

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held October 27, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
Stephen M. DeFrank, Vice Chairman  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

Priority 1 bridge repairs in response to a recent bridge inspection at the public crossing (DOT 510 521 Y), where Washington Street crosses, above grade, the tracks of Norfolk Southern Railway Company, Port Authority of Allegheny County East Busway and Waverly Avenue located in the Borough of Swissvale, Allegheny County and exemptions from the minimum side clearances required by 52 Pa. Code, Section 33.122

A-2022-3033069

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Rescission<sup>1</sup> (Petition) filed by Norfolk

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<sup>1</sup> We will exercise our discretion under 52 Pa. Code § 1.2(a), which provides that our Regulations be liberally construed to secure the just, speedy, and inexpensive determination of every action or proceeding to which they are applicable and consider the

Southern Railway Company (Norfolk Southern) on August 18, 2022, seeking rescission of the Secretarial Letter issued by the Commission on July 6, 2022, that approved the repair plans submitted by Norfolk Southern, relative to the above-captioned proceeding (*July 2022 Secretarial Letter*). On August 31, 2022, the Borough of Swissvale (Borough) filed an Answer to the Petition. For the reasons stated herein, we will grant the Petition, consistent with this Opinion and Order.

### **History of the Proceeding**

On June 15, 2022, Norfolk Southern electronically filed a letter (Application) with the Commission requesting approval of proposed bridge repair plans that would address Priority 1 maintenance needs discovered during a recent inspection at the bridge located at Washington Street in the Borough, Allegheny County, which crosses, above grade, the track of Norfolk Southern, Port Authority of Allegheny County (Port Authority) East Busway and Waverly Avenue, at the public crossing (DOT 510 521 Y). The proposed repair work described in the Application includes: (1) removal of loose concrete, rubble and bricks from below the deck; (2) full-depth pavement removal and replacement with high early strength concrete in three locations; (3) permanent and temporary shoring; and (4) structural steel repairs to the through-girders.<sup>2</sup> Application at 1-2.

On July 6, 2022, the Commission issued the *July 2022 Secretarial Letter* which, pursuant to 66 Pa. C.S. § 2702, approved the repair plans submitted by Norfolk Southern. In pertinent part, the *July 2022 Secretarial Letter* stated:

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Petition for Rescission as a Petition for Rescission or Amendment pursuant to 66 Pa. C.S. § 703(g).

<sup>2</sup> Included with the Application were sixteen sheets of detailed repair plans identified as “BRIDGE PT-344.91 WASHINGTON AVE. OVER NSRR, PAT BUSWAY & WAVERLY ST.”

Upon review of the circumstances regarding the condition of the bridge and in the interest of safety to the public, we will direct that the subject captioned bridge Priority 1 maintenance repairs be performed accordingly, THEREFORE:

1. The detailed repair plans filed with this Commission on June 13, 2022, identified as “BRIDGE PT-344.91 WASHINGTON AVE. OVER NSRR, PAT BUSWAY & WAVERLY ST.” consisting of sixteen (16) sheets, which plans are made part hereof and are hereby approved except insofar as they may relate to the division of work, deletion of work, or the allocation of costs and expenses incident to the installation of the project.
2. Norfolk Southern Railway Company, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain any detours or traffic control that may be necessary to properly and safely accommodate vehicular, pedestrian and railroad traffic during the time the crossing is being altered.
3. Norfolk Southern Railway Company, at its sole cost and expense, furnish and maintain watchmen, flagmen and/or inspectors that may be deemed necessary to protect and safeguard its railroad operations or facilities during the time the facilities are being constructed.
4. Norfolk Southern Railway Company, at its sole cost and expense, furnish all material and perform all work necessary to repair the bridge at the public crossing (DOT 510 521 Y), where Washington Street crosses, above grade, the tracks of Norfolk Southern Railway Company, Port Authority of Allegheny County East Busway and Waverly Avenue located in the Borough of Swissvale, Allegheny County; all in accordance with the approved plans and this Secretarial Letter.
5. Any relocation of, changes in and/or removal of any adjacent structures, equipment or facilities of any non-carrier public utility or municipal authority, which may be required as incidental to the alteration of the

crossing be made by said public utility or municipal authority at its initial cost, and in such a manner as will not interfere with the alteration of the crossing; and such relocated or altered facilities thereafter be maintained by said public utility at its sole cost and expense.

6. The exemption from the Commission's minimum side clearance requirements of 52 Pa. Code §33.122, be and is hereby granted, in this particular instance, for a horizontal clearance of 10-feet at the public crossing (DOT 510 521 Y) for the eastmost track as shown on the plans filed with this Commission on June 13, 2022.
7. Any operating railroads over the subject line, issue appropriate notice warning its employees of the restrictive clearances herein, all in accordance with its standard operation practice.
8. All parties involved herein cooperate fully with each other so that during the time the work is being performed, vehicular, pedestrian and railroad traffic will not be endangered or unnecessarily inconvenienced and said requirements of each of the parties will be provided for and accommodated insofar as possible.
9. Norfolk Southern Railway Company, pay all compensation for damages, if any, due to the owners of property taken, injured or destroyed by reason of the alteration of the crossing in accordance with this Secretarial Letter.
10. All work necessary to alter the crossing be completed in a manner satisfactory to this Commission on or before October 31, 2022.
11. Norfolk Southern Railway Company, notify Pennsylvania Public Utility Commission and the Pennsylvania Department of Transportation in writing within five (5) days after it has completed the requirements of Paragraph 4.

12. Upon completion of the work herein directed, and upon written request from any party of record, this proceeding be scheduled for a hearing at a time and place to be determined by the Commission, for the purpose of taking testimony upon the final allocation of any remaining costs incurred by the non-carrier utility companies and other matters relevant to this proceeding.
13. This Secretarial Letter is without prejudice to the right of any party to recover all or part of any costs incurred by said party in compliance with the provisions of this Secretarial Letter, in accordance with any lawful agreement between it and any other party.
14. In all other respects not inconsistent herewith our previous Commission Orders and/or Secretarial Letters for the public crossing captioned above remain in full force and effect.

*July 2022 Secretarial Letter* at 2-3.<sup>3</sup>

In addition, the *July 2022 Secretarial Letter* reminded the Parties that failure to comply with it or any Order or Secretarial Letter in this proceeding may result in an enforcement action seeking civil penalties and/or other sanctions pursuant to 66 Pa. C.S. § 3301. The *July 2022 Secretarial Letter* also included instructions and reminders about electronic service by the Commission, filings submitted via e-filing, and confidential material. Finally, the *July 2022 Secretarial Letter* stated that if Norfolk Southern is dissatisfied with the resolution of this matter, that it may e-file a Petition for Reconsideration from Staff Action, pursuant to 52 Pa. Code §§ 1.31 and 5.44, within twenty days, and that the action will be deemed to be a final action of the Commission if no timely request is made. Specific instructions were included as to the information required to be included in a Petition for Reconsideration from Staff Action. *Id.* at 3-4.

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<sup>3</sup> Certified rail plans were filed on July 7, 2022.

As stated, *supra*, on August 18, 2022, the instant Petition was filed by Norfolk Southern. On August 31, 2022, the Borough filed an Answer to the Petition.

Additionally, on August 31, 2022, the Borough filed a Motion to Join Additional Respondent (Motion) arguing that the Port Authority should be joined as an indispensable party in this proceeding. On September 20, 2022, the Port Authority filed an Answer to the Motion.

## **Discussion**

### **A. Legal Standards**

The Public Utility Code establishes a party's right to seek relief following the issuance of the Commission's final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

A petition for rescission or amendment can be filed at any time. See 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572(d).

The standards for granting a petition for rescission or amendment were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. PUC 553 (1982) (*Duick*).

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it

was stated that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them ....” *What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the commission.* Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

*Id.* at 559 (quoting *Pennsylvania Railroad Co. v. Pa. Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935) (emphasis added)).

Under the standards of *Duick*, a petition for rescission or amendment may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard by the Commission or considerations which appear to have been overlooked or not addressed by the Commission. *Id.*

The Commission has administrative discretion regarding whether to grant or deny a petition for rescission or amendment of an order filed under Section 703(g). *West Penn Power Co., v. Pa. PUC*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995). Such a petition, however, should only be granted judiciously and under appropriate circumstances, because such action results in the disturbance of a final order. *Id.* (citing *City of Pittsburgh v. Pennsylvania Department of Transportation*, 490 Pa. 264, 416 A.2d 461 (Pa. 1980)). The Commission has wide latitude to deny a petition for rescission or amendment, and its decision will not be overturned by an appellate court absent a showing that the Commission abused its discretion. *Id.*

In considering the instant Petition, we are reminded that we are not required to consider, expressly or at great length, each and every contention raised by a party to

our proceedings. *University of Pennsylvania, et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

## **B. Motion, Answer and Disposition**

As discussed, *supra*, the Borough filed its Motion to join the Port Authority as an indispensable party to this matter. The Borough avers that the Port Authority uses Washington Street in the Borough and the bridge as part of its transportation system for local commuters throughout the eastern suburbs of Allegheny County. The Borough further states that the parties responsible for maintenance to the structure of the bridge, not including the Borough, have created a safety hazard by allowing the bridge to fall into disrepair, which resulted in the closing of the bridge as recommended by the Commonwealth of Pennsylvania's Department of Transportation (PennDOT) so as not to endanger pedestrians and vehicular traffic using the sidewalks and bridge surface. The Borough also argues that the closing of the bridge has created a major transportation crisis in the eastern suburbs of Allegheny County, including the need for additional police resources to maintain traffic flow through the Borough, substantial commuting time for local residents, and delays for emergency vehicles. Moreover, the Borough states that Norfolk Southern is seeking to assign responsibility for future repair and maintenance of the bridge, and that the Port Authority has a major stake and responsibility for the replacement, repair and continued maintenance of the bridge. The Borough concludes that the Port Authority should be joined as an indispensable party to any proceedings related to the bridge because any decision made with respect to the bridge will have a major impact on the Port Authority's ability to provide future safe and efficient transportation to the residents in the eastern suburbs of Allegheny County. Motion at 1-3.

In its Answer to the Motion, the Port Authority states that it does not oppose being added as an additional party to this proceeding; however, the Port Authority

avers that it has no ownership interest or maintenance responsibility over the bridge. The Port Authority states that it will participate in this proceeding in order to ensure that its operations and the safety of its patrons are not adversely impacted. In addition, the Port Authority avers that its ridership level, while recovering, has not yet returned to pre-COVID-19 levels, and it denies that its use is more significant than other public or private entity uses. The Port Authority further denies that it contributed to creating any safety hazard or otherwise allowed the bridge to fall into disrepair because it has no ownership or maintenance responsibility for the bridge and its repair. The Port Authority does not oppose, and is willing to participate in, a site visit as Norfolk Southern requested. Port Authority Answer at 1-3.

Inasmuch as no Party has opposed joining the Port Authority as an indispensable party in this proceeding, we will grant the Borough's Motion. Therefore, the Port Authority will be joined as an indispensable party to this matter.

### **C. Petition, Answer and Disposition**

In the Petition, Norfolk Southern avers that there are newly discovered facts, and it requests the rescission of the *July 2022 Secretarial Letter* which approved the bridge repair plans proposed in the Application. Norfolk Southern states that since the development of the bridge repair plans, the Borough has closed the bridge pursuant to the recommendation of PennDOT. Norfolk Southern argues that PennDOT performed an analysis on the bent between the Busway and Waverly Avenue after the bridge was closed, which showed that strengthening of the bent would be required to reopen the bridge for vehicular traffic. In addition, Norfolk Southern contends that the bridge will also likely require floor system repairs and rehabilitation within the next several years. Norfolk Southern states that the approved bridge repair plans do not include strengthening of the existing bent, and that this work has not yet been engineered. Petition at 1-2.

Norfolk Southern estimates the costs for the maintenance work needed at the bridge in the next several years as follows:

- Previously approved Priority 1 repairs - \$400,000 (including engineering)
- Strengthening of bent or installation of new columns \$300,000 (including engineering)
- Floorbeam and deck replacement over Busway and Norfolk Southern and additional girder repairs - \$1.1 million (including engineering)

*Id.* at 2. Norfolk Southern contends that the cost estimate to replace the bridge is \$3.3 million, and it avers that the repairs would be an imprudent expenditure of money because the cost to repair the bridge over the next several years is a large percentage of the replacement cost. *Id.* at 2-3.

Norfolk Southern avers that it has offered to replace the bridge at its sole cost and expense if the Borough will accept future maintenance of the bridge; however, the Borough to date has declined this offer. As a result, Norfolk Southern requests that the Commission rescind the *July 2022 Secretarial Letter* and schedule a virtual field meeting with the Parties to discuss a process to bring the issue of the future disposition of the bridge to a resolution. *Id.* at 3.

In its Answer, the Borough denies several allegations in the Petition because it avers that it has insufficient information to reach a conclusion on the truth of the allegations. The Borough states that, to the best of its knowledge, the repairs ordered in the *July 2022 Secretarial Letter* would alleviate the risks to, and contribute to and protect and improve the safety of, the rail, public bus, and emergency vehicle traffic that passes beneath the bridge. In addition, the Borough admits that Norfolk Southern has offered to replace the bridge at its full cost and expense, but only on the condition that the

Borough agree to complete responsibility for future maintenance and repair of the bridge, which proposal the Borough has refused. Borough Answer at 1-2.

Furthermore, the Borough argues that Norfolk Southern's offer to replace the bridge indicates that it is well within its financial ability to replace the bridge, and that the Borough, with less than 10,000 residents, has no financial capacity to be responsible for maintenance or replacement of the bridge. The Borough contends that the bridge is a major benefit to Norfolk Southern because it was constructed for the benefit and purpose of accommodating the railroad's use of its main railway lines in southwestern Pennsylvania. Also, the Borough avers that its responsibility for decades has been limited to maintenance of the roadway surface and sidewalk, consistent with normal municipal responsibility for vehicular and pedestrian traffic. In addition, the Borough argues that since the last renovation of the bridge, the Port Authority has opened a nine-mile busway running parallel to the rail lines that carries 7.5 million riders annually on buses that pass under the bridge. The Borough further argues that the bridge is an essential part of the road system of the eastern suburbs of Allegheny County and the use of the bridge by residents of the Borough constitutes only a small percentage of individuals who use the bridge. The Borough contends that the bridge is a critical part of the Pittsburgh transit system and an essential portion of the road system used by emergency vehicles and commuters. The Borough states that the continued closure of the bridge due to inadequate maintenance by the parties currently responsible would create a substantial burden and risk to residents of the Borough and the eastern suburbs of Allegheny County. *Id.* at 2-3.

The Borough states that it has no objection to a virtual or onsite field meeting, as long as it includes all parties with major responsibility for and interest in continued safety and use of the bridge, not limited to Norfolk Southern, the County, the Port Authority and PennDOT. The Borough avers that Norfolk Southern should retain ongoing responsibility to prevent risks to residents, as well as train, bus and emergency

vehicle traffic, passing under the bridge. For this reason, the Borough objects to the rescission of the *July 2022 Secretarial Letter* and the order that Norfolk Southern make repairs to strengthen the bridge and protect public safety. The Borough contends that Norfolk Southern should continue to be responsible for safety issues at the bridge until a final resolution for repair or replacement of the bridge is made. *Id.* at 3-4.

A petition for rescission or amendment can be filed at any time.

66 Pa. C.S. § 703(g); *Duick*. Norfolk Southern's Petition, therefore, is properly before the Commission.

As noted, *supra*, a petition for rescission or amendment is governed by *Duick*, which requires a two-step analysis. First, we must determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. Second, we must evaluate any new or novel argument or overlooked considerations in order to determine whether modification of our previous decision is warranted. However, the Commission will not necessarily modify a prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked by the Commission in its prior order. *See Glenn Riddle Station, L.P. v. Sunoco Pipeline, L.P.*, Docket No. C-2020-3023129 (Order entered September 13, 2022); *SBG Management Services, Inc./ Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered May 19, 2019)<sup>4</sup> (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Order entered September 11, 2014)).

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<sup>4</sup> *Affirmed, Phila. Gas Works v. Pa. PUC*, \_\_ Pa. \_\_, 249 A.3d 963(2021); No. 14 EAP 2020 (April 29, 2021); 2021 WL 1681311; *remand granted, in part* (June 15, 2021); 2021 WL 2697432 (Table).

Upon review, we shall grant the Petition. We conclude that the standards for granting a petition for rescission or amendment under *Duick* have been met here. First, we find that Norfolk Southern, in its Petition, has identified new considerations that were not addressed by the *July 2022 Secretarial Letter*. Specifically, new information identified by Norfolk Southern that has arisen since the development and approval of the bridge repair plans includes: (1) the recent closure of the bridge by the Borough due to the recommendation of PennDOT following an analysis that showed that strengthening the bent between the Busway and Waverly Avenue would be required to reopen the bridge; (2) the identification by Norfolk Southern of likely required floor system repairs and rehabilitation in the next several years; (3) the estimated cost of \$1.4 million to strengthen the existing bent and repair the new floor systems; and (4) Norfolk Southern's offer to replace the bridge at a cost of \$3.3 million if the Borough will accept future maintenance of the bridge, which the Borough has declined.

Second, based upon this new information and considerations that were not previously identified when the bridge repair plans were developed and approved, we conclude that modification of our previous decision may be warranted. However, it is important to note that, at this time, we are not rescinding the *July 2022 Secretarial Letter* or the directives contained therein. Rather, we find that the appropriate modification of our previous decision warranted at this time is to hold in abeyance the *July 2022 Secretarial Letter* and its directives so that the Parties and the Commission can pursue and achieve final resolution of this matter after considering the new information and considerations identified by Norfolk Southern in its Petition. Therefore, we shall grant the Petition. Accordingly, we will refer this matter to the Commission's Rail Safety Section (Rail Safety) to schedule and conduct an onsite or virtual field meeting with the Parties to discuss a process to bring the issue of the future disposition of the bridge to a resolution.

Furthermore, we recognize that the repairs ordered in the *July 2022 Secretarial Letter* would alleviate certain risks and contribute to and protect and improve the safety of, the rail, public bus, and emergency vehicle traffic that passes beneath the bridge. We also acknowledge the inconvenience and burden to residents of the Borough and eastern suburbs of Allegheny County caused by the continued closure of the bridge due to the required maintenance and repairs. While we want to ensure that the needed repairs to the bridge are completed with the most prudent expenditure of money, we are also cognizant of the need to do so in a timely manner. For this reason, we shall direct Rail Safety to take prompt action to schedule and conduct the field meeting and facilitate an efficient process to bring this matter to a final resolution. To that end, we will direct Rail Safety to prepare and file a status report with the Commission's Secretary at this docket within sixty days of entry of this Opinion and Order. In the event the field meeting and process facilitated by Rail Safety does not render a resolution to this matter, then Rail Safety may refer this matter to the Commission's Office of Administrative Law Judge for a hearing and the issuance of a Recommended Decision for the Commission's consideration.

### **Conclusion**

For the reasons set forth above, we will grant the Petition, consistent with this Opinion and Order; **THEREFORE**,

#### **IT IS ORDERED:**

1. That the Petition for Rescission and Amendment filed by Norfolk Southern Railway Company on August 18, 2022, is granted.
2. That the Motion to Join Additional Respondent filed by the Borough of Swissvale on August 31, 2022, is granted.

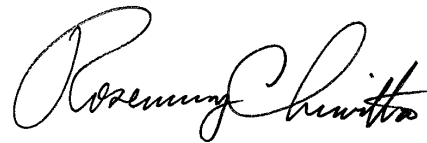
3. That the Port Authority of Allegheny County is joined as an indispensable party to this matter.

4. That this matter be referred to the Commission's Rail Safety Section to schedule and conduct an onsite or virtual field meeting with the Parties to discuss a process to bring the issue of the future disposition of the bridge to a resolution.

5. That the Secretarial Letter issued by the Commission on July 6, 2022, and the directives contained therein, shall be held in abeyance so that the Parties and the Commission can pursue and achieve final resolution of this matter.

6. That the Commission's Rail Safety Section shall prepare and file a status report with the Commission's Secretary, at Docket No. A-2022-3033069, within sixty days of entry of this Opinion and Order.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: October 27, 2022

ORDER ENTERED: October 27, 2022