had at the start of that proceeding, although PennDOT portrays this as an unwarranted amendment lacking due process. PennDOT Brief at 17. In any event, the Commission was not changing a prior order in PennDOT Exhibit D6.

PennDOT has thus had opportunity to be heard, which includes the present proceedings, and due process has been afforded. PennDOT still continues to assert, however, that had it been able to address the issues before the PUC that not only would the Commission have assigned the

four currently assigned bridges to Norfolk Southern, but also would have assigned the three unassigned bridges to Norfolk Southern as well. PennDOT could have, and did not, seek assignment of maintenance responsibilities for the three unassigned structures, instead sitting on its hands. That the PUC would have assigned maintenance responsibilities to the railroad is pure conjecture, and this type of speculation cannot rightfully be a basis for its argument that Norfolk Southern is trying to “get out of its responsibilities” to maintain the structures. PennDOT Brief at 18.

C. Additional Considerations

Since a good portion of the opposing parties’ briefs discussed what is just and equitable, Norfolk Southern will also address some general considerations concerning highway bridge maintenance. These considerations include the norms for inspection procedures, procedures concerning NEPA and the historic commission, general construction and repair procedures, timing of repairs and replacements with respect to the articulated plans, and travel route responsibilities.

1. Inspections are a state transportation department responsibility under federal law.

PennDOT argues that Norfolk Southern should be responsible for reimbursing future inspections on the subject bridges. PennDOT Brief at 35. Norfolk Southern has only ever had to pay PennDOT for inspections of two bridges out of the 600 highway bridges it runs under in all of Pennsylvania—both are at issue in this case. Norfolk Southern Statement No. 1R at 3. This inspection responsibility is mandated to state transportation departments such as PennDOT under federal law. 23 C.F.R. § 650.307. PennDOT, rather than a railroad, is also in the best position to inspect and follow up on the condition of bridges on its roads. Therefore, to the extent these

costs are not already reimbursed by the federal government, PennDOT should pay for these inspections in addition to conducting them.

2. Timing and priority of maintenance is best served by ordering Norfolk Southern's recommendations.

PennDOT avers that it will be unable to quickly complete any ordered repairs due to time-consuming processes. PennDOT Brief at 32. It cites environmental clearances and historic structure evaluations that it would be required to complete. PennDOT Brief at 33. These processes, however, do not apply to mere repairs, and any entity which attempts to procure federal funding for reconstruction or major rehabilitation bridge projects would have to complete the same processes, including Norfolk Southern.⁷ It is also important to note that PennDOT has already performed work on bridges carrying its highways over the same span of track in the same area, which means that it has the requisite knowledge to accomplish these projects and to work with the necessary governmental entities. PennDOT Statement No. 3 at 8, line 19. Also, with Norfolk Southern's proposed priority repairs on the assigned structures, PennDOT would not need to go through any of these processes until it decided to substantially rehabilitate or rebuild the bridges.

PennDOT also cites to the length of its design process as a supposed reason it would not be able to perform the work quickly, but Norfolk Southern goes through a similar prioritization, design and bid cycle. PennDOT Brief at 32; Hearing Transcript at 139, 184, 188. PennDOT mischaracterizes Norfolk Southern testimony concerning emergency repairs done on bridges, to make it seem as though these bridge repairs would fall into Norfolk Southern's emergency repairs category. PennDOT Brief at 33. In reality emergencies are more along the lines of work

⁷ See generally process articulated in Mid States Coalition for Progress v. Surface Transp. Board, 345 F.3d 520 (2003).

that would be necessary to get a line back in operation, not routine bridge rehabilitation. Hearing Transcript at 171. The example of an emergency given was that of a train derailment. Id. Due to these similarities in the processes, timing would not be drastically different should the maintenance be assigned to the railroad as opposed to PennDOT.

This is also relevant to BI&E's argument for why maintenance should be assigned to Norfolk Southern. It seems that the primary reason for this recommendation is that BI&E is under the impression that Norfolk Southern will be able to complete the repairs much faster than PennDOT and proposes that the PUC order all repairs within six months of the final order. BI&E Brief at 6-7. This is an extremely short time frame, especially if all work is ordered to be performed by a single entity. Even some of PennDOT's policies allow it to defer "priority 1" maintenance for two years in certain circumstances. PennDOT Statement No. 2 at 20, line 24. And BI&E counsel stated in one of his cross examination questions to Norfolk Southern that "what PennDOT calls Priority Code 1 repairs – which is their policy – not saying that Norfolk Southern has to be held to that. But their policy would be to get this done within six months." Hearing Transcript at 185.

3. Norfolk Southern is not its predecessor.

PennDOT has asked that the PUC order Norfolk Southern to reimburse \$121,093.94 worth of expenses. PennDOT Brief at 34. At least \$107,050.63 was apparently accrued during the time before Norfolk Southern bought the line from its predecessor, \$3,768.14 was accrued to close the bridge carrying T-821 to traffic, and \$847.67 and \$311.67 was accrued for inspections on the structures carrying SR 1025 and T-821. Id. at 35; PennDOT Statement No. 1 at 34-35. Norfolk Southern should not be responsible for costs PennDOT incurred during the tenure of its predecessor. PennDOT is not being asked to reimburse expenses incurred by the predecessor

railroad for work the predecessor railroad carried out at its initial cost and expense. To hold Norfolk Southern responsible for costs incurred by PennDOT during the time of its predecessor would not achieve a just and fair result when the predecessor railroad has not had any of the costs it incurred at its initial cost and expense reimbursed.

4. Railroads have nothing to do with surrounding travel routes, and there is no precedent of a railroad being responsible therefor.

Norfolk Southern has not advocated strongly for closing any of the crossings, however, it is not opposed to the closing of any crossing seen fit by the PUC. Hearing Transcript at 167. Nor is it opposed to paying for the costs to close any of the crossings. Id. It is strongly opposed, however, to bearing the costs of any improvements to alternate travel routes as PennDOT suggests. Hearing Transcript at 168; PennDOT Brief at 43. This is squarely within the duties of PennDOT, and railroads are not responsible for maintaining highways. It would be completely outside the Commission's jurisdiction for it to order Norfolk Southern to assume responsibility for local roads due to the closing of a crossing, and the PUC has no jurisdiction to order such an expense.⁸ 36 P.S. § 670-407; Re Pa. Dept. of Transp., 69 Pa. P.U.C. 208 (Feb. 9, 1989).

The jurisdiction of the PUC is limited to crossings, and not the surrounding travel routes. 66 Pa. C.S.A. § 2702. The Commission has stated that “[t]he extent of the Commission's jurisdiction over the approaches to rail-highway crossings is a fact-specific determination. The Commission properly exercises jurisdiction over an approach to a crossing where the facts establish that the approach is a necessary part of the crossing.” Ressler et. al. v. Reading, Blue Mountain, & N. R.R. Co., 2002 WL 34560327 (Pa. P.U.C.). This concept was tied directly to roadway improvements to the surrounding travel routes in Re Pa. Dept. of Transp. which held

⁸ See also Millcreek Twp. v. Pa. Pub. Util. Comm'n, 753 A.2d 324, 328 (Pa. Commw. Ct. 2000).


that "...highway improvements, not directly involved in the rail-highway crossings, are outside the jurisdiction of the Commission. Such additional highway improvements, though part of the overall project, are not related to the protection of the safety and welfare of the public at the rail-highway crossings involved herein." Re Pa. Dept. of Transp., 69 Pa. P.U.C. 208 (Feb. 9, 1989). Under this precedent, the PUC may not order Norfolk Southern to shoulder the costs of any surrounding travel route improvements. Id.

III. CONCLUSION

For all of the above reasons, all maintenance responsibilities and costs for the three unassigned bridges, SR 1018, 2017 and 4005, should be assigned to PennDOT. Following completion of the priority repairs outlined by Norfolk Southern at its sole cost for the four bridges for which maintenance at some level was assigned to its predecessor, maintenance responsibilities should thereafter be assigned to PennDOT for SR 1025, 2032 and 2041 and to Great Bend Township for T-821.

Respectfully Submitted,

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Date: July 3, 2018

IV. APPENDICES

A. Objections to Proposed Findings of Fact⁹

1. PennDOT

9. Norfolk Southern objects to this proposed finding of fact because no matter what type of crossing the railroad would continue to run exactly the same, therefore there is no increase in efficiency for the railroad when at-grade crossings are abolished. Because of this, separated grade crossings are for the convenience of the traveling public, which enjoys a much greater benefit than the railroad. Hearing Transcript at 213, line 4.

11. Norfolk Southern objects to this proposed finding of fact because the railroad does not own any of the bridges at issue in this matter, instead the structures are owned by the entities which own the highways that traverse them, PennDOT and Great Bend Township. City of Philadelphia at 354. Furthermore, this is a proposed conclusion of law disguised as a finding of fact.

12. Norfolk Southern objects to this proposed finding of fact because the Commission mentioned in passing the bridge as being “owned” by the predecessor railroad in describing the parties involved in the proceeding. PennDOT Exhibit D4 at 2. The Commission made no determination regarding ownership of the bridge and again, this is a proposed conclusion of law disguised as a proposed finding of fact.

13. Norfolk Southern objects to this proposed finding of fact because there is no way to definitively determine what the PUC would have decided, and any assertion one way or the other is nothing more than conjecture.

⁹ Paragraph numbers correspond to that party’s proposed finding of fact to which Norfolk Southern objects.

14. Norfolk Southern objects to this proposed finding of fact because PennDOT is primarily responsible for the deterioration of the unassigned structures due to its own neglect in the face of its inspection report findings and is at least partially responsible for the deterioration of the assigned structures via its constituency's use of the structures. BI&E Statement No. 1 at 3.

18. Norfolk Southern objects to this proposed finding of fact because it has taken steps to plan repairs for T-821, which is commencing in July of 2018, and has made proposals for the other three structures for which its predecessor was assigned some level of maintenance responsibility. Norfolk Southern Statement No. 1 at 9.

19. Norfolk Southern objects to this proposed finding of fact because PennDOT merely met its responsibilities by funding work on bridges carrying its highways over this line.

23. Norfolk Southern objects to this proposed finding of fact because PennDOT has at least partial control over federal funding for the reconstruction or major rehabilitation of these bridges in the future, and Norfolk Southern's repairs will provide it 25 years to do so. Hearing Transcript at 98-100, 129-131; Norfolk Southern Statement No. 1 at 12, line 8.

25. Norfolk Southern objects to this proposed finding of fact because it is the taxpayers which enjoy the benefits of these structures, and therefore an allocation of public funds is appropriate.

26. Norfolk Southern objects to this proposed finding of fact because no financial evidence has been produced to support this assertion.

27. Norfolk Southern objects to this proposed finding of fact because no financial evidence has been produced to support this assertion.

28. Norfolk Southern objects to this proposed finding of fact because, in fact, the procedures both mandated and internal are relatively similar for PennDOT and Norfolk Southern. Hearing Transcript at 139, 184, 188.

29. Norfolk Southern objects to this proposed finding of fact because it does not owe money for which its predecessor potentially may have been responsible. PennDOT Statement No. 2 at 2.

34. Norfolk Southern objects to this proposed finding of fact because the traffic assessment performed was sufficient for the purposes of this proceeding. Hearing Transcript at 240-41.

35. Norfolk Southern objects to this proposed finding of fact because at no point in the three pages of cited testimony by PennDOT or the page of cited Hearing Transcript testimony by Norfolk Southern, did either witness say the alternate routes were not reliable. PennDOT Statement No. 2 at 7-10; Hearing Transcript at 238.

36. Norfolk Southern objects to this proposed finding of fact because despite previous bridge removals, the volumes seen by all bridges at issue are still low. Norfolk Southern Statement No. 2 at 5-11.

2. Great Bend Township

16. Norfolk Southern objects to this proposed finding of fact because, in fact, Great Bend Township has always had an ownership interest in the structure for reasons previously stated under the City of Philadelphia case law and its progeny. Furthermore, this is a proposed conclusion of law.

17. Norfolk Southern objects to this proposed finding of fact because it does not own the structure. Again, under City of Philadelphia, the entity that owns the highway running atop the bridge owns the bridge absent definitive proof to the contrary—therefore Great Bend Township owns the structure. City of Phila. at 354. Furthermore, this is a proposed conclusion of law.

24. Norfolk Southern objects to this proposed finding of fact because the railroad has never owned the bridges carrying the highways crossing over this line, and no evidence has been produced by any party to the contrary.

25. Norfolk Southern objects to this proposed finding of fact because the factors that were relevant as to why the railroad built these structures 100 years ago are no longer relevant today. PennDOT Exhibit I; Hearing Transcript at 213, line 4.

26. Norfolk Southern objects to this proposed finding of fact because no matter what type of crossing the railroad would continue to run exactly the same with regard to efficiency. Hearing Transcript at 213, line 4.

3. BI&E

6. Norfolk Southern objects to this proposed finding of fact in order to clarify that it currently has assigned maintenance responsibility for SR 2041 and T-821 bridges at its sole cost and expense, and SR 2032 and SR 1025 merely at its initial cost and expense. PennDOT Exhibits D3 at 5 and D6 at 3.

B. Objections to Proposed Conclusions of Law¹⁰

1. PennDOT

7. Norfolk Southern objects to this proposed conclusion of law because it is neither just nor reasonable to allocate all present maintenance to Norfolk Southern.

8. Norfolk Southern objects to this proposed conclusion of law because it is neither just nor reasonable to allocate all of these specific future maintenance costs to Norfolk Southern.

10. Norfolk Southern objects to this proposed conclusion of law because it is not the responsibility of Norfolk Southern to answer for a predecessor railroad's potential costs,

¹⁰ Paragraph numbers correspond to PennDOT's proposed conclusion of law to which Norfolk Southern objects.

especially when PennDOT was not allocated any costs paid by the predecessor railroad at its initial cost and expense. See section C3 above.

13. Norfolk Southern objects to this proposed conclusion of law because due process was afforded when the PUC changed the orders from the predecessor railroad's *sole* to *initial* cost and expense. See above at section B2.

14. Norfolk Southern objects to this proposed conclusion of law because for the reasons articulated herein, it is just and reasonable for PennDOT to be assigned maintenance responsibilities for the structures carrying SR 1025 and SR 2032.

16. Norfolk Southern objects to this proposed conclusion of law because its repair recommendations do substantively address the priority items at the crossings where its predecessor was assigned some level of maintenance responsibility, and Norfolk Southern should not be responsible to make repairs on the unassigned bridges on SR 1018 and 2017, which are owned and were neglected by PennDOT. Hearing Transcript at 168-70, 172-73.

17. Norfolk Southern objects to this proposed conclusion of law because PennDOT has already assumed maintenance of SR 4005 and the PUC should formally assign maintenance to it. Hearing Transcript at 132; PennDOT Statement No. 3 at 4. Furthermore, AT&T v. Pa. P.U.C., 737 A.2d 201 (Pa. 1999) does not support that the Commission should assign future maintenance responsibility following a structural rehabilitation project not yet before it.

18. Norfolk Southern objects to this proposed conclusion of law because it would be outside the Commission's jurisdiction for it to order Norfolk Southern to assume responsibility for local roads due to the closing of a crossing, and the PUC has no jurisdiction to make such an order,¹¹

¹¹ See also Millcreek Twp. v. Pa. Pub. Util. Comm'n, 753 A.2d 324, 328 (Pa. Commw. Ct. 2000).

nor does the cited AT&T case support it. 36 P.S. § 670-407; Re Pa. Dept. of Transp., 69 Pa. P.U.C. 208 (Feb. 9, 1989).

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Bridge Structure where State Route 1025	:	M-2013-2364201
crosses over a single track of Delaware and	:	
Hudson Railway Company, Inc. (264 293 K)	:	
in Nicholson Borough, Wyoming County	:	
	:	
Investigation upon the Commission's own	:	I-2015-2472242
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	:	

CERTIFICATE OF SERVICE

I hereby certify that I served one (1) copy of the Brief of Norfolk Southern Railway Company in the above-referenced matter, this day by electronic mail and by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

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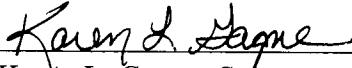
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July 3, 2018



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 14, 2018

I-2015-2472242

PUBLIC SAFETY ADVISORY

To Whom It May Concern:

The Rail Safety Section of the Public Utility Commission has identified a serious public safety hazard within the Pennsylvania Department of Transportation's state roadway system. The public safety issue involves a bridge on State Route 2017, in Lathrop Township, Susquehanna County which is part of the proceedings in the Commission's Docket No I-2015-2472242.

This serves as a notification and advisory of these hazards and all efforts should be made to voluntarily mitigate these hazards in an effort to promote public safety and prevent pedestrian and motor vehicle incidents. As the owner of this highway and the state agency that programs and allocates federal and state transportation funds, Pennsylvania Department of Transportation is the primary party responsible to mitigate these hazards. However, all the parties involved in this case should cooperate to resolve this matter expeditiously.

BMS No: 52-2017-0090-0000

Location: Bridge carrying SR2017 (Station Hill Rd.) over Norfolk Southern Railroad (DOT 264 291 W), Lathrop Township, Susquehanna County.

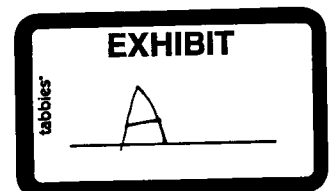
Bridge Type: Single-span closed spandrel concrete arch.

Public Safety Hazard: Severe deterioration of the right parapet (as identified by roadway stationing) is noted throughout. In its present condition, the right parapet is no longer effective in providing protection to motorists. Particularly concerning is the condition of the far-right approach guiderail transition. The far-right approach guiderail shows signs of collision damage. The embankment and wingwall that supports this section of guiderail has failed. A future collision at this location could be catastrophic.

Hazard Mitigation: The right parapet, far-right wingwall and approach guiderail of this bridge should be repaired immediately.

Very truly yours,

Ronald Hull, P.E.
Transportation Division—Rail Section
Bureau of Technical Utility Services
Phone (717) 787-1106



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