

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Reading Blue Mountain & Northern Railroad c/o	:	
Jolene Busher	:	
	:	
v.	:	C-2020-3016906
	:	
Pennsylvania Department of Transportation,	:	
Pittston Township and Luzerne County	:	

**RECOMMENDED DECISION**

Before  
Emily I. DeVoe  
Administrative Law Judge

**INTRODUCTION**

This decision recommends that Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, furnish all material and do all work necessary to make safe the public crossing where SR 2019 (Oak Street) crosses, at grade, the tracks of Reading Blue Mountain & Northern Railroad Company, located in Pittston Township, Luzerne County.

**HISTORY OF THE PROCEEDINGS**

The public crossing at State Route 2019 (Oak Street) in Pittstown Township is a highway/rail crossing which crosses at-grade two tracks of Reading Blue Mountain & Northern Railroad Company (Reading Blue Mountain, RBMR, RBMN, or the Railroad).<sup>1</sup> It has an average daily traffic of 12,178 vehicles, including an average daily truck traffic of 745 in the vicinity of the public crossing.<sup>2</sup> Oak Street is used to access Interstate 81 and Interstate 476 for

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<sup>1</sup> I&E Statement No. 1, pg. 2.

<sup>2</sup> PennDOT Statement No. 1, pg. 3.

interstate and local commerce, and is classified as Minor Arterial.<sup>3</sup> Oak Street is maintained by the Pennsylvania Department of Transportation (PennDOT) and the two sets of railroad tracks are maintained by RBMN.<sup>4</sup>

RBMN initiated this matter on January 13, 2020, by filing a complaint against PennDOT for the deteriorated condition of the railroad crossing surface and roadway approaches at the public crossing (DOT 361 425 J) at Oak Street. RBMN requested that PennDOT be required to repair the roadway approaches at PennDOT's expense. After a field investigation and conference, PennDOT and RBMN recognized their joint maintenance responsibilities and the need for substantial repair and reconstruction through the public crossing beginning with base repair to the roadway approaches and under the railroad tracks and ties beneath the concrete panels. RBMN and PennDOT came to an amicable agreement to reconstruct and repair the public crossing. The parties agreed to replace the high-type concrete panel crossing surface with a rubber flangeway and asphalt crossing surface.<sup>5</sup> The agreement was memorialized in a Secretarial Letter dated April 30, 2021, and later modified by a Secretarial Letter dated June 28, 2021.<sup>6</sup>

In short, RBMN was ordered to replace the high-type concrete panel railroad crossing surfaces with a rubber flangeway and asphalt crossing surface across both sets of tracks from two feet outside of each outside rail and all area in between both sets of tracks.<sup>7</sup> In addition, RBMN was ordered to remove five feet of roadway on each roadway approach and to furnish, place, and compact hot mix bituminous asphalt base material to two inches of existing

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<sup>3</sup> *Id.*

<sup>4</sup> I&E Statement No. 1, pg. 2.

<sup>5</sup> Secretarial Letter dated April 30, 2021; *see also Pittston Township v. Reading Blue Mountain & N. R.R.*, Docket No. C-2011-2274074 (Order entered Dec. 5, 2013) (Order attached as PennDOT Exhibit 3).

<sup>6</sup> Secretarial Letter dated April 30, 2021; *see also* Secretarial Letter dated June 28, 2021.

<sup>7</sup> I&E Statement No. 1, pg. 3, RBMN Statement No. 1, pgs. 2-3; *see also* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021.

grade as measured to the existing roadway approaches and to within two inches from the top of rail on each set of tracks.<sup>8</sup>

PennDOT was ordered to establish and maintain the detour and traffic controls for all vehicular traffic necessary for a 7-day roadway closure.<sup>9</sup> In addition, PennDOT was ordered to furnish, place, and compact two inches of hot mix bituminous asphalt wearing course material to finish the grade across the roadway approaches and railroad crossing surfaces.<sup>10</sup>

Construction was completed in July 2021.<sup>11</sup> Shortly after Oak Street was re-opened to the public, PennDOT received multiple complaints concerning the crossing, including complaints made by Pittston Township Municipal officials, local fire company, local EMS, the general public, Representative Carole's office, and internal PennDOT employees.<sup>12</sup> The condition at the crossing also made local news.<sup>13</sup>

PennDOT contacted RBMN to discuss the condition at the crossing. Unable to reach a mutually agreeable resolution, PennDOT erected a "Bump Ahead" sign and "Bump" sign and, on December 14, 2021, filed a motion for a hearing before the Commission.<sup>14</sup>

In its Motion, PennDOT averred that the work completed by RBMN pursuant to the April 30, 2021, and June 28, 2021 Secretarial Letters was unsatisfactory and created a

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<sup>8</sup> I&E Statement No. 1, pg. 3; *see also* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021; RBMN Statement No. 1, pgs. 2-3.

<sup>9</sup> I&E Statement No. 1, pgs. 3-4; *see also* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021.

<sup>10</sup> I&E Statement No. 1, pgs. 3-4; *see also* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021.

<sup>11</sup> N.T. pg. 72.

<sup>12</sup> PennDOT Statement No. 1, pg. 14.

<sup>13</sup> PennDOT Statement No. 1, pg. 14; I&E Statement No. 1, pg. 6; *see also* PA Homepage article, <https://www.pahomepage.com/top-stories/recently-completed-railroad-crossing-project-causing-issues-in-pittston-township/>.

<sup>14</sup> PennDOT Statement No. 1, pg. 15; *see also* PennDOT Motion to Schedule Matter for Hearing, dated December 13, 2021.

dangerous condition. Specifically, PennDOT alleged that RBMN raised the two tracks located within the crossing beyond what previously existed, which resulted in a dangerous transition for the travelling public. PennDOT noted that vehicles traversing the crossing were bottoming out and that it had concerns on how plow trucks would clear the road without damaging the tracks or the trucks.

On or about January 5, 2022, the Commission's Rail Safety Section requested that the matter be referred to the Office of Administrative Law Judge (OALJ), noting the motion filed by PennDOT on December 14, 2021, requested an expedited hearing.

On January 13, 2022, I held an initial prehearing conference which was attended by representatives from PennDOT, RBMN, the Commission's Bureau of Investigation and Enforcement (I&E), Pittston Township, and Luzerne County.

On January 14, 2022, a Prehearing Order was issued establishing the litigation schedule. Specifically, written direct testimony was due March 14, 2022, written rebuttal testimony was due April 4, 2022, and the evidentiary hearing was scheduled for May 24, 2022.

On March 14, 2022, I&E served written direct testimony. Also, on March 14, 2022, RBMN requested a brief extension to provide written direct testimony. Specifically, RBMN requested a 7-day extension for the submission of written direct and rebuttal testimony.

On March 15, 2022, I issued an Interim Order granting RBMN's request for an extension, resulting in written direct testimony being due March 22, 2022, and written rebuttal testimony being due April 11, 2022.

On March 18, 2022, RBMN served its written direct testimony.

On March 21, 2022, PennDOT served its written direct testimony and accompanying exhibits.

On April 11, 2022, I&E served its written rebuttal testimony.

On May 24, 2022, the evidentiary hearing convened as scheduled. Counsel from I&E, PennDOT, RBMN, and Luzerne County were present. The following written testimonies and exhibits were admitted into the hearing record:

- RBMR St. 1 - Direct Testimony of Matt Johnson
- RBMR St. 2 - Direct Testimony of Chris Goetz
- PennDOT St. 1 - Direct Testimony of Sarah Fenton
- PennDOT Exhibits 1, 2A, 2B, 2C, 3, 4A, 4B, 5, 6, 7
- I&E St. 1 – Direct Testimony of William Sinick
- I&E St. 1-R – Rebuttal Testimony of William Sinick
- I&E Exhibit A – Construction Plans

Witnesses Goetz, Johnson, Fenton, and Sinick provided additional testimony during the evidentiary hearing. The hearing resulted in a transcript of 129 pages.<sup>15</sup>

On July 6, 2022, an Interim Order Setting Briefing Schedule was issued directing the parties to file main briefs by August 5, 2022, and reply briefs by August 25, 2022.

On July 7, 2022, I&E filed Proposed Corrections to Hearing Transcript.

On July 19, 2022, an Interim Order Correcting Transcript was issued adopting the proposed corrections filed by I&E.

RBMN, PennDOT, and I&E submitted main briefs on August 5, 2022. On August 25, 2022, RBMN and I&E submitted reply briefs, and PennDOT filed a letter advising it was not filing a reply brief.

On September 23, 2022, I issued an Interim Order closing the hearing record. The case is now ripe for adjudication.

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<sup>15</sup> The transcript for the evidentiary hearing began on page 30, as the transcript for the prehearing conference consisted of 29 pages.

## FINDINGS OF FACT

1. The Oak Street public crossing (DOT 361 425 J) is a highway/rail crossing where State Route 2019 (Oak Street) crosses at-grade, two tracks of RBMN in Pittstown Township, Luzerne County.
2. Oak Street is maintained by PennDOT.<sup>16</sup>
3. Oak Street is a two-lane, two-direction roadway that approaches and crosses at-grade, two sets of railroad tracks maintained by RBMN.<sup>17</sup>
4. Oak Street connects State Highway 0315 to the southeast and to State Route 2021 to the northwest.<sup>18</sup>
5. Oak Street has an average daily traffic of 12,178 vehicles, including an average daily truck traffic of 745 in the vicinity of the public crossing.<sup>19</sup>
6. Businesses use SR 2019 to access Interstate 81 and Interstate 476 for interstate and local commerce.<sup>20</sup>
7. Oak Street is classified as Minor Arterial.<sup>21</sup>

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<sup>16</sup> I&E Statement No. 1, pg. 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> PennDOT Statement No. 1, pg. 3.

8. On March 17, 2014, RBMN submitted plans at Docket No. C-2011-2274074 to construct a high-type concrete crossing. The Commission approved plans for a superelevation of 2.5” between the rails throughout the crossing.<sup>22</sup>

9. Superelevation of railroad tracks occurs when one rail is set higher than the other through a curve to basically bank the train like a racetrack based on the speed and curvature of the tracks as it passes across a public highway crossing.<sup>23</sup>

10. Prior to any work being done by PennDOT or RBMN under this proceeding, the crossing surface and the roadway approaches were both in a highly deteriorated condition due to lack of maintenance by both RBMN and PennDOT.<sup>24</sup>

11. Prior to any work being done by PennDOT or RBMN under this proceeding, the at-grade crossing at Oak Street was a high-type concrete panel railroad crossing service.<sup>25</sup>

12. William Sinick is a Senior Civil Engineer Manger for the Bureau of Technical Utility Services Rail Safety Section.<sup>26</sup>

13. On March 31, 2021, Mr. Sinick held an onsite-field conference with RBMN and PennDOT and noted that both the roadway approaches and the railroad crossing surfaces were in poor condition through the public crossing and at the concrete panel/roadway interface.<sup>27</sup>

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<sup>22</sup> N.T. pg. 97; *see also* I&E Exhibit A.

<sup>23</sup> I&E Statement No. 1-R, pg. 2 (while originally labeled as I&E Statement No. 2, the testimony was admitted as I&E Statement No. 1-R and will be labeled as such for consistency purposes).

<sup>24</sup> I&E Statement No. 1, pg. 3.

<sup>25</sup> Secretarial Letter dated April 30, 2021; *see also* Pittston Township v. Reading Blue Mountain & Northern Railroad, Docket No. C-2011-2274074.

<sup>26</sup> I&E Statement No. 1, pg. 1.

<sup>27</sup> Secretarial Letter dated April 30, 2021.

14. PennDOT and RBMN each recognized their joint maintenance responsibilities and the need for substantial repair and reconstruction through the public crossing beginning with base repair to the roadway approaches and under the railroad tracks and ties beneath the concrete panels.<sup>28</sup>

15. As a result of the field conference, both PennDOT and RBMN agreed to reconstruct the highway/rail crossing and replace the high-type concrete panel crossing surface with a rubber flangeway and asphalt crossing surface.<sup>29</sup>

16. The terms of the agreement were memorialized by Secretarial Letters issued on April 30, 2021, and June 28, 2021.<sup>30</sup>

17. The Secretarial Letters provide, in pertinent part, the following:

- a. Pennsylvania Department of Transportation, at its sole cost and expense, agrees to furnish all material and do all work necessary to establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway and pedestrian traffic during the reconstruction of the roadway approaches and railroad crossing surfaces.<sup>31</sup>
- b. Pennsylvania Department of Transportation, at its sole cost and expense, agrees to provide a seven-day roadway closure of SR 2019 (Oak Street) at the public crossing (DOT 361 425 J) beginning on a Monday, while reconstruction of the crossing takes place, all in accordance with the Manual on Uniform Traffic Control Devices and this Secretarial Letter.<sup>32</sup>
- c. Reading Blue Mountain and Northern Railroad Company, at its sole cost and expense, agrees to furnish all material and perform all work relating to its facilities which may be incidental to the reconstruction work; furnish construction engineering and inspection service if

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Secretarial Letter dated April 30, 2021.



required as a result of the work; and furnish and maintain flagmen and watchmen, as required, to protect its operations during the time the work is being performed across, above and adjacent to its tracks.<sup>33</sup>

- d. Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, agrees to replace the high-type concrete panel crossing surfaces with rubber flangeway and asphalt crossing surfaces and perform all necessary base repair and subgrade repair underneath the railroad ties and tracks to extend two (2) feet from each outside rail on each set of tracks and all area in between and to finish the hot mix bituminous asphalt base course to within two (2) inches of top of finished grade on the railroad crossing surfaces to extend in width at a minimum the average width of the paved roadway and shoulder approaches.<sup>34</sup>
- e. Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, agrees to sawcut/mill and remove the approach roadway bituminous asphalt wearing and base courses measured from two (2) feet from each outside rail on each set of tracks to extend at a minimum five (5) feet back on each roadway approach for a total minimum distance from outside rail of seven (7) feet, removing bituminous asphalt material and preparing subgrade area and to furnish, place and compact at a minimum five (5) inch hot mix, twenty-five (25) mm bituminous asphalt base course material or match existing to the mutually agreed upon 7-inch maximum limit of hot mix, twenty-five (25) mm bituminous asphalt base course material to within two (2) inches of adjacent sawcut/milled top of roadway on each roadway approach for the full width of the approach and paved shoulder area.<sup>35</sup>
- f. Pennsylvania Department of Transportation, at its sole cost and expense, agrees to furnish, place and compact two (2) inches of hot mix bituminous asphalt wearing course material to finished grade of sawcut/milled roadway approaches and extend hot mix bituminous asphalt wearing course through the public crossing and up to each rubber flangeway on each set of tracks and the area in between for the full width and length of each crossing surface, roadway approach and paved shoulder area sealing all sawcut/milled edges.<sup>36</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Secretarial Letter dated June 28, 2021./

<sup>36</sup> Secretarial Letter dated April 30, 2021.

18. The Secretarial Letters indicated the work was to be completed by July 31, 2021.<sup>37</sup>

19. The replacement project at the Oak Street crossing was completed by the deadline, give or take a day or two.<sup>38</sup>

20. The sequence of work was, that PennDOT put a detour in place, RBMN did its portion of the work, and then PennDOT came in and finished the work.<sup>39</sup>

21. Sarah Fenton is the District Grade Crossing Administrator for District 4-0.<sup>40</sup>

22. Ms. Fenton has worked for PennDOT for approximately 14 years, holding various positions.<sup>41</sup>

23. Ms. Fenton sent her assistant on railroad projects, Richard Cooper, to the crossing to inspect RBMN as it completed some of its work at the crossing.<sup>42</sup>

24. Mr. Cooper was on scene for some of the ballasts and rail replacements.<sup>43</sup>

25. Mr. Cooper did not bring any issues to Ms. Fenton's attention while the work at the Oak Street crossing was being performed.<sup>44</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> N.T. pg. 72; I&E Statement No. 1, pg. 4.

<sup>39</sup> N.T. p. 74.

<sup>40</sup> PennDOT Statement No. 1, pg. 2.

<sup>41</sup> *Id.*

<sup>42</sup> N.T. pgs. 76-86.

<sup>43</sup> N.T. pgs. 76-86.

<sup>44</sup> *Id.*

26. The cost of the work completed by PennDOT at the Oak Street crossing was \$19,059.24.<sup>45</sup>

27. PennDOT completed the work they were ordered to complete consistent with the Secretarial Letters.<sup>46</sup>

28. In order to maintain a smooth transition through the crossing, meet PennDOT publication specifications, and maintain positive drainage in the area, a specific pave structure was indicated in the Secretarial Letter.<sup>47</sup>

29. There are numerous reasons as to why it is important to match an existing pave structure.<sup>48</sup>

30. Matching existing pave structure ensures positive drainage under the pavement so that there are no drainage issues that would cause deterioration to the pavement and surrounding areas. Unmatched pavement depths could create permeable or impermeable areas underneath the pavement (or in between the pavement layers) due to the gradation of the different pavement courses, which in turn could create drainage flow issues. This could force water in undesirable directions which could cause the bituminous pavement to deteriorate. It could also create undermining issues as well.<sup>49</sup>

31. Matching existing pave structure maintains structure integrity of the approaches. Too much or too little pavement could cause premature failure of the approaches.<sup>50</sup>

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<sup>45</sup> N.T. pg. 88.

<sup>46</sup> I&E Statement No. 2., pg. 3.

<sup>47</sup> PennDOT Statement No. 1, pg. 9.

<sup>48</sup> *Id.*

<sup>49</sup> PennDOT Statement No. 1, pgs. 9-10.

<sup>50</sup> PennDOT Statement No. 1, pg. 10.

32. Matching existing pave structure maintains the existing elevation of the roadway. Too much or too little pavement depth could create drop-off conditions for the roadway and the surrounding area.<sup>51</sup>

33. In completing its portion of the reconstruction, RBMN raised the grade of the railroad tracks approximately six inches as compared to the existing grade prior to the reconstruction.<sup>52</sup>

34. Raising the grade means the whole area of the tracks, the elevation of it, has been raised.<sup>53</sup>

35. RBMN also increased the superelevation between the tracks such that the difference in height between the tracks increased from 2.5 inches to over 5 inches.<sup>54</sup>

36. The raise in grade and change in superelevation of the tracks were not approved as part of the work to be performed under the Secretarial Letters.<sup>55</sup>

37. RBMN did not perform its work on the crossing in accordance with the Secretarial Letters.<sup>56</sup>

38. RBMN's raise in grade and increase in superelevation were not discussed nor agreed upon by the parties prior to construction.<sup>57</sup>

39. RBMN presented the testimony of Matt Johnson and Chris Goetz.

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, pg. 5.

<sup>53</sup> N.T. pg. 105.

<sup>54</sup> N.T. pgs. 105, 107

<sup>55</sup> I&E Statement No. 1, pg. 5.

<sup>56</sup> I&E Statement No. 1, pg. 5.

<sup>57</sup> *Id.*

40. Matt Johnson is the Vice President of Asset Management and Community Affairs for RBMN.<sup>58</sup>

41. Christ Goetz is the Vice President of Maintenance of Way for RBMN.<sup>59</sup>

42. Mr. Goetz testified it was necessary for RBMN to increase the elevation of the tracks to accommodate train speeds set by the Federal Railroad Administration.<sup>60</sup>

43. Mr. Johnson testified that the raising of the track elevation through the crossing was necessary to accommodate track speeds through the crossing.<sup>61</sup>

44. Train speed and degree of curvature of the tracks determines the elevation needed.<sup>62</sup>

45. Mr. Goetz did not know the train running speed or degree of curvature at the crossing.<sup>63</sup>

46. Mr. Johnson did not know the train running speed or degree of curvature at the crossing.<sup>64</sup>

47. No engineering was done by RBMN to verify if the increase of elevation was needed or safe for travelers through grade crossing.<sup>65</sup>

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<sup>58</sup> Direct Testimony of RBMN, pg. 2.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 7.

<sup>63</sup> N.T. pg. 51.

<sup>64</sup> *Id.* at 53-54.

<sup>65</sup> PennDOT Statement No. 1, pg. 16.

48. If a grade elevation change is more than what the Commission considers a minor correction, which is typically 1.5 inches, it is considered an “alteration” and an application is required to be submitted to the Commission.<sup>66</sup>

49. If a railroad changes the superelevation of their tracks through a highway crossing and that change affects the approach coming into the crossing, the Commission considers that an alteration, and an application is required to be submitted to the Commission.<sup>67</sup>

50. The Commission requires a railroad to submit an application so the highway entity has an opportunity to make any necessary adjustments to their roadway transition or speed limit.<sup>68</sup>

51. The raise in grade and change in superelevation at the Oak Street Crossing directly affects PennDOT’s roadway approaches.<sup>69</sup>

52. RBMN’s raise in grade and increase in superelevation created a system of steps built into the crossing surface and roadway approaches that vehicles must now travel over.<sup>70</sup>

53. Steps should never be a part of roadway design.<sup>71</sup>

54. Roadways and railroad crossing surfaces should provide a constant, safe, and smooth transition to the tracks and in between each set of tracks.<sup>72</sup>

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<sup>66</sup> N.T. pgs. 104-05.

<sup>67</sup> *Id.* at 103-04.

<sup>68</sup> *Id.* at 104.

<sup>69</sup> I&E Statement No. 1, pg. 5; PennDOT Exhibit 7.

<sup>70</sup> I&E Statement No. 1, pg. 5.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.*

55. The crossing does not currently provide a constant, safe, or smooth transition, even at the posted speed limit of 35 MPH.<sup>73</sup>
56. RBMN's raising of the tracks created a safety hazard for the traveling public.<sup>74</sup>
57. The safety hazard did not exist prior to the replacement project.<sup>75</sup>
58. Prior to the replacement project, the elevation leading up to and throughout the crossing was a much smoother transition.<sup>76</sup>
59. Vehicles currently bounce dangerously and erratically when moving through the crossing.<sup>77</sup>
60. In some instances, drivers were observed scraping the bottom of their vehicle on the ground when passing through the crossing.<sup>78</sup>
61. Ms. Fenton first became aware of the current condition at the crossing after being contacted by an individual on August 2, 2021, after the roadway was re-opened to the traveling public.<sup>79</sup>
62. PennDOT has received multiple complaints concerning the condition of the crossing.<sup>80</sup>

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<sup>73</sup> I&E Statement No. 1, pg. 5; PennDOT Statement No. 1, pg. 12.

<sup>74</sup> PennDOT Statement No. 1, pg. 12.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*; PennDOT Exhibits 8-9.

<sup>78</sup> PennDOT Statement No. 1, pg. 12.

<sup>79</sup> *Id.* at 11.

<sup>80</sup> *Id.* at 14.

63. PennDOT has received complaints from Pittston Township Municipal officials, local fire company, local EMS, the general public, Representative Carole's office, and internal PennDOT employees.<sup>81</sup>

64. The local news covered the current condition of the crossing.<sup>82</sup>

65. PennDOT has not received any complaints about the Oak Street Crossing since January 1, 2022.<sup>83</sup>

66. The complaints received by PennDOT are related to the elevation/grade change throughout the crossing, ranging from vehicle damage to body whiplash and near miss accidents.<sup>84</sup>

67. The subgrade and base course, which was prepped and completed by RBMN and/or their contractor, set the elevation for the 2 inches of 9.5mm wearing that PennDOT agreed to place.<sup>85</sup>

68. RBMN agreed to and was required to set the elevation of the crossing and roadway approaches pursuant to the Secretarial Letters.<sup>86</sup>

69. PennDOT could not have prevented or mitigated the safety hazard after RBMN laid the base course.<sup>87</sup>

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<sup>81</sup> PennDOT Statement No. 1, pg. 14

<sup>82</sup> *Id.*

<sup>83</sup> N.T. pg. 86.

<sup>84</sup> PennDOT Statement No. 1, pgs. 14-15.

<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



70. In order to maintain a smooth and safe transition throughout the crossing and ensure that the rail was protected from traffic impact, wearing course needed to be placed at the proper grade with the rail.<sup>88</sup>

71. PennDOT Publication 242 Pavement Policy Manual has strict placement and thickness requirements for 9.5mm wearing course. The minimum design thickness for 9.5mm wearing course is 1.5 inches and the maximum design thickness for 9.5mm wearing course is 2 inches.<sup>89</sup>

72. Even if design minimum and maximum thicknesses were not defined in the publication, placing a thicker wearing course depth beyond the 2 inches would place the track below the grade of the finished surface and would cause the tracks to be covered with the wearing course.<sup>90</sup>

73. Even if design minimum and maximum thicknesses were not defined in the publication, placing less than 2 inches of wearing course would leave the tracks exposed.<sup>91</sup>

74. If tracks are exposed, vehicles could bottom out at the crossing, cause pieces of vehicles to get caught, or cause damage to vehicles and/or the tracks.<sup>92</sup>

75. If tracks are exposed, tire rims could bend, tires could be flattened, and riders and passengers of motorcycles and bikes could be thrown upon impact. Such impacts could cause damage to the rails or could cause the rail to fracture and create a blunt end.<sup>93</sup>

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<sup>88</sup> PennDOT Statement No. 1, pgs. 14-15.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 14.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

76. The placement of the two inches of bituminous asphalt by PennDOT was not the cause for the hazardous condition existing at the crossing.<sup>94</sup>

77. The hazardous condition at the crossing was created by RBMN after it increased the superelevation of its tracks and set the elevation of the rails.<sup>95</sup>

78. The Oak Street crossing needs to be completely reconstructed.<sup>96</sup>

79. PennDOT contacted RBMN numerous times after first learning of the unsafe condition, but RBMN declined or was unresponsive.<sup>97</sup>

80. PennDOT asked RBMN numerous times to erect signage for the bump until the crossing was fixed.<sup>98</sup>

81. RBMN did not erect any signage.<sup>99</sup>

82. In August 2021, PennDOT, at its sole costs and expense, erected four signs – two installed on each side of the crossing.<sup>100</sup>

83. One sign is a “Bump Ahead” sign with a flashing light and the second sign, which is closer to the crossing, is a “Bump” sign.<sup>101</sup>

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<sup>94</sup> I&E Statement No. 1-R, pg. 3.

<sup>95</sup> *Id.*

<sup>96</sup> I&E Statement No. 1, pg. 6.

<sup>97</sup> PennDOT Statement No. 1, pg. 15; N.T. pgs. 70-71.

<sup>98</sup> PennDOT Statement No. 1, pg. 15.

<sup>99</sup> PennDOT Statement No. 1, pg. 15.

<sup>100</sup> *Id.*; N.T. pgs. 70-71.

<sup>101</sup> PennDOT Statement No. 1, pg. 15.

84. The total cost of the signage was \$468.36.<sup>102</sup>

85. PennDOT continued to receive complaints about the crossing after the signage was erected.<sup>103</sup>

86. PennDOT raised its safety concerns regarding the crossing with the Commission on or about August 2021.<sup>104</sup>

87. On August 18, 2021, Mr. Sinick held an on-site field conference with PennDOT and RBMN to address safety concerns regarding the crossing.<sup>105</sup>

88. A follow-up teleconference was held on August 30, 2021.<sup>106</sup>

#### BURDEN OF PROOF AND APPLICABLE LAW

Section 2702(c) of the Public Utility Code (Code) provides that:

Upon its own motion or upon complaint, the Commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the Commission.<sup>107</sup>

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<sup>102</sup> N.T. pg. 70.

<sup>103</sup> N.T. pgs. 86, 88.

<sup>104</sup> PennDOT St. No 1, p. 15; I&E St. No, 1, pg. 4.

<sup>105</sup> I&E Statement No. 1, pg. 4.

<sup>106</sup> I&E Statement No. 1, p. 5.

<sup>107</sup> 66 Pa. C.S. § 2702(c).

Section 332(a) of the Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.<sup>108</sup> RBMN, as the original 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. The Secretarial Letters memorialized PennDOT's and RBMN's admission that both parties failed to properly maintain the crossing.

After filing its motion for hearing, PennDOT now has the burden of proving, by a preponderance of evidence, that the work completed by RBMN caused the unsafe condition currently existing at the Oak Street crossing. "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."<sup>109</sup>

It is well established that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience, and welfare of the travelling public.<sup>110</sup>

Section 2702 of the Code vests the Commission with exclusive jurisdiction to determine the manner in which a rail-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished, as well as the manner and conditions under which a rail-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety.<sup>111</sup> The Commission possesses exclusive authority to determine and order which parties

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<sup>108</sup> 66 Pa. C.S. § 332(a); see also *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. Pub. Util. Comm'n.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. Pub. Util. Comm'n.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

<sup>109</sup> *Energy Conservation Council of Pa. v. Pa. Pub. Util. Comm'n.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

<sup>110</sup> Application of the Dep't of Transp. of the Commonwealth of Pa. for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135\*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto., Docket No. A-00114338, (Opinion and Order entered Mar. 14, 2002).

<sup>111</sup> 66 Pa. C.S. § 2702.

should perform such work at a crossing and which parties will maintain the crossing in the future, in order to effectuate the prevention of accidents and promote the public safety.<sup>112</sup>

The Commission also is empowered to order the reconstruction of a crossing upon such reasonable terms and conditions as it shall prescribe.<sup>113</sup> In apportioning costs, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement is that its order must be just and reasonable.<sup>114</sup> The financial ability of a concerned party to pay is not determinative of the issue of cost allocation.<sup>115</sup>

## DISCUSSION

### Whether the Secretarial Letters Authorized RBMN to Change the Grade or Superelevation of the Tracks

As a preliminary matter, it is important to note that there is a difference between raising the tracks and changing the tracks' 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.<sup>116</sup> Superelevation is like banking on a racetrack where one set of tracks is set higher than the other through a curve.<sup>117</sup> On the other hand, raising the tracks is setting the grade or changing the elevation of the entirety of the crossing.<sup>118</sup>

Pursuant to the Secretarial Letters, RBMN agreed to and was thereby ordered to replace the high-type concrete panel railroad crossing surfaces with a rubber flangeway and

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<sup>112</sup> *SEPTA v. Pa. Pub. Util. Comm'n.*, 592 A.2d 797 (Pa. Cmwlth. 1991).

<sup>113</sup> *Pa. Game Comm'n v. Pa. Pub. Util. Comm'n.*, 651 A.2d 596 (Pa. Cmwlth. 1994).

<sup>114</sup> *East Rockhill Township v. Pa. Pub. Util. Comm'n.*, 540 A.2d 600 (Pa. Cmwlth. 1988).

<sup>115</sup> *East Rockhill Twp. v. Pa. Pub. Util. Comm'n.*, 540 A.2d 600 (Pa. 1988).

<sup>116</sup> N.T. pg. 105; I&E Statement No. 1, pg. 2.

<sup>117</sup> I&E Statement No. 1-R, pg. 2; N.T. pg. 105.

<sup>118</sup> N.T. pg. 105.

asphalt crossing surface across both sets of tracks from two feet outside of each outside rail and all area in between both sets of tracks.<sup>119</sup> In addition, RBMN agreed to and was ordered to, at its sole cost and expense, remove five feet of roadway on each roadway approach and to furnish, place, and compact hot mix bituminous asphalt base material to two inches of existing grade as measured to the existing roadway approaches and to within two inches from top of rail on each set of tracks.<sup>120</sup>

PennDOT agreed to and was ordered to, at its sole cost and expense, establish and maintain the detour and traffic controls for all vehicular traffic necessary for a 7-day roadway closure.<sup>121</sup> In addition, PennDOT agreed to and was ordered to, at its sole cost and expense, furnish, place, and compact two inches of hot mix bituminous asphalt wearing course material to finish the grade across the roadway approaches and railroad crossing surfaces.<sup>122</sup>

In the professional engineering opinion of I&E's witness, Mr. Sinick, the Oak Street crossing was not constructed in accordance with the Secretarial Letters. Mr. Sinick explained that RBMN raised the grade or elevation of the railroad tracks approximately six inches, or more in places, as compared to the grade prior to the reconstruction.<sup>123</sup> Mr. Sinick also testified RBMN increased the superelevation of each set of tracks.<sup>124</sup> Mr. Sinick testified that the raise in grade and change in superelevation were not approved as part of the work to be performed under the Secretarial Letters. He explained that the April 30, 2021, Secretarial Letter ordered reconstruction to be performed such that a smooth, safe, and satisfactory condition would be maintained throughout the crossing for the full width of the roadway and paved shoulders located between the rails and the area between each set of tracks and for a distance of twenty-four inches beyond the outermost rails.<sup>125</sup>

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<sup>119</sup> I&E Statement No. 1, pg. 3.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; I&E Statement No. 2, pg. 3.

Notably, at no time throughout these proceedings did RBMN claim that its work on the Oak Street crossing was consistent with the Secretarial Letters. Therefore, I find RBMN's change in elevation and increase in superelevation of the tracks was not authorized by the Secretarial Letters.

#### Whether Raising the Superelevation of the Tracks was Necessary

RBMN argues it needed to increase the super elevation of the tracks. Mr. Goetz testified "it was necessary for [RBMN] to increase the elevation in the curves of track one and track two at the crossing during the rehabilitation according to FRA (Federal Railroad Administration) requirements due to speeds run on both track one and track two of the crossing through the roadway portion of the crossing."<sup>126</sup> Mr. Goetz explained that the FRA sets these regulations for unbalanced superelevation for various speeds on curves explaining, "basically, if you are traveling at 'x' speed and the curve is 'x' degree that will determine the elevation needed in the curve."<sup>127</sup>

RBMN maintains the Federal Railroad Administration sets the regulations for unbalanced superelevation for various speeds on curves.<sup>128</sup> RBMN argues it had no choice but to superelevate the tracks in order to comply with the federal regulations.<sup>129</sup>

I&E and PennDOT argue, RBMN failed to present any testimony or evidence as to the existing speed and existing degree of curvature of the tracks to support its contention that the raising of the elevation was necessary. I&E points out that when asked on cross-examination by counsel, neither Mr. Goetz nor RBMN witness Mr. Johnson were able to speak to the speeds the trains currently travel through the crossing.<sup>130</sup>

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<sup>126</sup> RBMN Direct Testimony, pg. 7.

<sup>127</sup> *Id.*

<sup>128</sup> RBMN Main Brief, pg. 15.

<sup>129</sup> *Id.*

<sup>130</sup> N.T. pg. 51.

Whether RBMN was required to or had the authority to superelevate the tracks under Federal regulations is not really the issue in this case. Even assuming that RBMN *was* required to do so, RBMN should have raised this issue with the Commission and PennDOT during the planning phase of this project and/or filed a separate application with the Commission. PennDOT’s expert, Ms. Fenton testified that it was not until after the crossing replacement project was completed in July 2021 and the elevation had already been raised that RBMN brought up their concern with safety due to the original alignment/elevation.<sup>131</sup> At no point leading up to the crossing replacement was elevation and/or safety brought up, discussed, or mentioned.<sup>132</sup> Multiple onsite and offsite meetings, as well as telephone conversations occurred prior to the replacement project and not once was the elevation safety mentioned or identified.<sup>133</sup> At the evidentiary hearing, Mr. Goetz was questioned as to why RBMN did not raise the issue of super elevation during the planning phase of this project. He had no explanation.<sup>134</sup>

Whether RBMN should have Filed an Application Prior to Changing the Grade or Superelevation of the Tacks

Even if raising the tracks or changing the superelevation of the tracks *was* necessary, I&E argues RBMN should have first filed an application with the PUC.<sup>135</sup> I&E acknowledges that a railroad may be able to adjust the superelevation of its tracks based on the approved speed and the existing degree of curvature of the tracks. However, if a railroad were to change the superelevation of their tracks going through a crossing across a highway such that it would affect the approach roadway coming into that particular crossing, the Commission would consider that an “alteration,” and would require the railroad to first file an application.<sup>136</sup>

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<sup>131</sup> PennDOT Statement No. 1, pg. 17.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> N.T. pg. 50.

<sup>135</sup> *Id.* at 107.

<sup>136</sup> N.T. pgs. 103-04.



Mr. Sinick testified that if a change is more than what the Commission considers a minor correction, which is typically 1.5 inches, the Commission would consider it an “alteration” and the Commission would require the railroad to first file an application.<sup>137</sup> Mr. Sinick testified the rationale is that a non-minor increase in superelevation may require the highway entity to make an adjustment to the roadway transition or possibly adjust their posted speed limit.<sup>138</sup> Here, it is undisputed that RBMN raised the superelevation from two-and-a-half inches to over five inches.<sup>139</sup> Thus, I&E argues RBMN was required to file an application with the Commission prior to changing the superelevation of the tracks.

RBMN argues Mr. Sinick’s testimony is vague, inconclusive, and contradictory. It argues I&E failed to establish any clear guidelines or written standards as to when a railroad is required to file an application with the Commission in conjunction with its intent to increase the superelevation of the tracks.

Upon careful review of Mr. Sinick’s testimony, I find his testimony is clear in that he testified that a railroad has the authority to superelevate its tracks without filing an application with the Commission, *unless* the superelevation affects a highway crossing *and* the superelevation constitutes an “alteration” of the crossing.

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 at this crossing is an “alteration” subject to the Commission’s jurisdiction and the application process.<sup>140</sup> Mr. Sinick clearly explained that increasing the superelevation of the tracks as RBMN did in this case constitutes an “alteration” such that RBMN should have first sought Commission approval.

Not only did RBMN increase the superelevation of the tracks, it changed the grade of the tracks as well. Mr. Sinick testified that in completing its portion of the

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<sup>137</sup> *Id.* at 104-05.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 105, 107.

<sup>140</sup> N.T. pgs. 104-105.

reconstruction, RBMN raised the elevation of the railroad tracks approximately six inches as compared to the existing grade prior to the reconstruction.<sup>141</sup>

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.<sup>142</sup> 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.<sup>143</sup> RBMN's actions changed the condition and layout of the public crossing, and thus are "alterations" subject to the Commission's jurisdiction and review/approval process.<sup>144</sup>

Accordingly, RBMN's decision to raise of the elevation and increase the superelevation of the tracks in excess of 1.5 inches are both material alterations which required Commission review and approval, including notice to and discussions with PennDOT. Such did not occur in this matter.

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<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Manchester Twp. v. Pa. Pub. Util. Comm'n*, 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 Consol. Rail Corp. For abolition of one (1) at grade crossing on Conrail's Chester Secondary rail line located on 49 Street in Phila., Pa.*, Docket No. A-00115212 (May 8, 2000 Recommended Decision affirmed by Opinion and Order dated Jan. 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. Pa. 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 S. Ry. Co. v. Pa. Pub. Util. Comm'n.*, 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.")

<sup>143</sup> *See generally* I&E Statement No. 1 and PennDOT Statement No. 1; *see also* PennDOT Exhibits 8 and 9.

<sup>144</sup> 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.

## Whether the Reconstructed Crossing at Oak Street is a Safety Hazard

The record is clear that the public crossing at Oak Street poses an ongoing safety hazard to the travelling public. PennDOT has received multiple complaints relating to the crossing, specifically from Pittston Township Municipal officials, local fire company, local EMS, the general public, Representative Carole's office, and internal PennDOT employees.<sup>145</sup> The complaints received by PennDOT relate to the elevation/grade change through the crossing, ranging from vehicle damage to body whiplash to near miss accidents.<sup>146</sup> Not only has PennDOT received complaints regarding the crossing, but the crossing has made local news which showed and articulated the hazardous condition currently at the crossing.<sup>147</sup>

Both Ms. Fenton and Mr. Sinick detailed the hazardous condition existing at the crossing. Ms. Fenton testified that the crossing does not have a safe and smooth transition throughout.<sup>148</sup> She explained that the existing safety issue was created when the tracks were raised, because the change of grade and elevation created a step-like transition through the crossing.<sup>149</sup> She further noted that vehicles bounce dangerously and erratically when driving through the crossing.<sup>150</sup> Ms. Fenton unequivocally testified that the safety problem currently existing at the crossing did not exist prior to the replacement project, and that the elevation leading up to and throughout the grade crossing previously presented a smooth and safe transition.<sup>151</sup>

Mr. Sinick corroborates Ms. Fenton's testimony and provided his professional opinion that the crossing needs to be reconstructed. Mr. Sinick testified that the highway/rail

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<sup>145</sup> PennDOT Statement No. 1, pg. 14.

<sup>146</sup> *Id.* at 14-15.

<sup>147</sup> PA Homepage article, <https://www.pahomepage.com/top-stories/recently-completed-railroad-crossing-project-causing-issues-in-pittston-township/>.

<sup>148</sup> PennDOT Statement No. 1, pg. 12; *see also* PennDOT Exhibits 8 and 9.

<sup>149</sup> PennDOT Statement No. 1, pg. 12; *see also* PennDOT Exhibits 8 and 9.

<sup>150</sup> PennDOT Statement No. 1, pg. 12.

<sup>151</sup> *Id.*

crossing at Oak Street does not provide a smooth and satisfactory condition, even at the posted speed of 35 mph.<sup>152</sup> Mr. Sinick explained that the crossing was made unsafe when the tracks were raised and superelevated with no apparent regard to the height of the existing roadway or necessary roadway transition to accommodate that elevation grade change.<sup>153</sup> The work completed by RBMN created a system of steps built into the crossing, which, according to Mr. Sinick, should never be part of a roadway design.<sup>154</sup> Mr. Sinick explained that roadways and railroad crossing surfaces should provide a constant, safe, and smooth transition to the tracks and in between each set of tracks.<sup>155</sup> Notably, prior to reconstruction, the tracks maintained a 2.5-inch superelevation from one rail to the other.<sup>156</sup> Now, the overall grade of the railroad tracks have been raised to 6 inches with respect to the prior grade and the superelevation from one rail to the other was increased from 2.5 inches to approximately 5.5 inches.<sup>157</sup>

Notably, RBMN's does not dispute that the crossing at Oak Street is unsafe. Rather, it argues that it should not bear sole financial responsibility for the reconstruction.<sup>158</sup> Therefore, I find the crossing at Oak Street is unsafe.

#### The Current Signage at the Crossing is Insufficient to Alleviate the Safety Hazard

After becoming aware of the safety problem RBMN created by raising its tracks, PennDOT made numerous attempts to ask RBMN to erect signage alerting the traveling public to the hazard until the crossing was fixed.<sup>159</sup> RBMN refused and PennDOT subsequently, at its

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<sup>152</sup> I&E Statement No. 1, pg. 5.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> I&E Exhibit A.

<sup>157</sup> N.T. pg. 105-107.

<sup>158</sup> RBMN Main Brief at 14-15. ("Since it appears the parties agree that further work is required at the Oak Street crossing, any allocation of costs for the additional work, on equitable principles alone, should treat the agreement of the parties regarding allocation of costs and responsibilities as set forth in the original Secretarial Letter, as subsequently modified.")

<sup>159</sup> PennDOT Statement No. 1, pg. 15; N.T. pgs. 70-71.

own cost, erected two signs on each side of the crossing in August 2021.<sup>160</sup> One sign is a “Bump Ahead” sign with a flashing light and the second sign, which is closer to the crossing, is a “Bump” sign.<sup>161</sup>

Notably, PennDOT continued to receive complaints about the crossing after the signage was erected.<sup>162</sup> Further, Mr. Sinick made clear that the highway/rail crossing needs to be completely reconstructed in order to make the crossing satisfactory, smooth, and safe at the posted speed limit.<sup>163</sup>

RBMN does not specifically argue against I&E’s positions that the current signage is insufficient to alleviate the unsafe condition at the crossing or that the crossing needs to be completely reconstructed.

#### Whether RBMN Caused the Hazardous Condition at the Oak Street Crossing

I&E and PennDOT argue RBMN is the sole party responsible for the hazardous condition existing at the Oak Street crossing because it (1) failed to discuss its intent to raise the tracks or increase the superelevation of the tracks during the planning stages of the project, and (2) did not complete its portion of the reconstruction project in accordance with the Secretarial Letters.

First, there is a general consensus among the parties that the raising of the tracks and altering the superelevation was not discussed prior to the replacement project. Ms. Fenton stated that altering the elevation of the tracks by RBMN was never brought up or discussed with PennDOT prior to the replacement project.<sup>164</sup> Mr. Sinick corroborated Ms. Fenton’s testimony

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<sup>160</sup> PennDOT Statement No. 1, pg. 15; N.T. pgs. 70-71.

<sup>161</sup> PennDOT Statement No. 1, pg. 15.

<sup>162</sup> N.T. pgs. 86, 88.

<sup>163</sup> I&E Statement No. 1, pg. 6.

<sup>164</sup> PennDOT Statement No. 1, pg. 10.

and testified that RBMN's intent to raise the grade and increase the superelevation of the tracks were not discussed at the March 31, 2021, field conference nor were they agreed upon by the parties prior to reconstruction.<sup>165</sup>

Mr. Sinick<sup>166</sup> and Ms. Fenton<sup>167</sup> both testified that the alterations were not approved as part of the work to be performed pursuant to the April 30, 2021 and June 28, 2021 Secretarial Letters. Mr. Sinick testified that RBMN's actions were contrary to the April 30, 2021 Secretarial Letter which ordered a safe, smooth, and satisfactory condition at the crossing surface.<sup>168</sup> Ms. Fenton also testified that the Secretarial Letters did not mention anything about RBMN raising the tracks and that the Secretarial Letters ordered a specific pave structure to match the existing pave structure.

Furthermore, it is undisputed that RBMN did not file an application with the Commission or otherwise seek approval prior to changing the grade or superelevation.

When asked what work and contributions RBMN agreed to perform at the crossing, both Mr. Johnson and Mr. Goetz stated that RBMN agreed to perform track work as well as paving through the crossing and to provide a railroad inspector during PennDOT's top coat paving portion.<sup>169</sup> Neither witness mentioned any agreement among the parties for RBMN to raise the grade of its tracks or change the superelevation.<sup>170</sup> At the evidentiary hearing, Mr. Goetz stated that he wasn't sure why the elevation of the track wasn't discussed or brought up at any time prior.<sup>171</sup>

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<sup>165</sup> I&E Statement No. 1, pg. 5; I&E Statement No. 1-R, pg. 3.

<sup>166</sup> I&E Statement No. 1, pg. 5; N.T. pg. 103; *see also* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021.

<sup>167</sup> PennDOT Statement No. 1, pg. 9.

<sup>168</sup> I&E Statement No. 1-R, pgs. 2-3.

<sup>169</sup> RBMN Statement No. 1, pgs. 2-3; RBMN Statement No. 2, pg. 6.

<sup>170</sup> *See generally* RBMN Statement No. 1 and RBMN Statement No. 2.

<sup>171</sup> N.T. pg. 50.

RBMN argues PennDOT should have asked RBMN if RBMN was planning on raising the tracks. RBMN argues that coordination of any construction job is a two-way street and requires communication from all parties.<sup>172</sup> RBMN argues PennDOT shares in some of the blame for not asking whether RBMN had plans to raise the tracks.<sup>173</sup>

RBMN also points out that PennDOT had a representative on site while RBMN was completing its portion of the reconstruction and did not raise any objections to the work. RBMN argues Mr. Cooper, Ms. Fenton's assistant, was on site, stood by, and said nothing.<sup>174</sup> RBMN argues Mr. Cooper's failure to raise any concerns or objections precluded any possibility of mitigating any potential problems with the work RBMN completed.<sup>175</sup> RBMN argues Mr. Cooper had an opportunity to raise any issues at that time, prior to PennDOT performing any of its work on the crossing, and failed to do so.<sup>176</sup>

It is simply unreasonable for RBMN to expect PennDOT to have asked whether RBMN had plans to raise the tracks. PennDOT had no reason to think RBMN would do so, and it is not PennDOT's responsibility to anticipate or foresee what RBMN might do. Further, although Mr. Cooper was on site for at least *some* of RBMN's work, the record is unclear regarding whether he was on site for *all* of RBMN's work. Assuming he *was* on site for all of it, or at least the portion of the work where the tracks were superelevated, there is no evidence he was aware or should have been aware of the significant changes in superelevation or grade RBMN was installing.

Ms. Fenton credibly testified that she only became aware of the unsafe condition at the crossing in August 2021, after receiving the first of many complaints. There is no evidence to suggest PennDOT was aware that a safety hazard existed until the project was

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<sup>172</sup> RBMN Main Brief at 17.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> RBMN Main Brief at 17.

completed and the roadway was re-opened to the traveling public.<sup>177</sup> It was not until shortly after the road was re-opened that PennDOT started receiving complaints and learned that there was an elevation change.<sup>178</sup> There was no way PennDOT could have known that vehicles would bounce dangerously and erratically and scrape on the ground until the construction was completed and the road was re-opened to vehicular traffic again.<sup>179</sup>

Additionally, even if PennDOT *had* been aware that a safety hazard would have resulted after it completed its portion of the work, there was nothing PennDOT could have done to fix the problem at that time. This is because the base course, which was prepped and completed by RBMN, sets the elevation of the crossing and roadway approaches.<sup>180</sup> Once the elevation was set by the base course, there was nothing that PennDOT could have done to fix or remediate the problem.<sup>181</sup> PennDOT simply followed its obligations under the Secretarial Letters and placed the two inches of wearing course over the base course.<sup>182</sup>

Thus, RBMN is the party responsible for the hazardous condition currently existing at the Oak Street crossing because it failed to follow the directives of the April 30, 2021 and June 28, 2021 Secretarial Letters and raised the grade and superelevation of the tracks without Commission approval or notice to PennDOT. The unsafe situation at the crossing could have been completely avoided had RBMN simply expressed its intent to raise the tracks with PennDOT or the Commission at any point during the planning phase of this project.

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<sup>177</sup> N.T. pgs. 84, 90.

<sup>178</sup> *Id.*; PennDOT Statement No. 1, pg. 11.

<sup>179</sup> N.T. pg. 90.

<sup>180</sup> PennDOT Statement No. 1, pg. 13.

<sup>181</sup> *Id.*; N.T. 84.

<sup>182</sup> PennDOT Statement No. 1, pg. 13.



## Whether RBMN Should Solely Bare the Costs of Reconstructing the Crossing and Roadway Approaches

The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs.<sup>183</sup> Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. Pub. Util. Comm'n.*, 668 A.2d 615 (Pa. Cmwlth. 1995), are the following:

- 1) The party that originally built the crossing, and whether the roadway existed before the construction of the crossing;
- 2) The party that owned and maintained the crossing;
- 3) The relative benefit initially conferred on each party with the construction of the crossing;
- 4) Whether either party is responsible for the deterioration of the crossing resulting in the need for its repair, replacement or removal;
- 5) The relative benefit that each party will receive from the repair, replacement or removal of the crossing.<sup>184</sup>

In addition, the Commission has considered the following: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation.<sup>185</sup> These factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.<sup>186</sup>

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<sup>183</sup> *N. Lebanon Twp. v. Pa. Pub. Util. Comm'n.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

<sup>184</sup> *Greene Twp. v. Pa. Pub. Util. Comm'n.*, 668 A.2d 615 (Pa. Cmwlth. 1995); *see also AT&T v. Pa. Pub. Util. Comm'n.*, 737 A.2d 201 (Pa. 1999) (when allocating costs of constructing, removing or altering a rail-highway crossing, the PUC is not confined to any one rate or formula; it must consider all relevant factors).

<sup>185</sup> *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981).

<sup>186</sup> *AT&T v. Pa. Pub. Util. Comm'n.*, 737 A.2d 201 (Pa. 1999); *Wheeling & Lake Erie Ry. Co.*, 778 A.2d 785 (Pa. Cmwlth. (2001)); *Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n.*, 672 A.2d 352 (Pa. Cmwlth. 1996).

I&E and PennDOT argue that, as the party responsible for the unsafe condition existing at the Oak Street crossing, RBMN should bear the sole cost and expense of reconstructing the crossing.

I&E argues that it would be inequitable to assign any costs or responsibilities for the reconstruction of the crossing and highway approaches to PennDOT. First, I&E argues RBMN's decision to raise of the tracks and alter the grade of the crossing solely benefits RBMN and had a negative impact on PennDOT and the travelling public.

Second, I&E argues RBMN is responsible for the safety hazard of the crossing resulting in the need for its repair, replacement, or removal. PennDOT completed the work they were ordered to complete in accordance with the Secretarial Letters.<sup>187</sup> The placement by PennDOT of the remaining two inches of bituminous asphalt wearing course was not the cause for the hazardous condition currently existing at the crossing.<sup>188</sup> The hazardous condition was created by RBMN after it raised the tracks and set the elevation of the tracks.<sup>189</sup> Had RBMN done what was agreed upon and captured in the Secretarial Letters, the safety hazard would not exist and there would be no additional work or costs to undertake.<sup>190</sup>

Third, the safety hazard RBMN created could have been avoided had RBMN disclosed to PennDOT or the Commission its intention to raise the tracks prior to the replacement project, thus eliminating additional redundant work and expenses.<sup>191</sup> RBMN took it upon themselves to unilaterally decide to raise the elevation of the grade through the crossing, which in turn created the safety issue that exists today.<sup>192</sup>

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<sup>187</sup> I&E Statement No. 2, pg. 3; N.T. pg. 116.

<sup>188</sup> I&E Statement No. 2, pg. 3.

<sup>189</sup> *Id.*

<sup>190</sup> PennDOT Statement No. 1, pg. 18.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

I&E also notes RBMN should be required to reimburse PennDOT for the signage it erected at the crossing in August 2021 alerting the traveling public of the safety hazard RBMN created. I&E notes PennDOT contacted RBMN numerous times to request RBMN install a bump ahead sign at the crossing.<sup>193</sup> Upon receiving very little to no correspondence from RBMN, PennDOT took it upon themselves, in the interest of the public safety, to install four signs so that the public was aware of the dangerous situation that was created by the tracks being raised.<sup>194</sup> I&E argues RBMN should reimburse PennDOT for the cost of the signage, which was \$468.36.<sup>195</sup>

Finally, I&E argues PennDOT is the party most adept at handling detours on public roadways. Therefore, PennDOT should create and implement the roadway detour for the remedial construction at RBMN's sole cost and expense.<sup>196</sup>

RBMN argues PennDOT should pay for the work two feet outside of the rails, and that costs should be allocated based on the initial agreement of the parties as set forth in the Secretarial letters.<sup>197</sup> Notably, RBMN argues the crossing was initially in need of reconstruction due to the maintenance failures of both PennDOT and the railroad.<sup>198</sup> RBMN argues that allocating costs between PennDOT and RBMN for further alteration of the crossing in these same proportions would be the equitable approach.<sup>199</sup>

RBMN also asserts that had RBMN informed PennDOT of its plan to increase the superelevation of the tracks during the planning phase of the project, it is likely that PennDOT and RBMN would have come to essentially the same agreement regarding allocation of the costs, i.e., PennDOT would have done the work from 2 feet outside the rails and RBMN would have

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<sup>193</sup> *Id.* at 15; N.T. pgs. 70-71.

<sup>194</sup> PennDOT Statement No. 1, pg. 15; N.T. pgs. 70-71.

<sup>195</sup> N.T. pg. 70.

<sup>196</sup> I&E Statement No. 1-R, pg. 3.

<sup>197</sup> RBMN Main brief at 13.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

done the work 2 feet inside the rails. RBMN argues the basic scope of work would have been the same with the only difference being the amount of costs spent. RBMN argues PennDOT spent \$19,059,24 performing its share of the work in the summer of 2021, instead of a much larger amount since the work would have been more extensive because of the tracks being raised.

It is hard to speculate as to what would have happened had RBMN made PennDOT aware of its plans to raise the tracks or increase the superelevation of the tracks during the planning phase of this project. It is also hard to speculate as to what PennDOT would have agreed to, or what the total costs or cost allocation might have been for the parties. The fact remains that RBMN did not disclose its intent to raise the tracks or increase the superelevation of the tracks with either PennDOT or the Commission prior to doing so. The change in superelevation, if not the raising of the tracks, constitutes an “alteration” such that RBMN should have first sought Commission approval. RBMN created the unsafe condition at the crossing and should bear the sole cost of reconstructing the crossing to make it safe to the travelling public.

#### CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. §§ 2702, 2704.
  
2. The Commission has exclusive jurisdiction over all rail-highway crossings in the Commonwealth and the approaches thereto. 66 Pa.C.S. § 2702; *Dep’t of Transp. v. Pa. Pub. Util. Comm’n*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springettsbury v. Pa. Pub. Util. Comm’n*, 289 A.2d 762 (Pa. Cmwlth. 1972).
  
3. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. §§ 2702, 2704.

4. The Commission possesses the exclusive authority to assess the cost of the work to be performed upon the concerned parties in such proper proportions as it may determine. 66 Pa. C.S. § 2704.

5. The Commission's Bureau of Investigation and Enforcement, the Pennsylvania Department of Transportation, Reading Blue Mountain & Northern Railroad Company, Pittston Township, and Luzerne County are all concerned parties within the meaning of 66 Pa.C.S. §§ 2702 and 2704.

6. Pursuant to Section 332(a) of the Public Utility Code, Reading Blue Mountain & Northern Railroad Company, as the complainant, initially held the burden of proof to show that the Pennsylvania Department of Transportation 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, the Pennsylvania Department of Transportation now has the burden of proving that the work completed by Reading Blue Mountain & Northern Railroad Company caused the unsafe and dangerous condition currently existing at the Oak Street crossing.<sup>200</sup>

7. Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. Pub. Util. Comm'n.*, 668 A.2d 615 (Pa. Cmwlt. 1995), are the following:

- (1) which party built the crossing;
- (2) whether a roadway existed before or after the construction of the crossing;
- (3) relative benefit conferred on each party with the construction of the crossing;
- (4) whether either party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; and
- (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing.

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<sup>200</sup> Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.

8. While the Commission has considered the foregoing factors to be relevant in the past, this in no way limits the factors that it can consider. The factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis. *Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n.*, 672 A.2d 352 (Pa. Cmwlth. 1996); *AT&T v. Pa. Pub. Util. Comm'n.*, 737 A.2d 201 (Pa. 1999); *Wheeling & Lake Erie Ry. Co.*, 778 A.2d 785 (Pa. Cmwlth. 2001).

## ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That Reading Blue Mountain & Northern Railroad Company shall reimburse the Pennsylvania Department of Transportation the cost of the signage installed at the Oak Street Crossing, \$468.36.

2. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, prior to the start of construction, prepare and submit a crossing surface construction plan that includes an existing and proposed roadway profile grade with elevations that includes the grade on the roadway approaches to the crossing surface and grade through the crossing surfaces, a plan, elevation, and cross-section view of the crossing surfaces which show roadway material specifications, dimensions, elevations of rails/roadway and planned super-elevation and grade of the railroad tracks through the public crossing at Oak Street (DOT 361 425 J). The construction plans shall be submitted to all parties for review and to the Commission for approval.

3. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, shall furnish all material and do all work necessary to reconstruct the existing asphalt/rail seal crossing surface by adjusting the geometry of the tracks to provide and

reestablish a constant, safe, smooth roadway profile grade across the two sets of railroad tracks and area in between both sets of tracks for the full width of the roadway and shoulders, and to establish a safe, smooth, and satisfactory transition from the roadway approaches to the asphalt/rail seal crossing surfaces as per and in accordance with the approved plans and this Order.

4. That the Pennsylvania Department of Transportation, at Reading Blue Mountain & Northern Railroad Company's sole cost and expense, shall furnish all material and do all work necessary to establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway and pedestrian traffic during the reconstruction of the highway/railway public crossing at Oak Street (DOT 361 425 J).

5. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, shall furnish all material and perform all work relating to its facilities which may be incidental to the reconstruction work; furnish construction engineering and inspection service if required as a result of the work; and furnish and maintain flagmen and watchmen, as required, to protect its operations during the time the work is being performed across, above, and adjacent to its tracks.

6. That the Pennsylvania Department of Transportation and Reading Blue Mountain & Northern Railroad Company, at their sole cost and expense, shall perform all work necessary to identify, locate, and provide notification to all non-carrier public utility companies, municipal authorities, or other entities that may have facilities located above or below the public crossings that may be impacted by all work described herein in accordance with the PA One Call system.

7. That Reading Blue Mountain & Northern Railroad Company, at least twenty (20) days prior to the start of work, shall notify the Pennsylvania Department of Transportation of the actual date on which work will begin.

8. That the Pennsylvania Department of Transportation, at least fourteen (14) days prior to the start of work, shall notify local emergency management services and all parties in interest of the actual date on which work will begin.

9. That any relocation of, changes in and/or removal of any adjacent structures, equipment or other facilities of any non-carrier public utility company or municipal authority located within the limits of this Commission's jurisdiction, which may be required as incidental to the execution of the public crossing project, be made by said public utility company or municipal authority at its initial cost and expense, and in such manner, as will not interfere with the construction of the project.

10. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, shall pay all compensation for damages, if any, due to the owners of any property taken, injured or destroyed by reason of the construction work described herein, in accordance with this Secretarial Letter.

11. All parties involved herein shall 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 so that the requirements of each of the parties will be provided for and accommodated insofar as possible.

12. All work necessary to complete the work at the subject public crossing be done in a manner satisfactory to this Commission within six months from the date of this Order, and that on or before said date, the Pennsylvania Department of Transportation and Reading Blue Mountain & Northern Railroad Company notify this Commission, in writing, the date the work is complete.

13. That upon completion of the described herein, Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its railroad facilities at the public crossing at Oak Street (DOT 361 425 J), including the railroad flashing-light warning signals, gates, bell, crossbucks, circuitry, tracks and all appurtenant equipment, and to maintain at all times in a safe, smooth, and



satisfactory condition at the crossing surface for the full width of the roadway and paved shoulders located between the rails and area between each set of tracks and for a distance of twenty-four inches beyond the outermost rails, all in accordance with the Manual on Uniform Traffic Control Devices, and shall provide the Pennsylvania Department of Transportation at least ten business days advance notice when performing any work that may affect their facilities, as directed by this paragraph.

14. That upon completion of work described herein, the Pennsylvania Department of Transportation, at its sole cost and expense, shall furnish all material and do all work necessary thereafter to maintain the highway approach roadways and paved shoulders to the public crossing at Oak Street (DOT 361 425 J) to points twenty-four inches beyond each outside rail in a safe, smooth, and satisfactory condition, and in addition to maintain the railroad advance warning signs, stop lines and railroad pavement markings on the SR 2019 (Oak Street) approaches thereto, all in accordance with the Manual on Uniform Traffic Control Devices, and shall provide Reading Blue Mountain & Northern Railroad Company at least ten business days advance notice when performing any work that may affect their facilities, as directed by this paragraph.

15. That upon completion of all repairs herein ordered, each non-carrier public utility company and municipal authority, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its respective facilities located within the limits of the improvement.

16. That upon completion of the work herein directed, and upon a written request by any party hereto, this proceeding be scheduled for a hearing at a time and a place assigned by this Commission, upon due notice to all parties, to receive evidence relative to the allocation of initial costs incurred, if any, by the public utility companies and municipal authorities, and any other matters relevant to this proceeding.

17. That upon the Commission receiving written notice from Reading Blue Mountain & Northern Railroad Company of the completion of the work ordered herein and after a final inspection of the work has been completed and deemed satisfactory by the Commission's

Bureau of Technical Utilities, Rail Safety Section, and there are no outstanding issues, the Complaint filed at Docket No. C 2020-3016906 shall be deemed satisfied and marked closed.

Date: December 14, 2022

\_\_\_\_\_/s/\_\_\_\_\_  
Emily I. DeVoe  
Administrative Law Judge