



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

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

January 13, 2023

**Via Electronic Filing**

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

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pennsylvania Public Utility Commission's **Bureau of Investigation and Enforcement's Reply to Reading Blue Mountain and Northern Railroad Company's Exceptions** in the above-referenced proceeding.

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

Sincerely,

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**BUREAU OF INVESTIGATION AND ENFORCEMENT'S  
REPLY TO EXCEPTIONS OF  
READING BLUE MOUNTAIN AND  
NORTHERN RAILROAD COMPANY**

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Dated: January 13, 2023

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## **I. INTRODUCTION**

On December 14, 2022, Administrative Law Judge (“ALJ”) Emily I. DeVoe issued a Recommended Decision in the above-captioned proceeding, which correctly ordered Reading Blue Mountain & Northern Railroad Company (“RBMN”) to furnish all material and complete all work necessary, including the drafting and submission of construction plans, to reconstruct the public crossing at Oak Street at their sole cost and expense, in addition to paying for any detours or traffic controls which may be required and completed by the Pennsylvania Department of Transportation (“PennDOT”) during the reconstruction.

On January 3, 2023, RBMN served its Exceptions to the ALJ’s Recommended Decision.

In accordance with Commission regulations at Section 5.535, I&E now submits this Reply to RBMN Exceptions.<sup>1</sup> For the reasons fully explained below, I&E respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny RBMN’s Exceptions and wholly affirm the ALJ’s Recommended Decision without modification.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates the Main Brief, including the Appendices, that it filed in the instant proceeding on August 5, 2022 and Reply Brief filed on August 25, 2022.

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<sup>1</sup> 52 Pa. Code § 5.535.

## II. SUMMARY OF ARGUMENT

The Commission has “exclusive power to determine and prescribe, by regulation or order, the manner in which highway-rail crossings may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of public safety.” *Pittsburgh & Lake Erie R. Co. v. Pa. PUC*, 445 A.2d 851, 853 (Pa. Cmwlth. 1982); *see also* 66 Pa. C.S. § 2702(b); *Pa. Game Commission v. Pa. PUC*, 651 A.2d 596, 603 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (1995). A Commission Order must be just and reasonable. *Mun. of Monroeville v. Pa. PUC*, 600 A.2d 655, 657 (Pa. Cmwlth. 1991).

In short, RBMN’s Exceptions fail to acknowledge the relevant applicable law and precedent that supports the Recommended Decision as found in the Conclusion of Law section. The Recommended Decision reviewed and analyzed RBMN’s arguments and judiciously found that RBMN created the unsafe condition at the Oak Street crossing and should bear the sole costs of reconstruction. The Recommended Decision is supported by sound, precedential case law and the evidence of record, and thus should not be disturbed on appeal. Importantly, the Recommended Decision’s Ordering Paragraphs are just and reasonable when reviewing the facts and situation presented in this case.

### III. I&E REPLY EXCEPTIONS

Exceptions must be numbered and identify the *finding of fact or conclusion of law* to which the exception is taken.<sup>2</sup> Exceptions must have supporting reasons for each specific exception and must be concise.<sup>3</sup> Notably, RBMN fails to follow Section 5.533 as it generally excepts to pages of the ALJ's analysis in the Recommended Decision and does not specifically identify a finding of fact or a conclusion of law. Accordingly, RBMN's Exceptions should be denied.

**A. I&E Reply to RBMN Exception 1, Page 24: The ALJ correctly concluded that RBMN should have raised the issue of superelevation of the tracks with the Commission and PennDOT during the planning phase or should have filed a separate application with the Commission.**

The ALJ's conclusion that RBMN should have brought the issue of superelevation of the tracks to the Commission for an application or to the parties through the planning stages is supported by the record evidence and the Public Utility Code. First, the ALJ explained that the change of superelevation at the crossing would affect the roadway approach, and thus is an alteration subject to the Commission's jurisdiction.<sup>4</sup> This conclusion is also supported by Commission precedent as the raising of the tracks and change in superelevation drastically affected the roadway grade, roadway approaches, and vehicle transition through the crossing.<sup>5</sup>

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<sup>2</sup> 52 Pa. Code § 5.533.

<sup>3</sup> 52 Pa. Code § 5.533.

<sup>4</sup> See Conclusions of Law No. 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, 66 Pa.C.S. §§ 2704.

<sup>5</sup> See generally *Manchester Township v. Pennsylvania Public Utility Commission*, 401 A.2d 1237, 1240 (Pa. Cmwlth. 1979) ("We believe that the PUC's order requiring the installation of signs and flashing signals can be

Second, the ALJ found that the expert testimony of Mr. William Sinick on this issue was clear.<sup>6</sup> The ALJ noted that Mr. Sinick clearly explained that increasing the superelevation of the tracks as RBMN did in this case constituted an alteration for which RBMN should have first sought Commission approval.<sup>7</sup> Moreover, the Commission should not overturn the ALJ's credibility determinations because the ALJ is in the best position to review and evaluate a person's credibility, and the ALJ adequately provided an explanation for her credibility determinations in the Recommended Decision.<sup>8</sup>

Notably, RBMN provides no support for its argument that a finding of fact cannot be based upon an expert witness's testimony. Thus, the ALJ's analysis and conclusion is supported by the record and the Public Utility Code, and should not be disturbed.

**B. I&E Reply to RBMN Exception 2, Page 25: The ALJ correctly found that Mr. William Sinick's testimony regarding alterations and track superelevation was clear.**

As stated above, the ALJ found that Mr. Sinick's testimony regarding alterations was clear.<sup>9</sup> The ALJ is not required to cite to the Public Utility Code for her credibility

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characterized as an alteration to or protection of a crossing subject to the PUC's control."); *Application of Consolidated Rail Corporation For abolition of one (1) at grade crossing on Conrail's Chester Secondary rail line located on 49 Street in Philadelphia, Pennsylvania*, Docket No. A-00115212 (May 8, 2000 Recommended Decision affirmed by Opinion and Order dated January 12, 2001)("The evidence in the record reveals that Conrail removed tracks, restored a track, elevated the tracks and barricaded the crossing to vehicular and pedestrian use without a Commission order authorizing the alteration."); *AT&T v. Pa. PUC*, 737 A.2d 201, 211 (Pa. 1999)("Given the broad language utilized by the General Assembly in connection with the establishment of the Commission's jurisdiction, as well as the importance of its purpose, we endorse the Commission's conclusion that the installation of telecommunications facilities within a regulated rail-highway crossing constitutes an alteration subject to the Commission's jurisdiction."); *Norfolk Southern Railway Company v. Pa. PUC*, 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>6</sup> See Recommended Decision, pg. 25.

<sup>7</sup> See Recommended Decision, pg. 25; Finding of Fact Nos. 48-50.

<sup>8</sup> See generally Recommended Decision, pg. 25.

<sup>9</sup> See Recommended Decision, pg. 25; Finding of Fact Nos. 48-50.



determination as credibility is not regulated by the Code. However, to bolster the credible testimony of Mr. Sinick, the ALJ cited to relevant Code sections and prior Commission precedent, as articulated above, to support the determination that the track superelevation was an alteration.

Accordingly, the ALJ's finding is supported by the record and should not be disturbed.

**C. I&E Reply to RBMN Exception 3, Page 30: The ALJ correctly found that the alterations completed by RBMN were not work approved to be performed pursuant to the April 30, 2021 and June 28, 2021 Secretarial Letters.**

I&E acknowledges that the April 30, 2021 and June 28, 2021 Secretarial Letters speak for themselves. However, the ALJ, acting within her judicial capacity, interpreted the Secretarial Letters and found that the raising of the tracks and superelevation of the tracks were alterations not approved through the Secretarial Letters.<sup>10</sup> Moreover, the expert testimony of Mr. Sinick,<sup>11</sup> who was acting on behalf of the entity responsible for interpreting and enforcing Secretarial Letters (I&E) and who is the supervisor of the section responsible for all rail matters (Rail Safety), is credible and consistent with the ALJ's interpretation.<sup>12</sup> Notably, RBMN does not provide any testimony to contradict the ALJ's interpretation.

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<sup>10</sup> See Recommended Decision, Finding of Fact Nos. 16, 17, 36, and 37.

<sup>11</sup> RBMN also provides a general argument/statement regarding its objection to Mr. Sinick's testimony on the Secretarial Letters but fails to provide any legal support for the objection other than generally objecting to Mr. Sinick's "characterization." This argument should fail as the ALJ properly overruled the objection because Mr. Sinick's understanding of the Secretarial Letters was an important fact to have on the record. Moreover, even if the portion requested by RBMN had been struck, Mr. Sinick's testimony regarding his professional opinion on whether the crossing was constructed in accordance with the Secretarial Letters can be found on page 5 of I&E Statement No. 1 and pages 2-3 of I&E Statement No. 2 (labeled at 1-R in the Recommended Decision).

<sup>12</sup> See Recommended Decision, Finding of Fact No. 12; I&E Statement No. 1, pg. 1.

Moreover, while the ALJ did grant RBMN's request to strike a portion of Ms. Sarah Fenton's testimony, the portion cited in the Recommended Decision was not stricken. The ALJ struck from page 8, line 18 through page 9, line 10- the question and answer portion specifically relating to Ms. Fenton's understanding of PennDOT's and RBMN's responsibilities under the Secretarial Letters.<sup>13</sup> The questions presented to Ms. Fenton after the removed portion form the basis for the Recommended Decision's citation- the Secretarial Letters did not mention RBMN raising the tracks, the Secretarial Letters were written to match the existing pave structure, and the reasonings why matching the existing pave structure are important.<sup>14</sup> Thus, Page 30 is supported by the record and should not be deleted.

**D. I&E Reply to RBMN Exception 4, Pages 31 and 32: The ALJ correctly found that RBMN is the sole party responsible for the hazardous condition existing at the Oak Street crossing.**

The ALJ judiciously found that RBMN was the sole party responsible for the hazardous condition existing at the Oak Street crossing. In rendering this finding, the ALJ acknowledged RBMN's arguments relating to Mr. Richard Cooper's sporadic presence at the crossing during RBMN's completion of its portion of the work and its position that PennDOT should have asked RBMN if it intended to raise the tracks and/or elevation.<sup>15</sup> However, the ALJ dismissed RBMN's arguments.

Specifically, the ALJ noted that it is unreasonable to expect PennDOT to ask RBMN whether it intended to raise the tracks, noting that PennDOT had no reason to

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<sup>13</sup> See N.T. pg. 65; PennDOT Statement No. 1, pgs. 8-9.

<sup>14</sup> PennDOT Statement No. 1, pgs. 9, 18.

<sup>15</sup> Recommended Decision, pg. 31.

expect or think RBMN would do so.<sup>16</sup> Further, the ALJ noted that Mr. Cooper was present during *some* of RBMN's work, and that there is no evidence on the record to suggest that Mr. Cooper was aware or should have been aware of the change in superelevation or grade while observing some of the work.<sup>17</sup> This fact is supported by the uncontroverted testimony of Ms. Fenton who stated that the hazardous condition of the crossing was not realized until the crossing was opened to the public and vehicular traffic.<sup>18</sup>

Moreover, once RBMN completed its work, there was nothing PennDOT could do to fix or remediate the issue caused by the change in superelevation or grade.<sup>19</sup> Pursuant to the Secretarial Letters, PennDOT was completing its requirement of placing the two inches of wearing course over the base course laid by RBMN.<sup>20</sup> Once RBMN raised the grade and superelevation and laid the base course, there was nothing PennDOT could do other than place the two inches of wearing course. Accordingly, Pages 31 and 32 are supported by the record evidence and should not be disturbed.

**E. I&E Reply to RBMN Exception 5, Page 34: The ALJ correctly found that RBMN should bear the full cost of reconstructing the Oak Street crossing.**

Pursuant to the factors outlined in *Greene Township v. Pa. Pub. Util. Comm'n*, 668 A.2d 615 (Pa. Cmwlth. 1995), the ALJ found that RBMN should bear the full cost of reconstructing the Oak Street crossing, and that such allocation would be just and

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<sup>16</sup> Recommended Decision, pg. 31.

<sup>17</sup> Recommended Decision, pg. 31.

<sup>18</sup> Recommended Decision, pg. 32; Finding of Fact No. 61.

<sup>19</sup> Recommended Decision, pg. 32; *see also* Finding of Fact Nos. 67-69, 71, 73, and 76.

<sup>20</sup> Recommended Decision, pg. 32.

reasonable in light of the facts of this case.<sup>21</sup> In support of this finding, the ALJ noted that it is difficult to speculate on “what would have happened” had RBMN made PennDOT aware of its intention to raise the grade and superelevation or filed the appropriate application seeking approval with the Commission.<sup>22</sup> Putting speculation aside, the ALJ found that the facts of this case show that RBMN should be solely financially responsible- RBMN did not disclose its intention to raise the grade or superelevation to PennDOT, RBMN did not file an application with the Commission to raise the grade or superelevation, and an unsafe condition at the crossing was realized after RBMN raised the grade and superelevation with no regard for the vehicular transition over the crossing or roadway approaches.<sup>23</sup> As the party responsible for the unapproved and unsafe condition existing at the Oak Street crossing, it is just and reasonable for RBMN to be assigned the sole cost and expense of reconstructing the crossing.

RBMN attempts to again offer speculation as a basis to challenge the Recommended Decision, but this attempt should fail. Indeed, the definition of speculation, reasoning based on inconclusive evidence; conjecture or supposition,<sup>24</sup> confirms that RBMN has no evidence to support its position. Thus, Page 34 should not be disturbed and RBMN’s Exception should fail.

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<sup>21</sup> Recommended Decision, pgs. 33-36.

<sup>22</sup> Recommended Decision, pg. 36.

<sup>23</sup> Recommended Decision, pg. 36; Finding of Fact Nos. 36-38, 48-52, 56, and 77.

<sup>24</sup> The Free Dictionary, <https://www.thefreedictionary.com/speculation>.

#### IV. CONCLUSION

I&E respectfully requests that the Commission reject the Exceptions of Reading Blue Mountain & Northern Railroad Company for the reasons discussed above, and adopt, in its entirety, the ALJ's Recommended Decision.

Respectfully submitted,



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Dated: January 13, 2023

**BEFORE THE  
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Northern Railroad Company, located in the :  
Pittston Township, Luzerne County. :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day, January 13, 2023, served a true copy of the foregoing **Bureau of Investigation and Enforcement’s Reply to Reading Blue Mountain & Northern Railroad Company’s Exceptions**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**Service by Electronic Mail:**

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