



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 25, 2022

Via Electronic Filing

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

Re: Complaint filed by Reading Blue Mountain & Northern Railroad Company involving the deteriorated condition of the railroad crossing surface and roadway approaches at the public crossing (DOT 361 425 J) where SR 2019 (Oak Street) crosses, at grade, the tracks of Reading Blue Mountain & Northern Railroad Company, located in the Pittston Township, Luzerne County.
Docket No. C-2020-3016906
I&E's Reply Brief

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the **Reply Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

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KLR/ac
Enclosures

cc: As per Certificate of Service
William Sinick, P.E. (via email - wilsinick@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Complaint filed by Reading Blue Mountain :
& Northern Railroad Company involving :
the deteriorated condition of the railroad :
crossing surface and roadway approaches at :
the public crossing (DOT 361 425 J) where : Docket No.: C-2020-3016906
SR 2019 (Oak Street) crosses, at grade, the :
tracks of Reading Blue Mountain & :
Northern Railroad Company, located in the :
Pittston Township, Luzerne County. :

**REPLY BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: August 25, 2022

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I. PROCEDURAL HISTORY

The Bureau of Investigation and Enforcement (“I&E”) incorporates the procedural history as set forth in its Main Brief submitted on August 5, 2022, on pages 1 through 3. A Main Brief was also submitted by the Pennsylvania Department of Transportation (“PennDOT”) and by Reading Blue Mountain & Northern Railroad Company (“Reading Blue Mountain” or “RBMN”) on August 5, 2022. Pursuant to the procedural schedule established in the July 6, 2022 Interim Order Setting Briefing Schedule and in accordance with Commission regulations at Section 5.501, I&E now submits this Reply Brief.¹

II. STATEMENT OF THE FACTS

I&E herein references and incorporates the Statement of the Case section as set forth in its Main Brief submitted on August 5, 2022, on pages 3 through 5, as well as Appendix A – I&E’s Proposed Findings of Fact. I&E’s Main Brief and accompanying appendices include an extensive discussion of the facts that are supported by the record in a substantial and credible manner. While I&E will not repeat all of that information here, a few salient points bear reiteration.

I&E emphasizes that there is a clear difference between raising the tracks and changing the superelevation. Superelevation relates to the relationship between the one rail to the other rail on the tracks, noting that there are two sets of railroad tracks through this crossing.² Superelevation is like banking on a racetrack where one set of tracks is set higher than the other through a curve based upon curvature of the tracks and speed.³ On the other

¹ 52 Pa. Code § 5.501.

² N.T. pg. 105; I&E Statement No. 1, pg. 2.

³ I&E Statement No. 1-R, pg. 2; N.T. pg. 105.

hand, raising the tracks is setting the grade or changing the elevation of the entirety of the crossing.⁴

III. BURDEN OF PROOF

Section 332(a) of the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.⁵ RBMN, as the complainant, initially held the burden of proof to show that PennDOT was the party responsible for the deteriorated condition of the at-grade crossing at Oak Street in Pittston Township. In light of the progression of the proceeding, PennDOT now has the burden of proving, by a preponderance of evidence, that the work completed by RBMN caused the unsafe and dangerous condition currently existing at the at-grade crossing at Oak Street, and RBMN has the burden of proving, by a preponderance of evidence, that the raising of the railroad tracks was proper and necessary. “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”⁶

IV. SUMMARY OF ARGUMENT

In its Main Brief, RBMN argues that the testimony of Mr. William Sinick regarding what qualifies as an alteration is unclear and inserts an excerpt from the transcript in an effort to prove this point. To the contrary, this excerpt confirms that Mr. Sinick clearly explained what the Commission would view as an alteration which would require an application subject to the Commission’s review and approval. Moreover, case law and the definition of

⁴ N.T. pg. 105.

⁵ 66 Pa. C.S. § 332(a); *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

⁶ *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

“alteration” further support Mr. Sinick’s testimony and clearly articulate what is considered an alteration.

V. ARGUMENT

A. THE TESTIMONY OF MR. WILLIAM SINICK ACCURATELY CHARACTERIZES RBMN’S COMPLETED WORK AT THE CROSSING AS AN ALTERATION REQUIRING COMMISSION APPROVAL

As explained by Mr. Sinick during the evidentiary hearing, an alteration at the Oak Street crossing beyond what was approved by the Commission occurred when RBMN raised the tracks and superelevated the tracks in excess of 1.5 inches.⁷ The raising of the train tracks and change in superelevation resulted in a change in track geometry, and subsequently a change in the roadway grade and approaches.⁸ Mr. Sinick explained that a change in track geometry changes the final elevation of the crossing, which is an alteration affecting the roadway transition, road approaches, possibly the posted speed limit, and possibly the drainage.⁹ By comparison, a minor adjustment to the superelevation of the track geometry, such as 1 to 1.5 inches, would be deemed minor and would not require a change or alteration to the crossing or surrounding area.¹⁰ Notably, Mr. Sinick unequivocally testified that while a minor change in the superelevation may not require an application, the raising of the railroad tracks such as was done in this matter is an alteration subject to the Commission’s jurisdiction and the application process.¹¹ Thus, Mr. Sinick clearly explained that raising the tracks and changing the grade is an alteration subject to the Commission’s jurisdiction, and a change to the superelevation in excess of 1.5 inches is also considered an alteration.

⁷ See generally N.T. pgs. 96-115.

⁸ N.T. pgs. 103-104

⁹ N.T. pgs. 103-106.

¹⁰ N.T. pgs. 104-105, 107-108.

¹¹ N.T. pgs. 104-105.

Accordingly, RBMN's completed work- changing the grade at the crossing and changing the superelevation- changed the entirety of the crossing and, most importantly, negatively affected the safety of the crossing.

As defined by The Law Dictionary, "alter" means "to make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected"¹² and "alteration" means "variation; changing; making different."¹³ The Commission has explicitly found various non-obvious, i.e., complete reconstruction, changes or installations at public crossings to be alterations subject to filing of an application for the Commission's review and approval.¹⁴ The record is clear that the raising of the tracks and change in superelevation drastically affected the roadway grade and approaches, not to mention the transition through the crossing between the railroad tracks.¹⁵ RBMN's actions clearly changed the condition and layout of the public crossing, and thus are alterations subject to the Commission's jurisdiction and review/approval process.¹⁶ RBMN's specious arguments that the raising of

¹² The Law Dictionary, featuring Black's Law Dictionary, 2nd Ed., <https://thelawdictionary.org/alter/>.

¹³ The Law Dictionary, featuring Black's Law Dictionary, 2nd Ed., <https://thelawdictionary.org/alteration/>.

¹⁴ *Manchester Township v. Pennsylvania Public Utility Commission*, 401 A.2d 1237, 1240 (Pa. Cmwlth. 1979)("We believe that the PUC's order requiring the installation of signs and flashing signals can be characterized as an alteration to or protection of a crossing subject to the PUC's control."); *Application of Consolidated Rail Corporation For abolition of one (1) at grade crossing on Conrail's Chester Secondary rail line located on 49 Street in Philadelphia, Pennsylvania*, Docket No. A-00115212 (May 8, 2000 Recommended Decision affirmed by Opinion and Order dated January 12, 2001)("The evidence in the record reveals that Conrail removed tracks, restored a track, elevated the tracks and barricaded the crossing to vehicular and pedestrian use without a Commission order authorizing the alteration."); *AT&T v. Pennsylvania Pub. Util. Comm'n*, 737 A.2d 201, 211 (Pa. 1999)("Given the broad language utilized by the General Assembly in connection with the establishment of the Commission's jurisdiction, as well as the importance of its purpose, we endorse the Commission's conclusion that the installation of telecommunications facilities within a regulated rail-highway crossing constitutes an alteration subject to the Commission's jurisdiction."); *Norfolk Southern Railway Company v. Pa. P.U.C.*, 870 A.2d 942 (Pa. Cmwlth. 2005)("Based on the outcome of those considerations, the PUC could order that the Bridge be raised, that the tracks be lowered or a combination to preserve the park's historic and esthetic nature as well as its recreational use.")

¹⁵ See generally I&E Statement No. 1 and PennDOT Statement No. 1; see also PennDOT Exhibits 8 and 9.

¹⁶ The Commission has jurisdiction over the construction, alteration, relocation, suspension, and abolishment of rail-highway crossings. 66 Pa.C.S. § 2702. Before alterations may be undertaken, the Commission's approval must be obtained. 66 Pa.C.S. § 2702. Furthermore, the agency directs the manner and conditions under which alterations, operations, maintenance, and protection are undertaken, in furtherance of public safety. 66 Pa.C.S. § 2702.

the tracks or change in superelevation are not alterations or that there is ambiguity in the law is in stark contrast to the plain meaning of “alteration.” Accordingly, the raising of the grade and change in superelevation in excess of 1.5 inches are both alterations which required Commission review and approval, including notice to and discussions with PennDOT on the effect of those alterations during the preliminary stages. Such did not occur in this matter.

VI. CONCLUSION

I&E respectfully requests that presiding ALJ DeVoe and the Commission find that (1) Reading Blue Mountain & Northern Railroad Company created an unsafe condition at the Oak Street crossing when its completed work raised the tracks and changed the superelevation; (2) that Reading Blue Mountain & Northern Railroad Company’s raising of the tracks and changing of the superelevation was not discussed or authorized by the Secretarial Letters; and (3) that Reading Blue Mountain & Northern Railroad Company be ordered to reconstruct the crossing at its sole cost and expense to the safety of the public.

Respectfully submitted,



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Pittston Township, Luzerne County. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, August 25, 2022, served a true copy of the foregoing **Reply Brief of the Bureau of Investigation and Enforcement**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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