

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Knox Township,

Complainant,

vs.

Docket No. C-2019-3009358

Buffalo & Pittsburgh Railroad Inc.,
Pennsylvania Department of
Transportation, Jefferson County &
Brookville Borough,

Respondents.

**MOTION REQUESTING THE COMMISSION TO ACCEPT THE FILING OF
BUFFALO & PITTSBURGH RAILROAD, INC.'S EXCEPTIONS TO
RECOMMENDED DECISION *NUNC PRO TUNC*, OR IN THE ALTERNATIVE,
TO EXTEND THE TIME PERIOD FOR FILING**

AND NOW, comes Respondent, Buffalo & Pittsburgh Railroad Company (“BPRR”), by its attorneys, Dickie, McCamey & Chilcote, P.C., J. Lawson Johnston, Esquire, Scott D. Clements, Esquire, and Aaron M. Ponzo, Esquire, and files its Motion for the Commission to Accept the Filing of Buffalo & Pittsburgh Railroad, Inc.’s Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing:

1. This matter involves three above-grade railroad crossings located in Knox Township, Jefferson County, Pennsylvania where Ramsaytown Road (T-841), East Bellport Road (T-405), and Harriger Hollow Road (T-420) cross the right of way of the Buffalo & Pittsburgh Railroad, Inc. The crossings consist of two concrete arch structures at Ramsaytown Road and East Bellport Road, and concrete abutments at Harriger Hollow Road which formerly supported a steel superstructure.

2. An evidentiary hearing was held on January 25, 2022.

3. On June 24, 2022, a Recommended Decision was issued by Administrative Law Judge Mary D. Long (“ALJ”) recommending that all three bridges be removed at BPRR’s cost, and that the crossings be abolished.

4. Exceptions to the Recommended Decision were due within 20 days, pursuant to 52 Pa. Code §5.533(1), or by July 14, 2022.

5. Counsel for BPRR worked diligently to prepare Exceptions to the Recommended Decision, which were necessary to address its position that the Recommended Decision contained numerous factual, legal, and evidentiary errors.

6. Counsel for BPRR began the process of uploading and filing BPRR’s Exceptions through the Commission’s eFiling system shortly before 4:30 PM on July 14, 2022, and successfully submitted the Exceptions through the eFiling system on July 14, 2022, at 4:32 PM. *See Exhibit 1*, Efiling – Filing Detail.

7. BPRR also served its Exceptions on all parties via email on July 14, 2022, in accordance with 52 Pa. Code §1.54(b), and provided a courtesy copy of the Exceptions to the Commission’s Office of Special Assistants. The email transmitting BPRR’s Exceptions was sent on July 14, 2022, at 4:38 PM. *See Exhibit 2*, Email correspondence dated July 14, 2022, and *Exhibit 3*, Exceptions of Buffalo & Pittsburgh Railroad, Inc. to Recommended Decision.

8. Although the Efiling – Filing Detail shows that BPRR’s Exceptions were transmitted at 4:32 PM on July 14, 2022, it lists a filing date and time of July 15, 2022, at 8:30 AM. *See Exhibit 1*.

9. As of the filing of this Motion, the docket reflects that BPRR’s Exceptions were filed on July 15, 2022.

10. Thus by virtue of being transmitted two minutes after 4:30 PM on July 14, 2022, BPRR's exceptions were deemed by the Commission to be filed on July 15, 2022. *See* 52 Pa. Code §1.11 (a)(4).¹

11. Based on the foregoing, the filing of BPRR's Exceptions technically does not conform with 52 Pa. Code §5.533.

12. 52 Pa. Code §1.2(a) provides:

This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. **The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.**

(Emphasis added).

13. 52 Pa. Code §1.2(c) further provides:

The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.

14. Pursuant to these Rules, the Commission has the discretion to disregard errors or defects of procedure which do not affect the substantive rights of the parties. *AT & T Communications of Pennsylvania v. Pennsylvania Public Utility Com.*, 568 A.2d 1362, 1364 (Pa. Commw. Ct. 1990)(citing 52 Pa. Code §1.2(a)).

15. In *AT & T Communications of Pennsylvania*, AT & T asserted that the Commission improperly considered untimely exceptions that were filed one day late, but the Commission itself argued "that to refuse to entertain the exceptions would be an arbitrary

¹ According to 52 Pa. Code §1.56 (a)(4), the date of service of BPRR's Exceptions is also July 15, 2022, because the document was transmitted by email after 4:30 PM on July 14, 2022.

and capricious deviation from the PUC's policy." *AT & T Communications of Pennsylvania*, 568 A.2d at 1364.

16. The Commonwealth Court agreed, stating:

Under Section 1.2(a) of Title 52 of the Pennsylvania Code, 52 Pa.Code. § 1.2(a), the general provisions of rules of administrative practice shall be construed liberally to secure the "just, speedy and inexpensive determination of every action" and **an agency employing this rule may at any stage of an action, "disregard an error or defect of procedure which does not affect the substantive rights of the parties."**

Id. (emphasis added)

17. AT & T did not show that it was prejudiced by the Commission's consideration of the untimely exceptions, and the Commonwealth Court found that "justice was best served by the PUC having done so." *Id.*

18. The same result should be reached here, where none of the parties have been prejudiced by the Exceptions being filed and served a few minutes after 4:30 PM on July 14, 2022, and the Commission should accept BPRR's Exceptions as timely filed and give them due consideration, even though they were deemed filed on July 15, 2022.

19. The factors the Commission considers in determining whether to exercise this discretion, include the party's conduct and allegations, the impact on regulatory predictability, the Commission's desire to avoid additional, unnecessary and expensive burdens, the impact on the parties due process rights, and the impact on the Commission's exercise of sound discretion. *Charles W. Houdanic v. Borough of Homestead*, 1995 Pa. PUC LEXIS 140, *5 (Pa. P.U.C. December 4, 1995).

20. Here, there is no indication that the filing of BPRR's Exceptions two minutes after 4:30 PM was intended to subvert Commission process or to cause prejudice to the other parties.

21. Regulatory predictability will not be harmed because BPRR's Exceptions conform to the requirements of 52 Pa. Code §5.533 and the Commission's exercise of discretion to consider BPRR's Exceptions will not result in any further non-compliance.

22. The Commission can avoid additional, unnecessary, and expensive burden of additional proceedings that would be likely to transpire if it were not to consider BPRR's Exceptions.

23. There is no adverse impact on due process because there is no prejudice or impact on the substantive rights of any parties resulting from the filing and service of BPRR's Exceptions shortly after 4:30 PM on July 14, 2022.

24. Accordingly, in accordance with 52 Pa. Code §1.2(a) and (c) the Commission should disregard the technical non-compliance with 52 Pa. Code §1.11 (a)(4) and consider the merits of BPRR's Exceptions.

25. In the alternative, BPRR respectfully requests that the Commission extend the deadline for the filing of BPRR's Exceptions to July 15, 2022, and accept BPRR's Exceptions as having been timely filed as of this date.

26. The Commission has the discretion to extend the time fixed or the period of time prescribed for an act to be done, after the expiration of the specified period, based upon a showing of reasonable grounds. 52 Pa. Code §1.15(a)(1).

27. Reasonable ground exists for extending the time period for filing Exceptions to the Recommended Decision.

28. The Commission has stated that it has accepted late-filed documents when a valid reason is provided and a good faith effort is made to provide the Commission with the requisite documentation in a timely manner. *Application of MVA Transit, LLC*, 2020 PA. PUC LEXIS 540, *6 (Pa. P.U.C. October 8, 2020).

29. As outlined above, counsel for BPRR worked diligently to prepare and submit its Exceptions, began the filing process prior to 4:30 PM on July 14, 2022, and submitted its Exceptions for filing on the due date.

30. Despite counsel's good faith efforts to electronically file the Exceptions on the due date of July 14, 2022, the Exceptions were transmitted at 4:32 PM that day, resulting in a filing date and time of July 15, 2022, at 8:30 AM, which is beyond the time period for filing Exceptions.

31. Counsel for BPRR acted in good faith by providing the Commission and all parties of record with the Exceptions, and in fact provided them through the Commission's e filing system and by email on July 14, 2022 shortly after 4:30 PM. *See Exhibits 1 and 2.*

32. Accordingly, reasonable grounds exist to extend the deadline for the filing of BPRR's Exceptions to the Recommended Decision.

33. The other parties to this proceeding are not be prejudiced by filing and service of BPRR's Exceptions to the Recommended Decision by a few minutes after 4:30 PM on July 14, 2022.

WHEREFORE, Respondent Buffalo & Pittsburgh Railroad, Inc. respectfully requests that the Commission grant its Motion for the Commission to Accept the Filing of Buffalo & Pittsburgh Railroad, Inc.'s Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing, and accept BPRR's Exceptions as having been timely filed as of this date.

Respectfully Submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: /s/Aaron M. Ponzio

J. Lawson Johnston, Esquire

PA I.D. #19792

Scott D. Clements, Esquire

PA I.D. #78529

Aaron M. Ponzio, Esquire

PA I.D. 203584

Attorneys for Buffalo & Pittsburgh
Railroad, Inc.

Dated: July 15, 2022

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Knox Township,

Complainant,

vs.

Docket No. C-2019-3009358

Buffalo & Pittsburgh Railroad Inc.,
Pennsylvania Department of
Transportation, Jefferson County &
Brookville Borough,

Respondents.

VERIFICATION

I, Aaron M. Ponzio, Esquire, counsel for Buffalo & Pittsburgh Railroad, Inc., hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: July 15, 2022

By: /s/Aaron M. Ponzio
Aaron M. Ponzio, Esquire
PA I.D. 203584

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion for the Commission to Accept the Filing of Buffalo & Pittsburgh Railroad, Inc.'s Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing has been served this 15th day of July, 2022, upon all parties in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Service by Electronic Mail

Honorable Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222
malong@pa.gov

CJ Zwick, Esquire
Zwick & Zwick LLP
171 Beaver Drive
P.O. Box 1126
DuBois, PA 15801
cjz@zwick-law.com
Counsel for Jefferson County
Knox Township
7525 Knox Dale Road
P.O. Box 41
Knox Dale, PA 15847
KnoxTwp@Windstream.net

Jilian G. Fellows, Esquire
Karen Cummings, Esquire
Commonwealth of Pennsylvania,
Department of Transportation
P.O. Box 8212
Harrisburg, PA 17105-8212
jfellows@pa.gov
kcummings@pa.gov
Counsel for PennDOT

Michael L. Swindler, Esquire
Kayla L. Rost, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17120
mwindler@pa.gov
karost@pa.gov
Counsel for BI&E

Jeffrey M. Gordon, Esquire
Gordon & Dennison
293 Main Street
Brookville, PA 15825
JGordon@293Law.com
Counsel for Knox Township
James D. Dennison, Esquire
Brookville Borough Solicitor
18 Western Avenue, Suite A
Brookville, PA 15825
JDennison@Windstream.net
Counsel for Brookville Borough

Respectfully Submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: /s/Aaron M. Ponzio

J. Lawson Johnston, Esquire

Scott D. Clements, Esquire

Aaron M. Ponzio, Esquire

Attorneys for Buffalo & Pittsburgh Railroad



Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
 Harrisburg, PA 17105-3265
EFILING - FILING DETAIL

Date Created	Filing Number
7/14/2022	2425547

Your filing has been electronically received. Upon review of the filing for conformity with the Commission's filing requirements, a notice will be issued acknowledging acceptance or rejection (with reason) of the filing. The matter will receive the attention of the Commission and you will be advised if any further action is required on your part.

The date filed on will be the current day if the filing occurs on a business day before or at 4:30 p.m. (EST). It will be the next business day if the filing occurs after 4:30 p.m. (EST) or on weekends or holidays.

Docket Number: C-2019-3009358

Case Description:

Transmission Date: 7/14/2022 4:32 PM

Filed On: 7/15/2022 8:30 AM

eFiling Confirmation Number: 2425547

File Name	Document Type	Upload Date
Exceptions of BPRR to Recommended Decision.PDF	Exceptions	7/14/2022 4:32:32 PM

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No paper submission is necessary for filings under 250 pages.

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Ellis, Emily

From: Ellis, Emily
Sent: Thursday, July 14, 2022 4:38 PM
To: malong@pa.gov; 'cjz@zwick-law.com'; mswindler@pa.gov; karost@pa.gov; knoxtwp@windstream.net; JGordon@293Law.com; jfellows@pa.gov; kcummings@pa.gov; jdennison@windstream.net
Cc: ra-OSA@pa.gov; Ponzo, Aaron
Subject: Knox Township v. BPRR C-2019-3009358
Attachments: Exceptions of BPRR to Recommended Decision.pdf; Chiavetta Ltr - Exceptions of BPRR to Recommended Decision.pdf

Counsel,

Please see the attached that was filed this date.

Thank you.

Emily Ellis
Paralegal
412-392-5265 Office
888-811-7144 Fax
EEllis@dmclaw.com

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Knox Township,

Complainant,

vs.

Docket No. C-2019-3009358

Buffalo & Pittsburgh Railroad Inc.,
Pennsylvania Department of
Transportation, Jefferson County &
Brookville Borough,

Respondents.

**EXCEPTIONS OF BUFFALO & PITTSBURGH RAILROAD, INC.
TO RECOMMENDED DECISION**

AND NOW, comes Respondent, Buffalo & Pittsburgh Railroad Company (“BPRR”), by its attorneys, Dickie, McCamey & Chilcote, P.C., J. Lawson Johnston, Esquire, Scott D. Clements, Esquire, and Aaron M. Ponzio, Esquire, and files its Exceptions to the Recommended Decision dated June 24, 2022, and states as follows:

I. Introduction

This matter involves three above-grade railroad crossings located in Knox Township, Jefferson County, Pennsylvania where Ramsaytown Road (T-841), East Bellport Road (T-405), and Harriger Hollow Road (T-420) cross the right of way of the Buffalo & Pittsburgh Railroad, Inc. The crossings consist of two concrete arch structures at Ramsaytown Road and East Bellport Road, and concrete abutments at Harriger Hollow Road which formerly supported a steel superstructure.

An evidentiary hearing was held on January 25, 2022. On June 24, 2022, a Recommended Decision was issued by Administrative Law Judge Mary D. Long (“ALJ”) recommending that all three bridges be removed at BPRR’s cost, and that the crossings be abolished.

The Recommended Decision is not based on sound legal or factual bases. The ALJ erred in several respects by making findings of fact that were not supported by substantial evidence and by reaching incorrect conclusions of law, as fully discussed by BPRR's Exceptions. Further, she disregarded the testimony of qualified experts presented by BPRR in favor of testimony given by unqualified or lesser qualified witnesses, and failed to make proper credibility determinations.

The Complainant in this case, Knox Township, utterly failed to carry its burden of proof. It did not call any witnesses except for Township Supervisor, Jim Berry, whose chief complaint was not about public safety, but about his own oversized farm equipment. The Township did not present any other witnesses. It did not submit any expert testimony to support its allegations that the conditions of the bridges pose a hazard to the public. Simply stated, the Township was content to rely on the Bureau of Investigation and Enforcement ("I&E") to make its case through I&E's sole witness, William Sinick, who is an engineer with the Commission's Rail Safety Section.

Mr. Sinick's testimony is unreliable, because as shown throughout BPRR's Exceptions and in the record, he relied on inapplicable bridge inspection standards and he does not actually perform bridge inspections or prepare reports. Further, the ALJ gave undue deference to Mr. Sinick's testimony even though his qualifications and experience pale in comparison to the experts who testified on behalf of BPRR.

BPRR presented the testimony of Charles Wooster, a Professional Traffic Operations Engineer with over 30 years of experience, who testified that all of the bridges safely and efficiently accommodate their traffic volumes. He further testified that it is improper to use the PennDOT Highway Design Manual for the purpose of evaluating existing structures such

as the bridges at issue in this matter, to determine if they should be removed. BPRR also presented the testimony and report of Wayne Duffett, a Professional Engineer with over 30 years of experience and a concentration in bridges and structures. Mr. Duffett testified that the bridges are in good condition aside from typical superficial deterioration. He also testified that any loose concrete can be addressed through routine maintenance.

Finally, Chad Boutet testified on behalf of BPRR with regard to its ownership, inspection, and maintenance of the bridges. Since the filing of Knox Township's Complaint in 2019, the bridges have been inspected three times, either by BPRR or by Mr. Duffett's firm. Those inspections did not reveal any immediate safety hazard or any falling concrete that would justify complete removal of the bridges. Mr. Boutet also testified that BPRR has placed the bridges on its Bridge Management Program, will inspect them annually, and perform any ongoing necessary maintenance.

The Recommended Decision will result in BPRR incurring hundreds of thousands of dollars in costs to remove structures that present no public safety hazard. The Commission should reject the Recommended Decision for the reasons set forth in these Exceptions, as well as BPRR's Main Brief and Reply Brief, which are incorporated by reference. The Commission should reach an entirely different result in which the bridges are allowed to remain in place, with BPRR to inspect and maintain them.

Any other outcome would not be fair and just, and would have significant implications for not only BPRR, but other railroads and public utilities throughout the Commonwealth. The ALJ made significant errors in the Recommended Decision. The Commission must closely scrutinize the Recommended Decision, BPRR's Exceptions, and the record in this matter in order to avoid an arbitrary and unreasonable result.

II. Standard of Review

The Commission is not bound by the ALJ's Recommended Decision, and it owes no deference to the findings and conclusions set forth in the Recommended Decision. "[I]f exceptions are filed, then the matter is taken to the [Commission], where "the [Commission] has all the powers which it would have had in making the initial decision" Romeo v. Pa. PUC, 154 A.3d 422, 429 (Pa. Cmwlth. Ct. 2016)(citing 66 Pa. C.S. § 335(a)).

The Commission can reach a complete different result than the ALJ. "The [Commission] has the power to conduct its own fact finding, to adopt or reject the ALJ's decision, or to come to an entirely different resolution. Thus, if exceptions are filed, only the [Commission] can take action, and the ALJ's decision cannot take on the force and effect of an order." Id. "The decision of the Administrative Law Judge . . . may always be superseded if a contrary decision is reached by the Commission based on substantial evidence." Pa. Retailers' Assoc. v. Pa. PUC, 440 A.2d 1267, 1273 (Pa. Cmwlth. Ct. 1980); Pa. Power Co. v. Pa. Pub. Util. Comm'n, 155 Pa. Commw. 477, 625 A.2d 719, 726 (Pa. Cmwlth. 1993).

Further, the Commission, as the ultimate factfinder, must evaluate the testimony, resolve conflicting testimony, and weigh the evidence. Energy Conservation Council of Pennsylvania v. Pa. PUC, 25 A.3d 440 (Pa. Cmwlth. Ct. 2011)(citing Duquesne Light Co. v. Pa. Pub. Util. Comm'n, 643 A.2d 130, 135 (Pa. Cmwlth. 1994))

III. Exceptions and Reasons for Exceptions

The ALJ focuses on three separate and distinct conditions or issues with the bridges in the Recommended Decision and then sets forth her disposition. BPRR's exceptions address each issue and the Findings of Fact which the ALJ relied upon in support of each.

A. Condition of the Structures at Ramsaytown and East Bellport Roads

1. BPRR excepts to the ALJ's conclusion that "falling concrete from the barrel arches of the crossings at Ramsaytown Road and East Bellport Road pose a hazard to the public." R.D., at 26.

This conclusion is not supported by the record, and an entirely different conclusion should be reached. The ALJ's conclusion relied upon certain findings of fact which are not supported by substantial evidence. The conclusion also disregarded more reliable and credible evidence that was not properly weighed.

2. BPRR excepts to Recommended Finding of Fact 42, which states: "Township workers removed the concrete from the road and put it on the side by the headwall. Tr. 166. *See* I&E Exhibit D, Pictures 7 and 11." R.D. at 11.

This finding of fact is based on testimony of Knox Township Supervisor, Jim Berry, and two photographs of a piece of concrete submitted by I&E. In the first instance, this evidence only related to Ramsaytown Road. Tr., at 166: 11-12. Therefore, this finding does not support the ALJ's conclusion with regard to East Bellport Road. Further, any testimony given by Mr. Berry should be given little weight because he is biased due to his personal interest in the outcome of this matter. He testified that the bridges affect his ability to move his own farm equipment along the roadways, which is obviously not a matter of public safety, but shows that Mr. Berry will benefit personally if the bridges are removed. Tr., at 160:2-6, 14-16, 161:13-18.

There is no testimony from a witness who actually saw a piece of concrete fall from the arch barrel ceiling of the Ramsaytown Road Bridge. Likewise, there is no testimony from any Township workers that they picked up a piece of concrete that was on Ramsaytown Road

within the arch barrel of the bridge. Mr. Berry was not present when the Township workers allegedly removed the piece of concrete from Ramsaytown Road. Tr., 167:13-17. There is no photographic evidence showing that this piece of concrete came from the arch barrel and fell into the roadway. Tr., 167:6-12.

The pictures relied upon by the Recommended Decision are I&E's pictures which show a piece of concrete lying in the grass next to one of the wing walls of the Ramsaytown Road Bridge. See I&E Exhibit D, Pictures 7 and 11. I&E's pictures were taken on October 21, 2021. Tr., at 206:3-4. Mr. Berry testified that the Township workers allegedly removed a piece of concrete from Ramsaytown Road **prior to 2019**. Tr., at 166:12. There is no evidence to suggest that the piece of concrete in I&E's pictures is the same one that was allegedly removed by Township workers more than two years prior. It is pure speculation that the piece of concrete in I&E's pictures fell from the arch barrel ceiling, landed in the road, was removed by Township workers, and was placed in the grass where it remained for more than two years.

Even if it is accepted that a piece of concrete fell from the arch barrel ceiling of the Ramsaytown Road Bridge sometime prior to 2019, this would not be evidence of its current condition. BPRR completed chipping and scaling work in the fall of 2019 to remove loose concrete. BPRR Statement 1, at 4:16-20. This work was observed at an interim field conference on February 21, 2020. Tr., at 220:19-23. No further directives were issued after the interim field conference. Tr., at 221:7-11. None of the bridge inspection reports from 2021 identify loose concrete on the arch barrel ceiling. See BPRR Exhibits 4-10.

3. BPRR excepts to Recommended Finding of Fact 43, which states: “Mr. Berry also reported that he has seen pieces of concrete the size of a football in the roadway. Tr. 152.” R.D. at 11

There is absolutely no evidence that any football-sized pieces of concrete fell into the roadway from either the Ramsaytown Road or East Bellport Road structures. The photographs of the arch barrel ceilings do not demonstrate evidence of multiple areas from where large pieces of concrete had fallen. *See* BPRR Exhibits 4-10. Mr. Berry’s testimony is not credible and should be given no weight.

4. BPRR excepts to Recommended Finding of Fact 44, which states: “As a Township Supervisor, Mr. Berry has received complaints regarding the overpasses at Ramsaytown Road, East Bellport Road, and Harriger Hollow Road. Tr. 148.” R.D. at 11.

Mr. Berry failed to substantiate this with any details or even cursory information about these alleged complaints. No testimony or evidence was submitted with regard to the nature and type of complaints that Mr. Berry claims to have received. He did not testify that any other resident of Knox Township complained about falling concrete, and no Township residents appeared at the hearing to testify that they had made any such complaints.

The Complaint filed by Knox Township alleged that there were concerns about the bridges raised by the fire department. However, Mr. Berry’s testimony on this point revealed that the concern was not even related to the bridges at issue in this case, but was related to a different bridge. Tr. at 155:12-25; 156:1-13.

5. BPRR excepts to Recommended Finding of Fact 53 and 54, which state:

“Mr. Sinick identified public safety issues at the crossings, noting that the concrete arch structures at Ramsaytown Road and East Bellport Road showed evidence of decay and the potential for debris to fall onto the road. I&E St. 1 at 3.”

“The Ramsaytown Road railroad structure had loose and delaminated concrete on the interior of the arch barrel ceiling, sidewalls, and end walls which were exposed to vehicle and pedestrian traffic, and which could fall from the structure onto the roadway. I&E St. 1 at 6.”

R.D. at 12.

These observations were made by Mr. Sinick during the initial field conference on June 14, 2019. I&E Statement 1, at 6:3-10. They are not evidence of its current condition. BPRR completed chipping and scaling work in the fall of 2019 to remove loose concrete. BPRR Statement 1, at 4:16-20. This work was observed by Mr. Sinick at an interim field conference on February 21, 2020. Tr., at 220:19-23. No further directives were issued after the interim field conference. Tr., at 221:7-11. None of the bridge inspection reports from 2021 identify loose concrete on the arch barrel ceiling. *See* BPRR Exhibits 4-10.

6. BPRR excepts to Recommended Finding of Fact 64, which states: “Mr. Sinick also noted that the removal of loose concrete was an ongoing problem. I&E St. 1 at 8-9.” R.D. at 14.

This finding relates to Mr. Sinick’s observations of the bridges on October 21, 2021. However, Mr. Sinick admitted he did not conduct a formal bridge inspection and did not complete a report. Tr., at 191:15-17; 197:23-198:4; 205:3-4.

On cross-examination, he claimed that he observed conditions that he would rate as a critical priority maintenance coding of zero under NBIS standards. Tr., at 188:3-15. However, NBIS standards do not apply to these bridges. See Reply Brief of BPRR, at 5-6. Additionally, Mr. Sinick admitted that he did not perform an inspection using the NBIS criteria. Tr., at 191:11-19. In fact, he never does. Tr., 192:1-6. Further, the fact that Mr. Sinick took no action whatsoever after allegedly observing what he thought to be critical conditions indicates that this testimony is unreliable and should be given no weight.

BPRR inspected the bridges on July 29, 2021, and identified spalling, and minor surface cracking in the concrete. BPRR Statement 1, at 3:23-4:2; BPRR Exhibits 4-6. These items were assigned a medium or low priority rating by Shawn Baer, BPRR's Director of Structures, meaning that repairs should be considered in either a three to four, or four to five year repair program. Tr., at 52:5-53:6; BPRR Exhibits 4-6.

The bridges were also inspected on October 4, 2021, by BPRR's expert Wayne Duffett. Tr. at 76:4. The conditions observed by Mr. Duffett such as minor cracking and spalling are surface deterioration due to environmental conditions and are typically addressed through periodic maintenance. Tr. at 76:14-22; 81:25-82:17. The conditions he identified on the arch barrels at Ramsaytown Road and East Bellport Road were all classified as C5, meaning a very low priority repair that can be addressed within the next five years. See BPRR Exhibits 10-11; Tr., at 79:3-14.

7. BPRR excepts to Recommended Finding of Fact 77, which states: "Mr. Sinick observed falling concrete from the inside of the arch barrels at Ramsaytown Road and East Bellport Road. I&E St. 1 at 9." R.D. at 15.

Mr. Sinick did not testify that he actually observed concrete that was currently falling from the bridges. His testimony was that he observed concrete that had the potential to fall or looked ready to fall. I&E St. 1 at 6:10-13. Mr. Sinick's testimony should be given little weight given the lack of formality and reporting of his observations on the three occasions he has visited the crossings, his reliance on inapplicable standards, and his unreliable testimony about conditions he allegedly would have assigned a critical priority maintenance coding of zero.

8. BPRR excepts to Recommended Finding of Fact 79, which states: "There are areas at the Ramsaytown Road structure where concrete is missing from the walls of the arch barrel. I&E Exhibit D, Picture 1, 2, 3." R.D. at 15.

The pictures relied upon for this finding were taken on October 21, 2021, by Mr. Sinick. The finding either ignores or disregards that BPRR chipped loose concrete from the walls of the Ramsaytown Road structure in the fall of 2019. If Mr. Sinick had completed and maintained reports from the prior two occasions he visited the crossings, he would have been able to compare the conditions and see that missing concrete is due to loose concrete having been removed.¹ Mr. Duffett's report and photographs from his inspection of October 4, 2021 explain and show that concrete is missing because it was chipped off during BPRR's work. *See* BPRR Exhibit 10.

9. BPRR excepts to Recommended Finding of Fact 80, which states: "There were pieces of concrete along the side of the roadway inside the arch barrel. I&E Exhibit D, Picture 1." R.D. at 15.

¹ The Recommended Decision criticizes Mr. Duffett for not having copies of his prior bridge inspection reports. R.D. at 26. However, Mr. Sinick does not even bother to complete reports in the first instance. The ALJ ignored that the reports completed by Mr. Duffett's firm on May 17, 2019, can be used as a comparison to the reports that Mr. Duffett completed following his inspection of October 4, 2021.

The picture relied upon for this finding shows very small pieces of concrete along the sidewall of the arch barrel, on the very edge of the roadway and outside of the drivable portion of the roadway. Chips and pieces of concrete alongside the roadway at the base of the side walls is not evidence of a hazard to motor vehicles as Mr. Duffett explained. Tr., 89:11-13, 94:22-25; 95:1-18.

10. BPRR excepts to Recommended Finding of Fact 82, which states: “There were sections of missing concrete in the arch barrel of East Bellport Road. I&E Exhibit B, Pictures 1, 2, 4, 5, 6, 10.” R.D. at 15.

The six pictures relied upon for this finding show only a few areas of the East Bellport Road Bridge. Pictures 1 and 5 show a spalled area near the top of the side wall. Picture 6 shows a spalled area on the spandrel wall. Pictures 2 and 10 show an area on the sidewall where loose concrete was chipped. *See* BPRR Exhibit 11. Mr. Duffett’s report and photographs from his inspection of October 4, 2021 explain and show that concrete is missing because it was chipped off during BPRR’s work. *See* BPRR Exhibit 10.

11. BPRR excepts to Recommended Finding of Fact 83, which states: “Concrete cobbles were also evident along the side of the road inside of the arches. E.g., I&E Exhibit B, Picture 1.” R.D. at 16.

This is not evidence of a hazard to motor vehicles as Mr. Duffett explained. Tr., 89:11-13, 94:22-25; 95:1-18. It is quite clear from the photographs that the “cobbles”, if they even came from the bridge and are not road debris or came from a truck, simply fell from the lower portion side walls to the edge of the roadway.

12. BPRR excepts to Recommended Finding of Fact 120, which states: “BPRR’s Bridge Management Program does not include a provision to inspect bridges on out-of-service lines. BPRR Statement 1 at 3.” R.D. at 20.

This finding implies that BPRR is not currently undertaking any efforts to inspect the three bridges at issue. However, Chad Boutet testified that BPRR has added these bridges to its inventory and they are on BPRR’s annual inspection program. This means that they will be inspected annually for structural integrity and public safety. BPRR St. 1 at 3:9-13. Further, the bridges have been inspected three times since Knox Township filed its Complaint. *See* BPRR exhibits 4-7, 9-12.

13. BPRR excepts to Recommended Findings of Fact 121, 122, and 123 (R.D. at 20) which state:

“BPRR has no inspection records before 2019.”

“One of the most important tools that a bridge inspector can have prior to an inspection is past bridge inspection reports and the history for that structure. I&E St. 2 at 5.”

“If an entity does not maintain a file or inventory of record documenting past inspection reports and history for that structure public safety is at risk. I&E St. 2 at 5.”

These findings ignore that the inspection of May 17, 2019, which was performed after BPRR received Knox Township’s Complaint, did not reveal any critical safety issues. *See* BPRR Exhibit 7. Further, no critical public safety issues were identified at the initial field conference of June 14, 2019, as evidenced by the fact that no immediate action was taken to close the crossings or to direct immediate repairs, and the Secretarial Letter containing Mr.

Sinick's recommendations was not issued until September 10, 2019, and gave the parties until November 15, 2019, to address his immediate concerns. *See* Secretarial Letter, September 10, 2019, at 5.

Further, a comparison of the bridge inspection reports from May 17, 2019, July 29, 2021, and October 4, 2021, particularly with regard to the Ramsaytown Road Bridge, shows that conditions improved with simple routine maintenance, and there is no evidence of progressive deterioration. *See* BPRR Exhibits 4-7, 9-12.

B. Line of Sight at the Harriger Hollow Crossing

14. BPRR excepts to the conclusion that "limited sight distance at the Harriger Hollow Road crossing is hazardous." R.D., at 27.

This conclusion is based solely on the sight distance measurement by BPRR's expert Charles Wooster, and ignores his opinion that the crossing can safely and efficiently accommodate its anticipated traffic. Further, no qualified expert testified that the sight distance of 110 feet at Harriger Hollow Road is hazardous to motorists, or that it would be alleviated by removing the abutments. There have been no reported accidents at this crossing involving more than one vehicle. There was no evidence presented by either Knox Township or I&E of complaints by motorists about the sight distance. This conclusion is not supported by substantial evidence in the record.

15. BPRR excepts to Recommended Finding of Fact 99, which states: "Harriger Hollow Road generally has limited sight distance due to the horizontal curvature of the roadway and the structure itself. Tr. 116; BPRR Exhibits 15-16." R.D. at 17.

The structure at Harriger Hollow Road consists of two concrete abutments. BPRR St. 1 at 1. The finding of fact implicates both abutments, but only the abutment on the western side of the road affects sight distance. See BPRR Exhibits 15-16.² The images below show the driver's view at the crossing from both directions.

Harriger Hollow Road looking southbound at the crossing



Harriger Hollow Road looking northbound at the crossing



² BPRR exhibit 16 consists of six videos recorded by Mr. Wooster while driving the length of each roadway from both directions. The videos show the driver's view while driving through each of the crossings from both directions as well.

Additionally, the images below show how the sight distance is affected by the curvature in the road and the vegetation on the side of the road to the north of the crossing.

Harriger Hollow Road looking northbound from the crossing



Harriger Hollow Road looking southbound toward the crossing



As these photographs demonstrate, even if the abutment on the western side of the road is removed, the curvature of the roadway and the vegetation will continue to restrict the sight distance. The Recommended Decision fails to account for this.

C. Safety of the Roadways and Abutments

16. BPRR excepts to the Recommended Decision's improper reliance on PennDOT's Publication 13M Design Manual Part 2 Highway Design ("PennDOT Design Manual"). R.D. at 27-29.

BPRR's expert Mr. Wooster explained that the PennDOT Design Manual is not used to review existing structures, and the criteria in the Design Manual do not apply here. Tr., at 119:13-25; Respondent Statement 5, at 6:8-22. He testified that the Design Manual states that its inclusion of specified design criteria does not imply that existing roadways are either substandard or must be reconstructed to meet the design criteria. BPRR St. 5 at 6:18-20. He further explained that the "clear zone" concept is applied to roadway projects involving new construction, reconstruction, resurfacing, restoration, rehabilitation and pavement preservation projects. BPRR St. 6 at 1:13-14. Mr. Wooster is a registered Professional Traffic Operations Engineer with 37 years of experience in traffic engineering. BPRR St. 5 at 1:2-30. He testified that there is nothing in the Design Manual that requires existing facilities to be removed in order to comply with the clear zone dimensions in Table 12.1 of the Design Manual. Tr., at 122:22-123:4; Respondent Statement 6, at 1:15-28.

I&E did not present any expert testimony by a qualified Professional Traffic Operations Engineer to contradict Mr. Wooster's testimony. Mr. Sinick admitted that he does not have any experience in this field. Tr., 217:16-18.³ The ALJ should therefore have given

³ Mr. Sinick's experience with railroad bridges is limited to the six or seven years he has been with the Rail Safety Section. Tr., 193-195.

Mr. Wooster’s testimony more weight than Mr. Sinick’s testimony, regarding the applicability and use of PennDOT’s Design Manual.⁴

The argument advanced by I&E and adopted by the ALJ is unpersuasive and illogical. The Recommended Decision states that “Mr. Sinick explained that the Commission’s Rail Safety Division uses the PennDOT Design Manual as a general reference to assess the public safety of public highways as those highways impact railway crossings.” R.D. at 28. Mr. Sinick is not a traffic engineer, as Mr. Wooster is, and is using the Design Manual for a purpose other than which it is used by professionals in the field of highway and roadway design. The Recommended Decision goes on to argue that, “If the crossings are eventually abolished, the Design Manual is used by the Commission as a tool on reestablishing the roadway geometry to ensure public safety.” R.D. at 28. This language reveals the fatal flaw in the ALJ’s analysis because it provides that a decision to abolish the crossing must first be reached **before** the Design Manual is used to reestablish the roadway geometry. By their own admission, I&E and the ALJ state that the Design Manual plays no role in determining whether the crossings are to be abolished. Yet, that is exactly how it is being deployed in this case. The Commission must decline to adopt this conclusion and its underlying rationale, which imposes an inapplicable standard onto existing facilities without a sound legal or factual basis.

17. BPRR excepts to Recommended Finding of Fact 15, which states: “The approaching roadway to the Harriger Hollow Road structure is a two-laned gravel roadway with an average width of approximately 15 feet with 3-to-5-

⁴ See *Pennsylvania Public Utility Commission, Independent Oil & Gas Association, Arthur Whitaker, Office of Consumer Advocate, Ronald A. Coddling v. The Peoples Natural Gas Company, Hospital Council of Western Pennsylvania, and Office of Small Business Advocate, Intervenor; The Peoples Natural Gas Company v. Pennsylvania Public Utility Commission*, 994 Pa. PUC LEXIS 87, *48-49 (Pa. PUC July 21, 1994)

foot shoulders on each side of the roadway. I&E St. 1 at 13-14; *see generally* I&E Exhibit C, Pictures 1, 5, and 10.” R.D. at 8.

Harriger Hollow Road is not a two-lane roadway. It is an unpaved gravel and dirt road with no pavement markings such as centerlines or edge lines. See BPRR Statement 5 at 3:31-33. Further, the typical roadway lane width according to PennDOT’s Design Manual is 11 to 12 feet, meaning that the average width of Harriger Hollow Road is 7-9 feet less than a two lane road.

18. BPRR excepts to Recommended Finding of Fact 32, which states: “The approaching roadway to the Ramsaytown Road structure is a two-laned paved roadway with an average width of approximately 16 feet with 3-to-5-foot gravel shoulders on each side of the roadway. I&E St. 1 at 11; *see generally* I&E Exhibit D, Picture 9.” R.D. at 10.

Ramsaytown Road is not a two-lane roadway. Further, it is a paved roadway in poor condition with no pavement markings such as centerlines or edge lines. See BPRR Statement 5 at 3:18-19. Further, the typical roadway lane width according to PennDOT’s Design Manual is 11 to 12 feet, meaning that the average width of Ramsaytown Road is 6-8 feet less than a two lane road.

19. BPRR excepts to Recommended Finding of Fact 34, which states: “The approaching roadway to the East Bellport Road structure is a two-laned gravel roadway with an average width of approximately 15 feet with 3-to-5-foot shoulders on each side of the roadway. I&E St. 1 at 12-13; *see generally* I&E Exhibit B, Picture 11.” R.D. at 10.

East Bellport Road is not a two-lane roadway. It is an unpaved gravel and dirt road with no pavement markings such as centerlines or edge lines. See BPRR St. 5 at 3:24-26. Further, the typical roadway lane width according to PennDOT's Design Manual is 11 to 12 feet, meaning that the average width of East Bellport Road is 7-9 feet less than a two lane road.

20. BPRR excepts to Recommended Findings of Fact 39 (R.D. 11) and 95 (R.D. 17), which state:

“There are no guide rails to redirect a vehicle collision with the abutments. Tr. 210; 228-29.”

“There are no guide rails to redirect a vehicle collision with the abutments. Tr. 210.”

The wing walls at the Ramsaytown Road and East Bellport Road bridges are flared and make an angle with the roadway. They do not present a perpendicular obstruction with the roadway. BPRR St. 3 at 3:12-13; 4:17-78; BPRR Exhibit 15.

Ramsaytown Road wing walls eastbound



Ramsaytown Road wing walls westbound



East Bellport Road wing walls westbound



East Bellport Road wing walls eastbound



21. BPRR excepts to Recommended Findings of Fact 89, 90, 91, 92, and 93 (R.D.

16-17), which state:

“A concrete obstruction, such as an abutment or concrete arch structure, is a rigid fixed object. I&E St. 1 at 7.”

“A rigid fixed object is an immovable object along the roadside for which if a vehicle impacts the object, it will transfer 100% of the vehicle impact to the driver and the rigid fixed object will not move upon impact. I&E St. 1 at 7.”

“Concrete abutments at each crossing constitute an obstruction in the roadway and the roadway “clear zone.” I&E St. 1 at 15.”

“The roadway clear zone is defined as the total roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles. I&E St. 1 at 15.”

“The clear zone may consist of a shoulder, a recoverable slope, a non-recoverable slope, and/or a clear run-out area. I&E St. 1 at 15.”

These findings are based upon Mr. Sinick’s Prepared Direct Testimony which recites selected language from the PennDOT Design Manual. The Design Manual was not offered by I&E as an exhibit and the ALJ did not enter it into evidence in this proceeding. It is therefore not part of the record. The Commission should not rely upon readings of cherry picked sections of the Design Manual which is inapplicable in the first instance, as discussed above. Further, as Mr. Wooster explained, the Design Manual is not applicable in this context. These findings of fact are therefore irrelevant and do not support removal of the bridges.

22. BPRR excepts to Recommended Finding of Fact 94, which states: “If left in place, the concrete abutments pose a danger to motor vehicles that may strike them. I&E St. 1 at 15.” R.D. at 17.

There is no evidence of site specific crash patterns for any of the crossings. *See* BPRR St. 5 at 7:12-16. The Township has no records of any accidents involving motor vehicles striking the abutments. *Tr.*, at 162:3-6. This finding is not supported by substantial evidence.

23. BPRR excepts to Recommended Finding of Fact 96, which states: “The roadways approaching each crossing are two lane roadways that narrow to one lane between the abutments. I&E St. 1 at 17.” R.D. at 17.

None of the roadways approaching the crossing reduce from a full two lanes down to one lane. These are all rural back roads with no lines or pavement markings of any kind, and the difference in the width between the roadway approaches and the roadway within the crossings is minimal. *See* BPRR Statement 5 at 3:18-36; BPRR Exhibits 15-16. In fact, the difference between the average width of the roadways in this case and the width within the

crossings is 2 feet at Harriger Hollow Road, 3 feet at East Bellport Road, and 4 feet at Ramsaytown Road. *See* R.D. at 8, 10.

24. BPRR excepts to Recommended Finding of Fact 97, which states: “Two vehicles cannot pass between the abutments at any of the crossings creating an unsafe condition that is not consistent with modern roadway design. I&E St. 1 at 17; Tr. 132,137-.” R.D. at 17.

This is not an unsafe condition, nor is it an uncommon condition, particularly in rural Pennsylvania. Obviously it would be unsafe if two vehicles tried to pass through the crossings at the same time, but this ignores the fact that vehicles have been passing through these crossings for more than 100 years. They are essentially part of the landscape. As Mr. Wooster testified, each of these roadways can safely and efficiently accommodate their anticipated traffic demand. *See* BPRR St 5 at 2:10.

25. BPRR excepts to Recommended Finding of Fact 116, which states: “Knox Township would like to widen Ramsaytown Road approximately two feet. Tr. 157-58.” R.D. at 19.

Knox Township has no current projects in place to widen any of the roadways at issue in this case. Mr. Berry’s testimony indicated that the Township had discussed widening sections of Ramsaytown Road with a PennDOT representative. *See* Tr. at 157:24-25; 158:1-5. However, there was no testimony that any of these projects were currently active or that the Township would undertake them if the Ramsaytown Road Bridge was removed.

Further, even if the Commission were to take this testimony into consideration, it has no bearing on East Bellport Road and Harriger Hollow Road.

D. Disposition

26. BPRR excepts to the Recommended Decision's improper reliance on prior proceedings involving PennDOT's removal of three crossings and the Commission's *Putneyville Decision*. R.D. at 29-31.

Neither of these proceedings have any precedential value or preclusive effect over this matter. It was improper for the ALJ to rely on them in this case.

No evidence was submitted to establish any relevance of the proceedings in which PennDOT removed three overhead railroad structures.⁵ There is nothing in the record to suggest that the structures PennDOT removed were similar to the ones involved here. I&E did not offer any evidence to demonstrate how PennDOT's removal of three structures almost ten years ago bears on the issues in this case. The Recommended Decision suggests that these crossings were described in the *Putneyville Decision*. R.D. at 29. A review of that decision however, reveals no description of those crossings other than their location.

Further, a brief review of the dockets and available filings in the proceedings initiated by PennDOT reveals that no substantive evidence or testimony was submitted with regard to the conditions of the structures that PennDOT removed, or the characteristics of the roadways involved. PennDOT's applications in those matters were unopposed and uncontested. Accordingly, there is nothing from those proceedings that applies here, and the ALJ erred in relying on them in her disposition.

Likewise, there was no evidence submitted in this matter to establish the relevance of the *Putneyville Decision* to the instant matter. Even though Mr. Sinick was involved in the *Putneyville* case and gave testimony, I&E never even attempted to offer evidence

⁵ As noted in the Recommended Decision, these proceedings were filed under Commission Dockets A-2009-2104031, A-2010-2185469, and A-2012-2338963. R.D. at 29.

demonstrating that the removal of the structure in the Putneyville case is relevant or persuasive on the issues in this case. This is because the facts in the Putneyville case are so distinguishable that they have no value here.

The roadway at issue in the Putneyville case was a paved two lane state highway with a 55 mph posted speed limit, and roadway widths of 24 feet and 21 feet on its approaches to the crossing, which narrowed to 10 feet within the crossing. *Mahoning Twp. v. Buffalo & Pittsburgh R.R. Inc.*, Docket C-2017-2585787, Recommended Decision, at 12-13. Thus, the roadway narrowed to one half of its width. In contrast, the difference in the average width of the roadways in this case and the width within the crossings is 2 feet at Harriger Hollow Road, 3 feet at East Bellport Road, and 4 feet at Ramsaytown Road. R.D. at 8, 10.

The roadway in the Putneyville case had an average daily traffic volume of 564 vehicles, 6% of which were trucks. *Id.* at 13. Here, the average daily traffic volume at Harriger Hollow Road is 15 vehicles (0% buses and 0% trucks). At East Bellport Road it is 30 vehicles per day (0% buses and 6.7 % trucks). At Ramsaytown Road it is 312 vehicles (1.3 % buses and 4% trucks). The Putneyville case involved a busy state route, whereas the roads in this case see a fraction of that traffic, particularly Harriger Hollow Road and East Bellport Road.

These facts alone distinguish the Putneyville case. In addition, the evidence presented by BPRR in this case, which included the testimony of two qualified expert witnesses on the critical issues, is markedly different than the evidence in the Putneyville case. In that case the Commission did not have the benefit of any expert testimony as compared to the testimony given here by Charles Wooster and Wayne Duffett. These experts

conducted the appropriate inspections and testified credibly about their findings. No other witness had the credentials or the level of expertise of Mr. Wooster and Mr. Duffett.

In spite of these substantial differences, the ALJ stated that “there is no compelling reason to treat the Knox Township crossings differently than the Putneyville Crossing or the PennDOT crossings described in that decision.” R.D. at 29. However, it is clear that the ALJ simply disregarded numerous compelling factors that should have led to a different result.

27. BPRR excepts to Recommended Finding of Fact 5, which states: “PennDOT has removed three of the overhead railroad structures along this abandoned line, along their roadways in conjunction with a larger federal/state funded roadway project under Commission dockets A-2009-2104031, A-2010-2185469 and A-2012-2338963. Secretarial Letter, September 10, 2019.” R.D. at 7.

This finding of fact is irrelevant and was improperly relied upon by the ALJ in her Disposition, for the reasons stated above.

28. BPRR excepts to Recommended Finding of Fact 6, which states: “The Railroad has removed one overhead structure along this line as ordered under a Commission complaint docket C-2017-2585787 leaving approximately 13 overhead public crossing railroad structures remaining in place. Secretarial Letter, September 10, 2019.” R.D. at 7.

This finding of fact references the Putneyville Decision, which the ALJ relied upon in her Disposition. R.D. at 29-30. As discussed above, the Putneyville Decision has no relevance to this case and, as such, this finding of fact is irrelevant.

29. BPRR excepts to Recommended Conclusion of Law 4, which states: “Buffalo & Pittsburgh Railroad, Inc.’s abutments at the subject public crossing are fixed obstructions in the roadway clear zone as designated in PennDOT’s Design Manual Part 2 Highway Design and therefore the abutments are hazardous to the traveling public. 67 Pa. Code §459.1.” R.D. at 36.

The section of the Pennsylvania Code that is cited here defines the “clear zone” as “The portion of right-of-way beyond the pavement edge within which, under Design Manual, Part 5, **no new obstructions may be located.**” Pa. Code §459.1 (emphasis added). The abutments in this case have been in place for over 100 years and are not new obstructions. This confirms BPRR’s argument, which has been made throughout the course of this proceeding that PennDOT’s Design Manual is inapplicable and cannot be used to evaluate the characteristics and safety of these crossings.

30. BPRR excepts to Recommended Conclusion of Law 5, which states: “The absence of any accidents at a railroad crossing does not establish that the crossing is adequate, efficient, safe and reasonable. *Pennsylvania Railroad Company v. PA. Pub. Util. Comm’n*, 195 A.d 162 (Pa. Super. 1963).” R.D. at 36.

The case cited in this Conclusion of Law does not support the proposition stated. Further, this is not a correct statement of the law.

The decision of the Pennsylvania Superior Court in *Pennsylvania Railroad Company v. PA. Pub. Util. Comm’n* provides that a lack of accidents does not limit the Commission’s power to correct conditions it believes may lead to injury or death. 195 A.2d 162, 164. That case involved an at-grade crossing that was being used by a railroad’s employees to traverse two main line tracks and five yard tracks to walk to and from a parking lot while trains were

stopped on the tracks. The railroad's 160-200 employees had to cross the tracks several times per day while trains were blocking the crossing. The employees had to climb between the cars without protection from moving trains, which was obviously a dangerous situation even though no accidents or injuries occurred. The Commission ordered the railroad to construct a pedestrian walkway for its employees, and the Superior Court affirmed. In its analysis of the railroad's argument that there had not been any accidents, the Court stated, "Although there is no substantial evidence of the occurrence of any serious accidents at this crossing, **we do not believe that fact limits the power of the Commission to correct a condition which it believes may lead to the injury or death of persons subjected to such condition.**" *Id.* (emphasis added)

The ALJ who presided over the Putneyville case interpreted *Pennsylvania Railroad Company* to mean that a lack of accidents does not prove that a crossing is safe. This is inherently inconsistent with the Superior Court's holding, which simply stated that the Commission can still regulate a facility even if there is no evidence of accidents.⁶ It is reasonable to conclude that hundreds of railroad workers crossing live tracks every day without protection is potentially unsafe despite no accidents occurring. This does not lead to the conclusion, however, that a lack of motor vehicle accidents at a railroad crossing fails to prove that the crossing is safe.

The Commission must decline to adopt this conclusion of law for the reasons stated above. In addition, the continued reliance on this proposition will result in the disregard of relevant evidence in proceedings such as this one. The evidence in this case that accidents

⁶ No exceptions were filed to the Recommended Decision which included this conclusion of law, and the Commission adopted it.

do not occur at these crossings is overwhelming and there is no reliable evidence to the contrary. The fact that accidents rarely or never occur is relevant and compelling evidence of a safe condition, or the absence of a dangerous condition. *See Spino v. John S. Tilley Ladder Co.*, 696 A.2d 1169 (Pa. 1997); *Orlando v. Herco, Inc.*, 505 A.2d 308 (Pa. Super. Ct. 1986). Yet, if this conclusion of law is allowed to stand as stated, it would allow for the capricious disregard of evidence.

31. BPRR excepts to the Recommended Ordering Paragraphs 1-21 (R.D. 37-42).

BPRR excepts to each and every Recommended Ordering Paragraph for the reasons set forth herein, and for the reasons articulated in BPRR's Main Brief and Reply Brief, which are incorporated by reference as if fully set forth herein. The Recommended Order Paragraphs are not supported by substantial evidence in the record, do not have sound legal and factual bases, and the recommended result is not just and reasonable.

32. BPRR excepts to the Recommended Ordering Paragraph 2 (R.D. 37).

The crossings do not need to be altered because, as set forth above and in BPRR's Main Brief and Reply Brief, which are incorporated by reference as if fully set forth herein, the crossings are not unsafe for the public and their alteration will not prevent accidents or promote public safety.

33. BPRR excepts to the Recommended Ordering Paragraph 3 (R.D. 37).

The crossings do not need to be altered because, as set forth above and in BPRR's Main Brief and Reply Brief, which are incorporated by reference as if fully set forth herein, the crossings are not unsafe for the public and their alteration will not prevent accidents or promote public safety. Accordingly, BPRR should not be ordered to perform the work in Recommended Ordering Paragraph 3.

Further, BPRR should not be forced to incur hundreds of thousands of dollars in costs to remove the public crossings when they do not pose a hazard to the public. Further, the crossings were not constructed by BPRR. BPRR Exhibits 1-3. The record is without any evidence demonstrating when BPRR took ownership of the crossings. As BPRR did not own the crossings when they were constructed, it would not have received any initial benefit from them. However, Knox Township would have benefitted from the crossings in that they permitted its residents to travel the respective roadways unobstructed by rail traffic. Tr., at 237:18-21. BPRR is responsible for maintenance of the bridges, but they have not deteriorated to the point that they need to be removed. See BPRR Exhibits 4-7, 8-12. Any benefit that BPRR would realize from the removal of the bridges is outweighed by the cost of doing so. In contrast, Knox Township would benefit from the removal of the bridges. Tr., at 238:17-20. The recommended cost allocation is not just and reasonable.

34. BPRR excepts to the Recommended Ordering Paragraph 4 (R.D. 37).

The crossings do not need to be altered because, as set forth above and in BPRR's Main Brief and Reply Brief, which are incorporated by reference as if fully set forth herein, the crossings are not unsafe for the public and their alteration will not prevent accidents or promote public safety. Accordingly, BPRR should not be ordered to perform the work in Recommended Ordering Paragraph 4.

35. BPRR excepts to the Recommended Ordering Paragraph 5 (R.D. 37).

The crossings do not need to be altered because, as set forth above and in BPRR's Main Brief and Reply Brief, which are incorporated by reference as if fully set forth herein, the crossings are not unsafe for the public and their alteration will not prevent accidents or

promote public safety. Accordingly, BPRR should not be ordered to perform the work in Recommended Ordering Paragraph 5.

IV. Conclusion

The result suggested in the Recommended Decision is not one that is just or reasonable, and contains numerous factual and legal errors. The evidence was not properly weighed, and the ALJ was wrong to accept the testimony of Knox Township's Supervisor, Mr. Berry, and I&E's witness Mr. Sinick, over that of BPRR's expert witnesses Mr. Wooster and Mr. Duffett, when the latter were eminently more qualified and credible. It is improper to use PennDOT's Highway Design Manual to assess the safety of existing railroad bridges, and the ALJ disregarded evidence regarding the lack of accidents at this crossing. The ALJ reached incorrect conclusions of law which must be corrected, and the Recommended Decision improperly relies on prior proceedings which have no precedential value.

Accordingly, Respondent Buffalo & Pittsburgh Railroad, Inc. respectfully requests that the Commission consider its Exceptions, reject the Recommended Decision, and adopt BPRR's Proposed Findings of Fact and Ordering Paragraphs:

FINDINGS OF FACT

1. Complainant is Knox Township, a municipality located in Jefferson County, Pennsylvania, with a mailing address of 7525 Knox Dale Rd., P.O. Box 41, Knox Dale, Pennsylvania 15847. Compl, ¶3.

2. On April 10, 2019, Knox Township filed a Complaint before the Pennsylvania Public Utility Commission ("Commission") against Pittsburgh & Shawmut Railroad.

3. On April 25, 2019, the Commission's Secretary served the Complaint on Buffalo and Pittsburgh Railroad, Inc., the Pennsylvania Department of Transportation

("PennDOT"), Jefferson County, and Brookville Borough, naming those parties as Respondents.

4. The Complaint alleges "[t]here are 3 overpasses on a railroad right-of-way that are creating a traffic and safety problem." Compl., ¶3. It claims that the overpasses are "too narrow for two-lane traffic and are not wide enough to meet state requirements", and further that, "[l]arge fire apparatus are concerned with clearances." *Id.* The Complaint also alleges that "[t]hese overpasses are deteriorating and large pieces of concrete from the ceiling are falling on the roadway." *Id.*

5. The Township requests that the structures be removed. Compl., ¶4.

6. The overpasses identified in the Complaint are railroad bridge structures located at public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) where Ramsaytown Road (T-841), Harriger Hollow Road (T-420) and East Bellport Road (T-405) cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., located in Knox Township, Jefferson County. Secretarial Letter, September 10, 2019, at 1.

7. These crossings are no longer active as the railroad line has been abandoned and the track has been salvaged. Respondent Statement 1, at 1:16-17.

8. The bridges were left in place to keep the corridor intact in the event that railroad traffic returns to the area, and to preserve the value and utility of the property. Respondent Statement 2, at 1:17-24.

9. The structures located at Ramsaytown and East Bellport Road were constructed in 1910, and the structure located at Harriger Hollow Road was constructed in 1906. Tr. at 49:3-6; Respondent Exhibits 1-3.

10. The plans indicate that the crossings were constructed by the Pittsburg and Shawmut Railroad. *See* Respondent's Exhibits 1-3.

11. The Ramsaytown and East Bellport Road structures are 16 foot wide concrete arch bridges, and the Harriger Hollow Road structure consists of two concrete abutments. Respondent Statement 1, at 1:11-16.

12. BPRR currently owns these structures. *Tr.*, at 50:5-7.

13. BPRR also inspects and maintains these structures pursuant to its Bridge Management Program. Respondent's Statement 1, at 1:28-3:13.

14. The structures were inspected on July 29, 2021, by Shawn Baer, BPRR's Director of Structures. *Tr.*, at 50:18-51:17; Respondent's Statement 1, at 3:14-16.

15. The inspections identified spalling, and minor surface cracking in the concrete. Respondent's Statement 1, at 3:23-4:2; Respondent's Exhibits 4-6.

16. These items were assigned a medium or low priority rating, meaning that repairs should be considered in either a three to four, or four to five year repair program. *Tr.*, at 52:5-53:6; Respondent's Exhibits 4-6.

17. The structures were also inspected on October 4, 2021, by BPRR's expert Wayne Duffett. *Tr.* at 76:4.

18. Mr. Duffett is a professional engineer with a concentration in bridges and structures, and is licensed in several states including Pennsylvania. *Tr.* at 74:15-75:6.

19. The structural integrity of each structure is good, there are no structural issues, and all three are structurally safe. *Tr.*, at 76:23-77:1-3; Respondent's Statement 3, at 2:2-3; Respondent's Exhibits 9-12.

20. There is minor cracking and spalling, which is surface deterioration due to environmental conditions, and is typically addressed through periodic maintenance. Tr. at 76:14-22; 81:25-82:17.

21. There are no through cracks or settlement at any of the structures. Respondent's Statement at 2:11-12.

22. The abutments of the Ramsaytown and East Bellport Road structures have a thickness of 7'10" and 6'7", respectively. Respondent's Statement 3, at 5:12-16.

23. The dimensions of all three structures are set forth in the Plans. Respondent's Exhibits 1-3.

24. Any concrete potentially falling from the wing walls of the Ramsaytown Road Bridge would not pose a hazard to motor vehicles because it would not be falling from overhead. Tr., at 94:11-95:11.

25. Only concrete falling from the arch barrel or the headwalls could potentially present a hazard, but these areas are in good condition. Tr. at 96:24-97:11.

26. A traffic engineering investigation was performed with respect to each of the structures and roadways by Charles Wooster, a professional traffic engineer. See Respondent's Exhibits 14-16.

27. Ramsaytown Road is paved, but it has no pavement markings and its width varies from 14 to 20 feet. Respondent's Statement 5, at 3:18-21.

28. East Bellport and Harriger Hollow Road are both unpaved gravel and dirt roadways, with no pavement markings and widths that vary from 14 to 16 feet and 14 to 18 feet, respectively. *Id.*, at 3:24-36.

29. The site distances approaching the Ramsaytown and East Bellport Road structures are 500 and 300 feet, respectively. Tr., at 116:5-16; Respondent's Statement 5, at 4:30-33.

30. The sight distance at Harriger Hollow Road is 110 feet approaching the structure due to the curvature of the road and the north abutment. Tr., at 116:16-20; Respondent's Statement 5, at 5:3-8.

31. Harriger Hollow Road generally has limited sight distance due to several severe horizontal curves. *Id.*, at 5:1-2; Respondent's Exhibits 15-16.

32. The average daily traffic volume on Ramsaytown Road is approximately 312 vehicles with only 1.3% of that volume consisting of buses and 4% trucks; East Bellport Road has an average daily traffic volume of approximately 30 vehicles per day (0% buses and 6.7% trucks); Harriger Hollow Road's average daily traffic volume is a mere 15 vehicles (0% buses and 0% trucks). Tr., at 115:4-20; Respondent's Statement 5, at 5:10-18.

33. Accident data from PennDOT for the last 10 years for each road revealed that there is no site specific crash pattern for any of the bridges. Tr., at 111:17-25.

34. No reported accidents occurred at the East Bellport structure during that time period. Respondent's Statement 5, at 5:33.

35. One reported accident occurred at the Ramsaytown Road structure and one occurred at the Harriger Hollow Road structure, but these were due to snowy conditions and the drivers traveling too fast for conditions, failing to maintain proper speed, and driving on the wrong side of the road. *Id.*, at 5:27-6:2.

36. There is no evidence of non-reported accidents such as skid marks, or contact marks from vehicles on any of the structures. Tr., at 114:23; Respondent's Statement 5, at 7:12-16.

37. There are no applicable roadway design standards, including PennDOT's Highway Design Manual, Publication 13M, that require the alteration, modification, or removal of any of the three railroad bridge structures. Tr., at 112:10-16; 117:19-118:4; Respondent's Statement 5, at 2:15-21; 6, at 1:17-28.

38. Knox Township has not had any engineering experts inspect the bridges or roadway approaches. Tr., at 157:12-16; 158:16-21.

39. Knox Township does not have records of any accidents occurring at any of the bridges. Tr., at 162:3-6.

40. Mr. Sinick did not conduct a formal bridge inspection with respect to any of the structures. Tr., at 191:15-17; 197:23-198:4.

41. Mr. Sinick did not perform a structural rating inspection. Tr., at 203:2-5.

42. Mr. Sinick did not do an in-depth inspection or structural analysis of the structures. Tr., at 207:5-6.

43. Mr. Sinick did not gather any traffic data or accident data. Tr., at 207:112-14-208:3.

44. Mr. Sinick is not aware of any complaints from motorists who have had their vehicles damaged by concrete falling from any of the structures. Tr., at 216:13-18.

45. Mr. Sinick is not aware of any instances of debris falling from above the bridges. Tr., at 226:12-22.

46. Mr. Sinick is not aware of any accidents at the structures other than the two noted by BPRR's expert Mr. Wooster, and could only assume there were more. Tr., at 240:19-241:5-7.

47. Mr. Sinick agreed that bridges with abutments in the clear zone are "all over the place" within the Commonwealth. Tr., at 228:17-20.

48. Bridges do not need to be removed solely because their abutments are in the clear zone. Tr., at 229:6-9.

49. Knox Township received some benefit from the crossings in that they permitted its residents to travel the respective roadways unobstructed by rail traffic. Tr., at 237:18-21.

50. East Bellport and Harriger Hollow Roads are not paved and lack posted speed limits or advisory speed limits, and all of the roadways lack pavement markings. Tr., at 118:14-25.

51. Implementing these measures, along with improving storm water runoff and repairing vertical pavement deflections and failures, all of which are the responsibility of Knox Township, would enhance safety. Respondent's Exhibit 14, at 8.

52. BPRR would not benefit from the removal of the bridges. The estimated cost of removal for the three structures would likely reach or exceed \$250,000. Tr., at 56:7-12.

53. Estimates for removal were obtained by BPRR in March of 2020. The estimate to remove the abutments at Harriger Hollow road was \$18,000 for the above grade portion of one abutment, and \$35,000 for both abutments, with an additional \$30,000 estimated for a below grade removal. Tr., at 55:8-24.

54. The costs for removal of the structures at Ramsaytown Road and East Bellport Road were estimated at \$40,000 each for the above grade portions and \$75,000 each for the below grade portions. Tr., at 56:1-3.

55. It is anticipated that these estimates would likely increase by 10-20% since the time they were obtained. Tr., at 56:3-5.

56. The chipping and scaling work completed in the fall of 2019 was \$4,000. Respondent's Statement 1, at 4:18-24.

57. The cost to reconstruct new bridges in the event that rail service returns to this line would likely be several million dollars. Tr., at 68:4-9.

58. Removal of the bridges would diminish the value and utility of BPRR's property. Respondent Statement 2, at 1:23-24.

59. Knox Township would benefit from the removal of the bridges. Tr., at 238:17-20.

ORDERING PARAGRAPHS

1. The public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) where Ramsaytown Road (T-841), Harriger Hollow Road (T-420) and East Bellport Road (T-405) cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., located in Knox Township, Jefferson County shall not be altered or removed.

2. The Buffalo & Pittsburgh Railroad, Inc. shall, at its sole cost and expense, continue to inspect the bridges at the crossings pursuant to its Bridge Management Program and maintain the bridges as necessary and appropriate.

3. Knox Township shall, at its sole cost and expense, maintain the roadways and any existing advanced warning signs posted along the roadways and roadway clearance markers installed at the bridges.

4. The Complaint of Knox Township is hereby dismissed.

WHEREFORE, Respondent Buffalo & Pittsburgh Railroad, Inc. respectfully requests that the Commission consider its Exceptions and reject the Recommended Decision.

Respectfully Submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: /s/Aaron M. Ponzio

J. Lawson Johnston, Esquire

PA I.D. #19792

Scott D. Clements, Esquire

PA I.D. #78529

Aaron M. Ponzio, Esquire

PA I.D. 203584

Attorneys for Buffalo & Pittsburgh
Railroad, Inc.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Exceptions of Buffalo & Pittsburgh Railroad, Inc. to Recommended Decision has been served this 14th day of July, 2022, upon all parties in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Service by Electronic Mail

Honorable Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222
malong@pa.gov

CJ Zwick, Esquire
Zwick & Zwick LLP
171 Beaver Drive
P.O. Box 1126
DuBois, PA 15801
cjz@zwick-law.com
Counsel for Jefferson County

Knox Township
7525 Knox Dale Road
P.O. Box 41
Knox Dale, PA 15847
KnoxTwp@Windstream.net

Jilian G. Fellows, Esquire
Karen Cummings, Esquire
Commonwealth of Pennsylvania,
Department of Transportation
P.O. Box 8212
Harrisburg, PA 17105-8212
jfellows@pa.gov
kcummings@pa.gov
Counsel for PennDOT

Michael L. Swindler, Esquire
Kayla L. Rost, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17120
mwindler@pa.gov
karost@pa.gov
Counsel for BI&E

Jeffrey M. Gordon, Esquire
Gordon & Dennison
293 Main Street
Brookville, PA 15825
JGordon@293Law.com
Counsel for Knox Township

James D. Dennison, Esquire
Brookville Borough Solicitor
18 Western Avenue, Suite A
Brookville, PA 15825
JDennison@Windstream.net
Counsel for Brookville Borough

Respectfully Submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

By: /s/Aaron M. Ponzio

J. Lawson Johnston, Esquire
Scott D. Clements, Esquire
Aaron M. Ponzio, Esquire
Attorneys for Buffalo & Pittsburgh
Railroad

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