

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

Public Meeting held April 20, 2023

Commissioners Present:

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

Knox Township:

C-2019-3009358

Complaint filed by Knox Township verses Buffalo & Pittsburgh Railroad Inc. involving roadway clearance issues and falling concrete from abandoned railroad overpasses at public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) where T-841, T-420, and T-405 cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., located in Knox Township, Jefferson County¹

v.

Buffalo & Pittsburgh Railroad, Inc.

OPINION AND ORDER

¹ By Commission Secretarial Letter of September 10, 2019, *infra*, the caption of the subject proceeding was revised.

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Buffalo & Pittsburgh Railroad, Inc. (BPRR) on July 15, 2022, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Mary D. Long issued on June 24, 2022, in the above-captioned formal complaint proceeding. Commission dockets indicate that, also on July 15, 2022, BPRR filed a Motion Requesting the Commission to Accept the Filing of BPRR Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing (BPRR Motion). On August 1, 2022, the BPRR Motion was amended (Amended Motion) to include a Notice to Plead as required by 52 Pa. Code §5.103(b), informing Parties of a responsive pleading to be filed within twenty (20) days of service.

On July 25, 2022, the Commission's Bureau of Investigation and Enforcement (I&E) filed Replies to the Exceptions of BPRR. Also on July 25, 2022, and August 3, 2022, I&E filed letters/Answers to the BPRR Motion and Amended Motion to advise that I&E takes no position on the BPRR request for extension of time in which to file Exceptions.

On review of the record, the Exceptions and Replies to Exceptions, we shall grant the BPRR Amended Motion and consider the Exceptions on their merits. On consideration, the BPRR Exceptions shall be denied, consistent with the discussion in this Opinion and Order and the recommendations of the Recommended Decision adopted.

History of the Proceeding

A. Complaint and Answers

On April 10, 2019, Knox Township (also, Complainant) filed a Formal Complaint (Complaint) against BPRR. In the Complaint, Knox Township averred that three overpasses on a railroad right-of-way were creating a traffic and safety problem. The overpasses were identified as located on: (1) Harriger Hollow Road (DOT 863 296 J); (2) East Bellport Road (DOT 863 302 K); and (3) Ramsaytown Road (DOT 863 298 X). *See* Finding of Fact No. 3, *infra.*, citing September 10, 2019, Commission Secretarial Letter, *infra*; BPRR St. 1 at 1.

The Complaint alleged, in pertinent part, that: (a) there are no railroad tracks and the overpasses had not been used by the railroad for twenty years; (b) the overpasses are deteriorating and large pieces of concrete from the ceiling are falling on the roadway; and (c) the overpasses are too narrow for two-lane traffic and are not wide enough to meet state requirements. It was further alleged that “[l]arge fire apparatus are concerned with clearances,” “[o]ne of the overpasses is a school bus route and large pieces of concrete are falling on the roadway,” and “[t]he narrow width and height are creating an economical impact on our community.” *See* Complaint at 1-2.

For relief, Knox Township requested that the Commission direct BPRR to remove the overpasses. Complaint at 2.

On April 25, 2019, the Commission served the Complaint on BPRR, the Pennsylvania Department of Transportation (PennDOT), Jefferson County, and Brookville Borough.

On May 6, 2019, PennDOT filed an Answer in which it responded that the overpasses are over township roads.

On May 13, 2019, BPRR filed an Answer and New Matter to the Complaint. BPRR admitted that the overpasses are located on its right-of-way but denied that the structures were creating a traffic and safety problem. BPRR admitted that the tracks have not been used for many years and admitted that the overpasses are owned by BPRR. In New Matter, BPRR stated that it was “assessing” the three overpasses and reserved the right to amend its Answer.

By letter dated May 16, 2019, the Commission’s Rail Safety Division, Technical Utility Services (Rail Safety Division), scheduled a field conference at the crossing(s) for Friday, June 14, 2019.

On May 17, 2019, the Borough of Brookville filed an Answer. The Borough admitted that the three (3) overpasses are located within Knox Township, Jefferson County.

Jefferson County did not file an answer to the Complaint, but counsel for Jefferson County entered an appearance on May 22, 2019.

B. Field Conference and Secretarial Letter

On June 14, 2019, the Commission, through its Rail Safety Division, convened a field conference at the site of the public crossings. The Commission’s field engineer as well as representatives of Knox Township, Jefferson County, Brookville Borough, BPRR and PennDOT attended. At the field conference, BPRR acknowledged

ownership and maintenance of the railroad structures. Knox Township acknowledged maintenance of the approach roadways to the structures. R.D. at 2-4.

During the field conference, the Parties discussed the conditions at each of the crossings. In the immediate interests of public safety, the Parties agreed to certain mitigation measures for each of the crossings. Following the field conference, the Commission served a Secretarial Letter dated September 10, 2019, (*September 2019 Secretarial Letter*) which memorialized the observations and identified safety issues. The *September 2019 Secretarial Letter* also directed certain Parties to perform interim remedial safety work at the crossings. R.D. at 3-4.

The Recommended Decision has summarized the Commission directives of the *September 2019 Secretarial Letter* as follows:

Knox Township was required to:

- a) furnish and install advance warning signs for the vertical clearance restrictions for each crossing;
- b) furnish low clearance overhead signs which BPRR would install on each structure;
- c) furnish and install advanced warning signs and an advisory speed placard for the horizontal clearance restriction at the Ramsaytown Road crossing;
- d) furnish and install roadway clearance markers at the edge of the abutments and arch end walls;
- e) establish and maintain any detours or traffic controls that may be required during the work of BPRR.

BPRR was required to:

- a) install the low clearance overhead signs provided by Knox Township;
- b) remove all loose and delaminated concrete and debris from the inside and outside of the concrete arch supports at Ramsaytown Road and East Bellport Roads and remove all material that had fallen into or adjacent to the roadways.

R.D. at 3, referencing *September 2019 Secretarial Letter*.

The *September 2019 Secretarial Letter* also required BPRR and Knox Township to coordinate and cooperate with each other to complete the work on or before November 15, 2019. No Party filed a petition for reconsideration of staff action regarding this action. R.D. at 4.

By letters dated December 13, 2019, and February 10, 2020, BPRR advised the Commission that the work directed by the *September 2019 Secretarial Letter* had been completed. R.D. at 4.

A further field conference was held on February 21, 2020, and further settlement discussions commenced. The Parties were unable to reach an agreement regarding the resolution of Knox Township's Complaint. The Commission's Rail Safety Division, therefore, requested that the Complaint be referred to the Office of Administrative Law Judge (OALJ) for hearing.

C. Prehearing Conference and Evidentiary Hearing

By hearing notice dated June 8, 2021, this matter was assigned to ALJ Long and a telephonic prehearing conference was scheduled for July 1, 2021.

I&E entered an appearance on June 10, 2021.

On July 1, 2021, the prehearing conference convened as scheduled. Counsel for Knox Township, BPRR, I&E, the Borough of Brookville, Jefferson County and PennDOT appeared and participated. The Parties discussed the conditions at the crossings and agreed to a litigation schedule. The litigation schedule was memorialized in a prehearing order issued on July 6, 2021, and included the service of prepared written direct and rebuttal testimony. The prehearing order also scheduled an evidentiary hearing for January 25, 2022. R.D. at 4.

The evidentiary hearing convened on January 25, 2022, and was conducted by telephone. Witnesses for Knox Township, I&E, and PennDOT testified. Counsel for Jefferson County appeared but did not offer any exhibits or call any witnesses to testify. No one appeared on behalf of Brookville Borough. R.D. at 4-5.

Pursuant to the January 25, 2022, evidentiary hearing, the following written testimonies and exhibits were offered for admission into the record:

Party	Testimonies and Exhibits
Knox Township	Direct Testimony of James M. Berry, Jr.
I&E	Direct Testimony of William M. Sinick (portions stricken) ² Rebuttal Testimony of William M. Sinick I&E Exhibits A, B, C, D, E
BPRR	Direct Testimony of Chad Boutet

² Certain portions of testimony were stricken from the written testimony of William M. Sinick. *See* Interim Order Memorializing the Striking of Written Testimony entered January 26, 2022.

Rebuttal Testimony of Chad Boutet
Direct Testimony of Wayne Duffett
Rebuttal Testimony of Wayne Duffett
Direct Testimony of Charles A. Wooster
Rebuttal Testimony of Charles A. Wooster
BPRR Documentary Exhibits 1-15
BPRR Video Exhibit 16 (six video files)
PennDOT Direct Testimony of Charles P. Keilman, IV, P.E.

The testimonies and exhibits were otherwise admitted into the record without objection. R.D. at 5.³

Knox Township, I&E, and BPRR filed Main Briefs on March 31, 2022. PennDOT filed a letter noting that it would not be filing a brief. BPRR filed a Reply Brief on April 20, 2022.

By interim order dated April 26, 2022, presiding ALJ Long notified the Parties that the *September 2019 Secretarial Letter*, including factual statements in that letter, would be considered record evidence in this proceeding, to the extent it was not already part of the record. The Parties were provided an opportunity to object. BPRR filed an objection on April 28, 2022, noting that certain factual statements in the Secretarial Letter were in conflict with witness testimony. By order dated April 29, 2022, BPRR's objections were overruled and the record was closed. R.D. at 6.

³ As noted and discussed, below, BPRR objected to the presiding ALJ's consideration of the findings in the *September 2019 Secretarial Letter* and, *infra*, in its Exceptions, objects to the ALJ's consideration of a prior proceeding before the Commission, *Mahoning Township v. Buffalo & Pittsburgh Railroad, Inc., Pennsylvania Department of Transportation, Armstrong County, and New Bethlehem Borough*, Docket No. C-2017-2585787 (Recommended Decision issued June 12, 2018 (ALJ Conrad A. Johnson); Order adopting Recommended Decision August 2, 2018)) (*Putneyville Crossing Decision*); see Finding of Fact No. 6.

The record consists of the orders issued by the presiding officer, the written testimonies and exhibits which were admitted into the record, the Commissions *September 2019 Secretarial Letter*, the transcribed notes of testimony of the prehearing conference and evidentiary hearing totaling 269 pages (“Tr.”), and the Main and Reply Briefs (“MB” and “RB”). R.D. at 6.

The Recommended Decision of ALJ Long was issued on June 24, 2022. Exceptions (Exc.), Replies to Exceptions (R.Exc.) and related motions were filed thereafter. In the Recommended Decision, ALJ Long recommended that the Complaint of Knox Township be granted, that the three crossings identified as Harriger Hollow Road, East Bellport Road, and Ramsaytown Road be abolished and costs assigned consistent therewith.

II. Discussion

A. Legal Standards⁴

The matter before the Commission is, as noted, a formal complaint initiated by Knox Township against BPRR. *See* 66 Pa. C.S. § 701. Knox Township, as the Complainant in this matter, is the party seeking an order from the Commission and, consequently, bears the burden of proof. 66 Pa. C.S. 332(a): “. . . Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.”

As the party with the burden of proof, Knox Township must demonstrate that BPRR is responsible or accountable for the problem described in the Complaint. R.D. at 21, citing *Dennison Twp. Bd. Of Supervisors v. Reading, Blue Mtn. and N.R.R.*,

⁴ *See* R.D. at 20-22.

Docket No. C-20031319 (Order entered October 20, 2006). *See, also Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196, 199 (1990).

Knox Township, as the party with the burden of proof, has the duty to establish facts in support of its Complaint by a preponderance of the evidence. Preponderance of the evidence means that the evidence offered on behalf of the Complaint offers the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *Theresa Gavin v. PECO Energy Company*, Docket No. C-2017-2616249 (Order entered July 11, 2019); 2019 WL 3252287 (Pa. P.U.C.), citing *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

As noted, I&E entered an appearance in this matter and has offered evidence in support of the relief requested by Knox Township in its Complaint. R.D. at 21. Of significance to this proceeding is the participation of, and reliance upon, the evidence sponsored by I&E in support of the Complaint by the presiding ALJ. BPRR makes substantial objection to the ALJ's reliance upon the testimony of I&E in this proceeding to support the recommendations of the ALJ that the crossings be abolished. For reasons addressed in detail, below, we conclude that the objections to the I&E evidence by BPRR are without merit and we afford such evidence its probative value in the Complaint.

B. Commission Jurisdiction

Section 2702 of the Public Utility Code (Code), 66 Pa. C.S. § 2702, vests the Commission with exclusive jurisdiction to determine the points at which and 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.

The Commission possesses exclusive authority to determine and order which parties should perform such work at a crossing and which parties will maintain the crossing in the future, all to effectuate the prevention of accidents and promote public safety. R.D. at 21; *also SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991). The Commission’s jurisdiction also extends to the approaches of a crossing. *Dept. of Transportation v. Pa. PUC*, 440 A.2d 657 (Pa. Cmwlth. 1982); and *Springettsbury v. Pa. PUC*, 289 A.2d 762 (Pa. Cmwlth. 1972).

The Commission has jurisdiction over the three crossings at issue in the subject Complaint. *See September 2019 Secretarial Letter* at 1: “[t]he three (3) subject railroad structures involved with this proceeding are highway/railroad crossings under the Commission’s jurisdiction and are part of and along a 40-mile railroad line abandonment that took place in 2005 and 2006 through the Federal Surface Transportation Board by Pittsburg & Shawmut Railroad LLC, a subsidiary of Buffalo & Pittsburgh Railroad Inc., under dockets AB-976X and AB 369 (Sub no. 5X).”

C. Allocation of Costs

The Code further provides the Commission with the exclusive authority to assess the costs of any work ordered to be performed upon the concerned public utilities or municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa. C.S. § 2704(a). The discretion afforded the Commission is broad. R.D. at 22, citing *Dept. of Transp. v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983). The only requirement is that the Commission’s order be just and reasonable. *Id.*, citing *East Rockhill Twp. v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth 1988).

The Commission is not limited to any fixed rule in the allocation of costs but takes all relevant factors into consideration. *See* R.D. at 22, citing *East Rockhill Twp. v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth 1988); *Application of CSX Transp., Inc.*, Docket No. A-2019-3013783 (Order entered February 3, 2022), citing *N. Lebanon Twp. v. Pa. PUC*, 962 A.2d 1237 (Pa. Cmwlth. 2008); *Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615 (Pa. Cmwlth. 1995).

The following, non-comprehensive, list, as drawn from *Greene Twp. Bd. of Supervisors v. Pa. PUC*, are some of the factors we may consider: *See Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615, 619 (Pa. Cmlth. 1995): “While there is no Pennsylvania case law or statutory law clearly delineating the factors that are relevant to the allocation of costs among the parties, a review of the numerous cases involving challenges to the reasonableness of the Commission’s decisions indicates that several factors have consistently been viewed as relevant. They include:

1. The party that originally built the crossing. *See Department of Transportation v. Pennsylvania Public Utility Commission*, [76 Pa.Cmwlth. 525] 464 A.2d 645 (Pa. Cmwlth. 1983). Related to this factor is the issue of whether the road existed before or after the construction of the crossing;
2. The party that owned and maintained the crossing. *Id.*;
3. The relative benefit initially conferred on each party with the construction of the crossing. *See Department of Transportation v. Pennsylvania Public Utility Commission*, [21 Pa. Cmwlth. 407] 346 A.2d 371 (Pa. Cmwlth. 1975);
4. Whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement or removal. *Id.*; *see also Department of Transportation v. Pennsylvania Public Utility Commission*, [79 Pa. Cmwlth. 266] 469 A.2d 1149 (Pa. Cmwlth. 1983); and

5. The relative benefit that each party will receive from the repair, replacement or removal of the crossing. *See Pittsburgh and Lake Erie Railroad Co. v. Pennsylvania Public Utility Commission*, [124 Pa. Cmwlth. 611] 556 A.2d 944 (Pa. Cmwlth. 1989).”⁵

D. Description of the Crossings

The instant Complaint involves three rail crossings which are owned by BPRR. Finding of Fact No. 7. The history of the crossings has been described, in pertinent part, as follows:

4. The Harriger Hollow Road, Ramsaytown Road and East Bellport Road crossings are highway/railroad crossings under the Commissions jurisdiction and are part of and along a 40-mile railroad line abandonment that took place in 2005 and 2006 through the Federal Surface Transportation Board (STB) by Pittsburgh & Shawmut Railroad LLC, a subsidiary of Buffalo & Pittsburgh Railroad Inc., under dockets AB-976X and AB 369 (Sub no. 5X). September 10, 2019 Secretarial Letter.

Finding of Fact No. 4.

The Ramsaytown Road and East Bellport Road crossings are above-grade crossings consisting of a 16-foot-wide concrete arch bridge structure. Finding of Fact

⁵ *See also Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992) (indicating that factors to be considered by the Commission in allocating costs include, amongst other things, prior ownership and maintenance responsibilities, benefits that will flow to the parties, and the general equities of the case). *Green Twp. v. Pa. PUC*, 668 A.2d at 619.

No. 3.⁶ The Harriger Hollow Road crossing is an above-grade crossing consisting of two concrete abutments that supported a steel superstructure. *Id.* The crossing at Harriger Hollow Road once included a steel superstructure. BPRR removed the steel superstructure and only the abutments remain. The structures at Ramsaytown and East Bellport Road were constructed in 1910. Finding of Fact No. 20. The Harriger Hollow Road was constructed in 1906. Finding of Fact No. 10.

PennDOT has removed three of the overhead railroad structures along the abandoned rail line in conjunction with a larger federal/state funded roadway project under Commission dockets Nos. A-2009-2104031, A-2010-2185469 and A-2012-2338963. BPRR has removed one overhead structure along this line as ordered under a Commission complaint docket, No. C-2017-25857873 (*Putneyville Crossing Decision*), leaving approximately thirteen (13) overhead public crossing railroad structures remaining in place. Finding of Fact Nos. 5-6. Each crossing consists of concrete abutments on either side of the road. The roadways approaching each crossing are two lane roadways that narrow to one lane between the abutments.

E. Positions of the Parties

1. Knox Township

Complainant in this matter is Knox Township, a municipality located in Jefferson County, Pennsylvania. Finding of Fact No. 1. Knox Township consists of, approximately 1,100 people. Finding of Fact No. 2; Tr. at 159.

⁶ This type of concrete bridge structure is known as a concrete closed spandrel arch and consists of an arch barrel, spandrel walls, abutments, and wings. Finding of Fact No. 22; I&E St. 1 at 10. The Ramsaytown Road arch barrel is the portion of the bridge that you would drive through. Finding of Fact No. 23; I&E St. 1 at 10.

Knox Township contends that the three crossings identified in the Complaint are unsafe because they are too narrow and because concrete falls from the inside of the tunnels at the crossings at Ramsaytown Road and East Bellport Road (arch structures). In support of its position Knox Township sponsored the testimony of Mr. James M. Berry, Jr. Mr. Berry has served as a township supervisor for twenty years. He also works as a farmer and a school bus driver within the township. Finding of Fact No. 40; Knox St. 1 at 1; Tr. 147.

Mr. Berry, based on his residency and position in Knox Township, has reported that he has seen pieces of concrete the size of a football in the roadway. *See* Tr. 152. Further, as a Township Supervisor, Mr. Berry has received complaints regarding the overpasses at Ramsaytown Road, East Bellport Road, and Harriger Hollow Road. Finding of Fact No. 44. As a result of those complaints, Mr. Berry filed a formal complaint on behalf of Knox Township with the Commission. Knox St. 1 at 1; Tr. 148.

Pursuant to the testimony of Mr. Berry, citizens of Knox Township have difficulty moving farm equipment, because some of the modern machinery is too large to fit through the crossings. The Township would like to widen the roadway on Ramsaytown Road, but it cannot do so because of the railway crossing structure. Finding of Fact No. 116.

2. I&E

I&E takes the position that the three railroad crossings present an ongoing safety hazard to the public and should, therefore, be abolished. I&E sponsored the

testimony of Mr. Sinick,⁷ who expressed his professional opinion, that the complete removal of the concrete obstructions (abutments) at the crossings and railroad bridge structures involved and re-establishment of the roadway, shoulders, and ‘clear zone’ is necessary to promote public safety at the crossings. *See* I&E Stmt. 1 at 5; 16.

Mr. Sinick gave a historical perspective of the subject crossings.⁸ I&E testified and advised that three crossings were the subject of proceedings before the STB whereby BPRR obtained authority to abandon the line. BPRR abandoned the rail service on the line sometime in 2004 or 2005. The crossings are no longer active. The track and ballast have been removed and salvaged. *See* R.D. at 23.

In addition to the condition of the deterioration of the structures at the Ramsaytown and East Bellport Road crossings as evidenced by testimony regarding the presence of concrete, I&E observes that a further safety issue is presented by the fact that two vehicles cannot pass between the abutments at any of the crossings. This, also, creates an unsafe condition and is not consistent with modern roadway design. R.D. at 23. Further, witness Sinick testified to a limited sight distance at the Harriger Hollow Road crossing which was also a safety hazard. *Id.* Mr. Sinick testified that the

⁷ Mr. Sinick is the Manager of the Rail Safety Division. *See* I&E Stmt. No. 1. He has extensive experience in the design, construction, maintenance, and inspection of highway/rail bridges. *See* generally Tr. at 179-241; I&E Stmt. No. 1, and I&E Stmt. No. 2. Mr. Sinick has been a licensed professional engineer in the Commonwealth of Pennsylvania since June 2005 and has been a certified bridge inspector in the Commonwealth of Pennsylvania since 2011. I&E Stmt, No. 1; Tr. at 187, 193.

⁸ We note that certain portions of the testimony of Mr. Sinick were stricken upon motion of BPRR, which was granted by the presiding ALJ.

abutments, which currently serve no purpose for rail transportation, are a hazard to the motoring public because a vehicle can hit them. *Id.*; Finding of Fact Nos. 94-97:

94. If left in place, the concrete abutments pose a danger to motor vehicles that may strike them. I&E St. 1 at 15.
95. There are no guide rails to redirect a vehicle collision with the abutments. Tr. 210.
96. The roadways approaching each crossing are two lane roadways that narrow to one lane between the abutments. I&E St. 1 at 17.
97. Two vehicles cannot pass between the abutments at any of the crossings creating an unsafe condition that is not consistent with modern roadway design. I&E St. 1 at 17; Tr. 132,137-.

R.D. at 17.

I&E, in conclusion, argues that the record establishes that crossing should be abolished and the costs for removal should be borne by BPRR. The cost should be absorbed and borne by BPRR since: (1) BPRR (or its corporate predecessors) built the structures; (2) BPRR has been responsible for cost and maintenance of the structures; (3) BPRR benefited the most from the existence and presence of the structures; and (4) BPRR has not maintained or inspected the structures in thirteen (13) years, which is a major contributing factor to the deteriorated conditions of the structures. *See* I&E M.B. at 24.

3. BPRR

BPRR argues that Knox Township did not meet its burden of proof to establish by a preponderance of the evidence, that the three subject crossings are unsafe or pose safety hazards to the public based on structural soundness of the crossings or

traffic considerations attendant to the crossings. BPRR, therefore, takes the position that the crossings should not be abolished. It argues that the totality of the evidence shows that the continued existence of these structures does not present a hazard to public safety and, accordingly, the record does not support an order directing the removal or alteration of the crossings pursuant to 66 Pa. C.S. § 2702, at BPRR's cost and expense. Rather, BPRR states that the subject crossings should be allowed to remain in place, with BPRR assigned responsibility for inspection and maintenance. *See* BPRR MB at 12-17.

BPRR, variously notes, in support of its position, that the work performed by the Parties pursuant to the Commission's *September 2019 Secretarial Letter* was completed. And, after the work was completed pursuant to the Commission's directives, the condition of the crossings was, thereafter, observed at an interim field conference on February 21, 2020. *See* BPRR MB at 4, referencing Tr. at 220:19-23. No further directives were issued after the interim field conference regarding the subject crossings. *Id.*, citing Tr., at 221:7-11. Based on the completion of the prior work and subsequent review, BPRR views the safety condition of the crossings as abated and would prefer that the crossings remain.

BPRR also critiques the strength and persuasiveness of Knox Township's evidence in this matter. BPRR notes that the Complainant presented no expert witnesses in support of the Complaint, but only the lay testimony of Mr. Berry. *See* BPRR Exc. at 2, *infra*. BPRR states that the testimony of Mr. Berry was, essentially, testimony concerning complaints about farm equipment (BPRR alleges was oversized) and included one instance in which a piece of concrete was 'allegedly' found on Ramsaytown Road. BPRR argues that there was no evidence or testimony submitted by Knox Township that any accidents have occurred at the structures, that any vehicles have been struck by falling concrete, or that concrete is actually falling from any of the railroad crossings.

In contrast, BPRR avers that, based on the testimony of its expert witnesses, the record in this case supports its view that the three railroad bridges/structures at issue are all “reasonably” safe for the motoring public; that they are all structurally safe; and, despite the age of the crossings, have only superficial deterioration. Under the circumstances, BPRR argues that there is no basis to order it to alter or remove the crossings. *See* BPRR RB at 4-8.

BPRR extensively addresses the evidence sponsored by I&E to assert that this evidence, also, is not sufficient to establish the requisite safety hazards of either of the crossings or justify an order by the Commission directing BPRR to remove or alter the crossings. Essentially, BPRR makes the argument that the ALJ’s reliance on the testimony of I&E witness, Mr. Sinick, in support of the decision that Knox Township established its burden of proof was misplaced. BPRR MB at 13-15.

BPRR would explain and, so argue, that the testimony of I&E witness, Sinick is flawed. BPRR argues that Mr. Sinick’s testimony advocating for removal of the three structures is, *inter alia*, based purely on the fact that crossings no longer carry active railroad tracks, and not because they present a public safety issue. Otherwise, according to BPRR, the witness would advocate for removal regardless of whether the railroad was still active. Accordingly, BPRR asserts that this testimony on this issue should be given little weight. BPRR MB at 14.

BPRR also urges that we give Mr. Sinick’s testimony regarding the condition of the bridges should be afforded limited persuasive value. BPRR argues that Mr. Sinick acknowledged that he did not conduct any formal inspections of the bridges; that he did not prepare any written reports, nor did the witness have any substantive notes to refer to when preparing his testimony. *See* BPRR MB at 14; Tr. at 205:3-9.

BPRR finds it significant that Mr. Sinick stated that he observed conditions at the crossings that he would assign a priority rating of “zero” based on National Bridge Inspection Standard (NBIS) standards. BPRR MB at 14, citing Tr., at 188:6-8. However, explains BPRR, I&E witness Sinick did not perform an inspection using NBIS criteria. *Id.*, citing Tr., at 191:11-19. Rather, BPRR argues, the only bridge inspections in this case were performed by BPRR and its expert witness, Mr. Duffett, which inspections revealed that the bridges are in good condition. BPRR holds the position that its witness supports a conclusion that there is only superficial deterioration at the crossings which can be addressed by routine maintenance. BPRR and BPRR witness Mr. Duffett rated these conditions as either “low” or “moderate” repair priorities and no public safety hazards were identified with respect to the conditions of any of the structures. *See* BPRR MB at 10;14.

BPRR also finds fault with Mr. Sinick’s reliance on the “clear zone” concept found in PennDOT’s Highway Design Manual for the argument that the structures should be removed because their abutments constitute obstructions in the clear zone. *See* I&E Statement 1, at 15:8-22.⁹ BPRR responds that its expert, Mr. Wooster, explained that this Manual is not applicable in the context of this Complaint and is not used to review existing structures. *See* Tr., at 119:13-25; BPRR Stmt. 5. BPRR argues, there is nothing in the Manual regarding the clear zone concept that requires the removal of the structures. BPRR Stmt. 6, at 1:12-28. Further, BPRR explains, Mr. Sinick conceded that it is common for bridge abutments to be in the clear zone on Pennsylvania’s roadways and that this factor alone does not require removal of the bridge(s). *See* BPRR MB at 23, “Proposed Findings of Fact,” nos. 47-48: “47. Mr. Sinick agreed that bridges with abutments in the clear zone are “all over the place”

⁹ *See* Finding of Fact No. 92: “The roadway clear zone is defined as the total roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles. I&E St. 1 at 15.”

within the Commonwealth. Tr., at 228:17-20. 48. Bridges do not need to be removed solely because their abutments are in the clear zone. Tr., at 229:6-9.”

Furthermore, according to BPRR, the only traffic engineering investigation in this case was performed by BPRR expert Charles Wooster. BPRR MB at 14. And, this witness concluded that the roadways can safely and efficiently accommodate their anticipated traffic demand. BPRR cited the lack of accidents¹⁰ as persuasive evidence on this point. Tellingly, asserts BPRR, no witnesses were called to testify about accidents in which they were involved, nor was any documentary evidence submitted with regard to any minor accidents. BPRR MB at 14-15.

Based on the foregoing, BPRR states that it would be mere speculation to suggest that non-reported accidents occurred at these bridges. As such, the location and extremely low volume of traffic on these roadways indicate there is no public safety concern. BPRR notes that these are “rural back roads” that do not provide through routes for outside traffic and are used primarily by local residents who are (presumably) familiar with them and are aware of the bridges. BPRR MB at 15.

BPRR’s concluding point of opposition is to the ALJ’s recommendation that the crossings be abolished and that the costs assigned to BPRR. *See* BPRR MB at 15-18. BPRR acknowledges that it has been responsible for maintenance of the crossings, but argues, *inter alia*, that it will not receive the majority of the benefit of the abolition of the crossings. BPRR MB at 17-18. BPRR qualifies its ownership of the

¹⁰ One reportable accident occurred at the Ramsaytown Road structure and one occurred at the Harriger Hollow Road structure. These accidents were attributable to snowy weather conditions. Finding of Fact No. 108; BPRR St. 5 at 5-6. No reportable accidents occurred at the East Bellport structure in the last ten years. Finding of Fact No. 109; BPRR St. 5 at 5.

crossings, noting that the crossings were built by a corporate predecessor, the Pittsburgh and Shawmut Railroad. BPRR MB at 16, citing BPRR Exh. Nos 1-3.

F. ALJ's Recommendations

ALJ Long reached one-hundred twenty-four (124) Findings of Fact and drew eleven (11) Conclusions of Law. We, hereby, adopt said findings and conclusions unless they are expressly modified or rejected, or modified or rejected by necessary implication from our disposition of the Exceptions in this proceeding.

ALJ Long was persuaded that the Complaint should be granted based on the record in this matter. In addition to the record in this proceeding, ALJ Long expressly referenced and was influenced by considerations addressed by the Commission in the *September 2019 Secretarial Letter*, which expressly included findings, and made reference to, conclusions and deliberations of the *Putneyville Crossing Decision*. See R.D. at 29-30:

The history of other crossings abandoned along the railway at issue here was addressed by the Commission in the *Putneyville Crossing Decision* and referenced in the September 10, 2019 Secretarial Letter. As explained below, I conclude that there is no compelling reason to treat the Knox Township crossings differently than the Putneyville Crossing or the PennDOT crossings described in that decision.

The September 10, 2019 Secretarial Letter noted that PennDOT had “removed three (3) of the overhead railroad structures along their roadways in conjunction with a larger federal/state funded roadway project under Commission dockets A-2009-2104031, A-2010- 2185469 and A-2012-2338963.” In the *Putneyville Crossing Decision*, the Commission explained that PennDOT had removed overhead railroad structures, including the concrete abutments “to enhance the safety for motorists by providing improved visibility and less restrictive clearances through the former

crossings.” The Commission found this factor was persuasive in concluding that the Putneyville Crossing, including the abutments, was not safe for the motoring public.

R.D. at 29-30; (notes omitted).

The two structures at Ramsaytown and East Bellport Roads are arch structures. Finding of Fact No. 21; 33. ALJ Long considered the testimony of the Parties and concluded that the structures presented a hazard to the public and should, therefore, be abolished. R.D. at 26-27.

Of significance to this conclusion was the visual evidence of the deteriorating condition of the concrete at the crossings (R.D. at 24-27) in addition to the testimonial evidence of the observance of falling/spalling concrete. *See* Finding of Fact Nos. 72-83.

ALJ Long noted and acknowledged, as did all the Parties, that the expert witness testimony of BPRR witness, Mr. Duffett, that the condition of the bridges was sound, was not disputed.¹¹ Therefore, based on this testimony, there was no finding of immediate or imminent hazard of structural failure, *i.e.*, of collapse regarding the crossings. Notwithstanding, ALJ Long found that such testimony regarding the overall structural integrity of the structures was not dispositive of the issue of safety to the traveling public in Knox Township. R.D. at 25. The pertinent reasoning of the ALJ was, as follows:

The testimony of Mr. Berry and Mr. Sinick describing the concrete falling from inside the arch barrels of Ramsaytown Road and East Bellport Road are more credible than the

¹¹ Mr. Duffett is a professional engineer with a concentration in bridges and structures and is licensed in several states including Pennsylvania. BPRR St. 3 at 1; Tr. at 74- 75; BPRR Exhibit 8. *See* Finding of Fact No. 68.

testimony of Mr. Duffett. Mr. Duffett was overly dismissive of the risk of falling concrete damaging vehicles or harming pedestrians and is contradicted by the photographic evidence which clearly shows cobbles of concrete along the roadway which are much larger than “flakes” or “dust.” Moreover, photographs also show sections of concrete which are missing from the walls and ceiling of the arch barrels. Although Mr. Duffett claimed he had inspected the crossings at some point in the 1990s, Mr. Duffett did not have a progression of inspection reports which would support his position that these sections came from the walls gradually over time as “dust” or “flakes.”

BPRR has neglected these crossings for many years. There is no evidence that any of the structures had been inspected before 2019, shortly after Knox Township filed its complaint. There is no evidence of any inspection done when rail service was abandoned sometime in 2005 or 2006. Although Mr. Duffett testified that he recalls inspecting the crossings in the 1990s, he did not have copies of any reports. Further, it is not credible that, given the thousands of bridge inspections that Mr. Duffett performs, he would have a reliable memory of two crossings in a rural area of Pennsylvania.

R.D. at 26; (notes omitted).

ALJ Long further concluded that the sight distance of the Harriger Hollow Road crossing presented an unacceptable risk to the traveling public.

BPRR removed the steel superstructure at the Harriger Hollow crossing. Only the abutments remain. BPRR’s traffic expert Charles Wooster testified that the sight distance at this crossing is limited. This limited sight distance at each approach is caused by the horizontal curvature of the roadway and by the structure itself. The sight distance to a motorist as

they drive through the structure is 110 feet. This limited sight distance is hazardous.

R.D. at 27; (notes omitted).

In conclusion, the ALJ recommended that the Complaint be granted. She further recommended that the crossings be abolished at the initial cost and expense of BPRR:

Having determined that the railway crossing structures are a safety hazard, I will now address the allocation of costs and expenses to the responsible parties. Both BPRR and Knox Township presented general estimates for the removal of the crossings.

As explained in more detail below, I find that it is just and reasonable for BPRR, Knox Township and Jefferson County to bear the costs and expenses for the removal of the railroad crossing structures at Ramsaytown Road, East Bellport Road and Harriger Hollow Road. None of the crossings impact highways over which PennDOT has any jurisdiction or responsibility. Therefore, no costs will be assessed to PennDOT.

Similar to the Commission's order regarding the *Putneyville Crossing Decision*, I find it just and reasonable to assess the costs for the removal of the crossing structures, including the removal of the abutments and the grading as set forth in more detail in my order.

In recommending removal of the abutments and grading of the crossing, Knox Township and Jefferson County will receive the benefit of a safer highway running through the township and county. Therefore, I find it just and reasonable that the township and county bear some of the costs and expenses associated with removing the railroad substructure at the crossing and grading of the crossing.

BPRR is the owner of the rights-of-way and structures at the crossings and was the operator of the rail line that had been

located there. The railway bridges were constructed more than 100 years ago. BPRR (or its predecessors) had the benefit of the rail line for over a century.

BPRR and Knox Township will benefit from the removal of the structures because there will no longer be any danger of vehicular collision into the abutments. Removal of the abutments allows Knox Township to enhance safety for motorists by providing improved visibility and a less restrictive clearance through the roadway. Knox Township will benefit from the removal of the crossings because it will be able to develop the roadways. The removal of the crossings will also ease the movement of school buses and farm equipment. The benefit to each party and traffic safety is a factor that the Commission may consider in allocating costs.

R.D. at 34-35; (notes omitted)

G. Exceptions and Replies to Exceptions

1. BPRR's *Nunc Pro Tunc* Filing

As noted, BPRR filed a Motion (later amended), requesting the Commission to accept the filing of its Exceptions, *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for filing on July 15, 2022. The filing was made after BPRR received confirmation that its Exceptions were deemed filed on July 15, 2022.

Pursuant to Section 1.11 of the Commission's Regulations, 52 P. Code § 1.11, BPRR was required to file its Exceptions prior to 4:30 p.m. on July 14, 2022, to be considered timely. 52 Pa. Code § 1.11(a)(4). BPRR completed its filing after 4:30 p.m., and, thus, the Exceptions were deemed filed as of July 15, 2022, which was untimely. No other Party opposes the BPRR request.

Generally, *nunc pro tunc* relief is granted when a delay in filing a document is caused by extraordinary circumstances involving fraud or a breakdown in the operations of the court or administrative agency involved. *See Gloria Scarnati v. Pennsylvania-American Water Company*, Docket No. C-00015273 (Order entered January 10, 2002); 2002 WL 963419 (Pa. P.U.C.), citing *Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130 (1996) – addressing untimely filing of administrative appeal. Additionally, such relief may be granted when a delay in filing a document is caused by an unforeseeable and unavoidable event, but only if the document is, thereafter, filed as soon as possible and the opposing party is not thereby prejudiced. *Id. also, White Haven Borough v. Reading, Blue Mountain and Northern Railroad Company*, Docket No. C-00004204 (Order entered February 8, 2002); 2002 WL 34560328 (Pa. P.U.C.).

On consideration of the Motion, the Exceptions have been filed one day after the deadline and no other Party to this matter has expressed prejudice to their consideration. As limited to the particular facts of this proceeding, in order to secure the just, speedy, and inexpensive determination in this proceeding we shall grant the Motion (as Amended) of BPRR and consider its Exceptions on their merits. *See* 52 Pa. Code § 1.2(a).

2. BPRR Exceptions

In its Exceptions, BPRR, as a threshold contention, cites caselaw and administrative authority to establish that the Commission is the ultimate fact finder in any matter decided under the Code and may supersede and reject the ALJ's recommended findings. BPRR Exc. at 4, citing *Romeo v. Pa. PUC*, 154 A.3d 422, 429 (Pa. Cmwlth. 2016) (citing 66 Pa. C.S. § 335(a)). BPRR observes that the presiding ALJ focused on three separate and distinct conditions or issues regarding the subject crossings in the Recommended Decision. BPRR's Exceptions, as a result, address each issue and

the Findings of Fact on which the ALJ relied upon in support of each recommendation to abolish the subject crossings. BPRR's Exceptions are organized in response to the conditions noted at the subject crossings. *Id.*

(a) Condition of the Structures at Ramsaytown and East Bellport Roads - BPRR Exceptions Nos. 1-13 and Replies

In Exceptions Nos. 1-13, under the topic heading, "Condition of the Structures at Ramsaytown and East Bellport Roads," BPRR attacks the probative value of the evidence and testimony relied upon by the presiding ALJ in reaching certain conclusions regarding the presence of loose particles of concrete observed at the subject crossings (Exc. Nos. 1-3; 5-11). BPRR Exc. at 5-13.

BPRR further objects to the conclusions of the ALJ that the record substantiates the testimony of Knox Township witness, Mr. Berry, that he received complaints of any other resident(s) of Knox Township about falling concrete regarding the overpasses (Exc. No. 4). BPRR Exc. at 7.

BPRR also excepts to the conclusion that BPRR's Bridge Management Program does not include a provision to inspect bridges on 'out-of-service lines' (BPRR Statement 1 at 3; R.D. at 20) and alleges that this discussion is misleading (Exc. No. 12). BPRR Exc. at 12.

Additionally, BPRR objects to the conclusions reached by the ALJ that it has no inspection records before 2019 (Exc. No. 13). BPRR Exc. at 12-13.

I&E, in its Replies to the Exceptions of BPRR, pages 3-11, responds to each, separately identified Exception raised by BPRR. In its Replies, I&E urges the Commission to deny the Exceptions of BPRR. I&E extensively identifies and provides

detailed references to those portions of the record and the Recommended Decision in which the issue has been addressed. I&E R.Exc. at 3-11.

I&E replies that the ALJ correctly concluded that falling concrete from the barrel arches of the crossings at Ramsaytown Road and East Bellport Road pose a hazard to the public and such conclusion is supported by the record. I&E refers to the testimony of Mr. James Berry and Mr. William Sinick in this regard. *See* I&E R.Exc. at 8-9; I&E Exhibit B, Pictures 1, 4, and 15; I&E Stmt. No. 1, pgs. 6, 17-18.

Mr. Sinick testified that concrete falling from a bridge structure can cause damage to a vehicle. I&E notes that BPRR fails to acknowledge that Mr. Sinick, in preparation for the evidentiary hearing, visited the crossing on October 21, 2021, and again noted delaminated concrete at the Ramsaytown Road structure. Thus, not only did Mr. Sinick observe loose concrete and delamination at Ramsaytown Road after BPRR completed its chipping and scaling work pursuant to the Commission's directives in the *September 2019 Secretarial Letter*, but he also observed the loose concrete and delamination more than a year later. I&E responds that Mr. Sinick credibly and unequivocally testified that the removal of loose concrete is an ongoing problem. This fact is also supported by BPRR's witnesses: (1) Mr. Wayne Duffett stated that he observed loose concrete on the north abutment and northwest wingwall at the Ramsaytown Road crossing, and (2) BPRR witness, Mr. Chad Boutet, recommended that any loose concrete at Ramsaytown Road (in addition to the other 2 crossings) be scaled back. *See* I&E R.Exc. at 7.

**(b) Line of Sight at the Harriger Hollow Crossing –
BPRR Exceptions Nos. 14-15**

In Exceptions Nos. 14-15, BPRR excepts to the conclusion that “limited sight distance at the Harriger Hollow Road crossing is hazardous” (Exception No. 14,

referencing R.D., at 27) and Recommended Finding of Fact No. 99, which states: “Harriger Hollow Road generally has limited sight distance due to the horizontal curvature of the roadway and the structure itself. Tr. 116; BPRR Exhibits 15- 16.” (Exception No. 15, referencing R.D. at 17). BPRR Exc. at 13-16.

In its Replies, I&E cites to pertinent portions of the record to note that the ALJ’s determination relating to the limited sight distance at Harriger Hollow Road is supported by both the testimony of Mr. Wooster and of Mr. Sinick and buttressed by photographic and video evidence. It points out that the pictures provided by BPRR in its argument further support the fact that the limited sight distance is caused by the curvature of the road and the structure itself. I&E R.Exc. at 11-12.

(c) Safety of the Roadways and Abutments – BPRR Exceptions Nos. 16-25

BPRR excepts to the Recommended Decision’s, alleged, improper reliance on PennDOT’s Publication 13M Design Manual Part 2 Highway Design (“PennDOT Design Manual”). (Exception No. 16, referencing R.D. at 27-29); BPRR objects to the “two-lane” and “gravel road” description of the crossings (Exception Nos. 17-19); BPRR excepts to Findings of Fact No. 39 (R.D. 11) and No. 95 (R.D. 17), which state: “There are no guide rails to redirect a vehicle collision with the abutments. Tr. 210; 228-29.” (Exception No. 20); BPRR Exc. at 16-23.

BPRR excepts to Recommended Findings of Fact 89, 90, 91, 92, and 93 (Exception No. 21, citing R.D. 16-17), which state: “A concrete obstruction, such as an abutment or concrete arch structure, is a rigid fixed object. I&E St. 1 at 7;” and excepts to Finding of Fact No. 94, which states: “If left in place, the concrete abutments pose a danger to motor vehicles that may strike them. I&E St. 1 at 15.” (Exception No. 22,

citing R.D. at 17) pertaining to the concrete abutments at the crossing and whether they pose a danger to motor vehicles. BPRR Exc. at 21-22.

In pertinent part, I&E replies that the ALJ correctly used PennDOT's standards in rendering the Recommended Decision. Mr. Sinick elaborated that with any rail proceeding before the Commission, the Rail Safety Division's main purpose is to promote public safety and prevent accidents. Therefore, when an engineer is assessing the public safety of the crossing, he/she is assessing a possible improvement to the crossings which would require acknowledgement of PennDOT's standards. It also notes that the Complaint itself requests the removal of the three (3) railroad bridge structures, and thus is a possible improvement project. Based on the foregoing, I&E explains that the PennDOT manual was properly used in this matter. *See* I&E R. Exc. at 12-18.

(d) The ALJs' Reliance on the *Putneyville Crossing Decision* – BPRR Exceptions Nos. 26-28

In Exceptions Nos. 26-28, BPRR excepts to the ALJ's citation and reliance on the *Putneyville Crossing Decision* in reaching her conclusions and recommendations in the Recommended Decision. BPRR goes on to factually distinguish these proceedings from the instant formal complaint. BPRR Exc. at 24-26.

I&E, in its Replies, responds with a summary of the issues addressed by the Commission in the *Putneyville Crossing Decision* and concludes that the facts presented in this matter are similar to the *Putneyville Crossing Decision*. Thus, responds I&E, the ALJ accurately relied upon prior case precedent in rendering the Recommended Decision. It also cites the case of *Pa. Indep. Oil & Gas Ass'n v. Commonwealth*, 146 A.3d 820 (Pa. Cmwlth. 2016), citing *Ario v. Reliance Ins. Co.*, 980 A.2d 588, 597 (Pa. 2009) for the general proposition that Pennsylvania generally follows the rule of

stare decisis, under which “a conclusion reached in one matter should be applied to future substantially similar matters.” I&E R.Exc. at 20, n. 83.¹²

(e) The ALJ’s Recommendation – BPRR Exceptions No. 29

BPRR excepts to Recommended Conclusion of Law No. 4, which states: “Buffalo & Pittsburgh Railroad, Inc.’s abutments at the subject public crossing are fixed obstructions in the roadway clear zone as designated in PennDOT’s Design Manual Part 2 Highway Design and therefore the abutments are hazardous to the traveling public. 67 Pa. Code §459.1.” R.D. at 36. Exc. at 27.

I&E replies that the Conclusion of Law regarding the concrete abutment is supported by the evidence and is proper. As explained in the Recommended Decision, “the abutments themselves, as immovable objects in the roadway clear zone, pose a crash risk regardless of their placement in relation to the roadway” and that “[i]t is important to keep in mind that the risk posed by the abutments as a vehicle hazard is not offset by any public benefit.” See I&E R. Exc. at 21-22.

(f) The ALJ’s Citation of and Reliance Upon *Pa. Railroad v. Pa. PUC*, *supra* – BPRR Exception No. 30

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

¹² The Commission notes that, as an administrative agency, we are not bound by the rule of *stare decisis*. *Bell Atlantic-Pennsylvania, Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1995). Rather, as an administrative agency, we must render consistent opinions and should either follow, distinguish or overrule our own precedent. *Id.*

BPRR summarizes the facts and holding of the *Pennsylvania Railroad Company* decision to argue that the ALJ who presided over the *Putneyville Crossing Decision* case interpreted the holding to mean that a lack of accidents does not prove that a crossing is safe. This, according to BPRR, is inconsistent with the holding. The holding, argues BPRR, is to be expressed as the Commission can still regulate a facility even if there is no evidence of accidents. BPRR Exc. at 28. BPRR further clarifies its position on the holding of *Pennsylvania Railroad* to mean that the fact that accidents rarely or never occur is relevant and compelling evidence of a safe condition, or the absence of a dangerous condition. See BPRR Exc. at 29, citing *Spino v. John S. Tilley Ladder Co.*, 548 Pa. 286, 696 A.2d 1169 (1997)¹³; *Orlando v. Herco, Inc.*, 505 A.2d 308 (Pa. Super. 1986).¹⁴

In Replies, I&E states that Conclusion of Law No. 5 is accurate. It explains that, in *Pennsylvania Railroad Company*, the Court found that “[a]lthough there is no substantial evidence of the occurrence of any serious accidents at this crossing, we do not believe that fact limits the power of the Commission to correct a condition which it believes may lead to the injury or death of persons subjected to such condition.” Therefore, as this principle has been affirmed by the Commission, the Commission need not wait until an accident actually occurs before it takes steps to prevent or correct a condition it believes may lead to injury. I&E R.Exc. at 22, citing *Pennsylvania Railroad Company* 195 A.2d at 164.

¹³ This is a products liability civil action and we find it has minimal applicability to the evidentiary considerations in this Complaint.

¹⁴ This is a proceeding alleging, *inter alia*, negligence in the preparation of food and a count in assumpsit for breach of an implied warranty of merchantability, *i.e.*, that the food was fit for human consumption. In part, the court found that evidence regarding the absence of complaints from other patrons who had ordered the subject food (shrimp creole), while not conclusive that the food sold to plaintiff was merchantable, was a relevant fact to be considered by the jury.

(g) The ALJ's Recommendation that the Three Crossings be Altered/Abolished – BPRR Exceptions Nos. 31-35

In Exceptions Nos. 31-35, BPRR excepts to the recommended ordering paragraphs of the Recommended Decision in their virtual entirety. For the reasons set forth and articulated in BPRR's Main and Reply Briefs, BPRR asserts that the recommendations are not supported by substantial evidence in the record, do not have sound legal and factual bases, and the recommended result is not just and reasonable. BPRR repeats its essential contention that the three subject crossings do not need to be altered because, as set forth above and in BPRR's briefs, the crossings are not unsafe for the public and their alteration will not prevent accidents or promote public safety. BPRR Exc. at 29-31.

I&E, in its Replies, argues that the record supports the recommended ordering paragraphs of the R.D. *See* I&E R.Exc. at 22-24.

H. Disposition

We advise the Parties that any issue or contention that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *See Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), *also see, generally Univ. of Pa., et al. v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984).

1. *Putneyville Crossing Decision*

On review of this matter, we find that, as a threshold contention, we must address the objections of BPRR to the ALJ's citation of, and reliance upon, those considerations addressed in the *Putneyville Crossing Decision*.

On consideration of the Exceptions of BPRR, we shall deny the Exceptions consistent with our discussion in this Opinion and Order. Contrary to the position of BPRR, we conclude that the presiding ALJ properly considered the evidentiary record in this matter and also properly acknowledged the determinations reached by the Commission in the *Putneyville Crossing Decision*. As a matter of law, the Commission, as an administrative agency, is empowered to consider the deliberations of other matters before it with the caveat that due process considerations of notice and opportunity are provided to the parties. *Pocono Water Co. v. Pa. PUC*, 630 A.2d 971 973 (Pa. Cmwlth. 1993): 147 P.U.R.4th 428 (1993) citing *City of Erie v. Pa. PUC*, 398 A.2d 1084 (Pa. Cmwlth. 1979) - although the Commission may take notice of results it reached in other cases, the record must reflect that the parties had notice that the Commission would consider such evidence.

As identified in the *September 2019 Secretarial Letter*, the instant crossings - Ramsaytown, Harriger Hollow and Bellport, are related to an approved abandonment of the railroad lines along a forty (40) mile corridor. We, therefore, cannot, in the interest of justice, view the present Complaint in an isolated context. Rather, under the specific facts of this matter, we must view the present Complaint in its contextually proper place. We find that the ALJ has done so.

We also reject BPRR's related objections to our consideration of the *Putneyville Crossing Decision* based on principles of hearsay. We would cite our discussion of hearsay in the matter of *Catherine J. Frompovich v. PECO Energy*

Company, Docket No. C-2015-2474602 (Order entered May 3, 2018); 2018 WL 2149249 (Pa. P.U.C.) (*Frompovich*).¹⁵ Under the relaxed evidentiary standards applicable to administrative proceedings, *see* 2 Pa. C.S. § 505, it is well-settled that simple hearsay evidence, which otherwise would be inadmissible at a trial, generally may be received into evidence and considered during an administrative proceeding. *Frompovich*, citing *D'Alessandro v. Pennsylvania State Police*, 937 A.2d 404, 411, 594 Pa. 500, 512 (2007); *see, also, Scott and Linda Moore v. National Fuel Gas Dist. Corp.*, Docket No. C-2014-2458555 (Order entered May 11, 2015): 2015 WL 4464734 (Pa. P.U.C.).

On consideration of the recommendations of the ALJ concerning the persuasive value of the deliberations in the *Putneyville Crossing Decision*, such recommendations are adopted.

2. Conditions of the Crossings

On review of the record, we disagree with what we observe as the trivialization of the hazard to the travelling public from conditions of the concrete at each of the structures and presence of the remaining abutments. We shall, therefore, deny the Exceptions of BPRR. Review of the visual evidence in this proceeding is compelling in support of the preponderance of the evidence in support of the Complaint and the overall recommendations of the presiding ALJ. We shall, therefore, adopt the recommendations of the ALJ. In pertinent part, the following reasoning supports our determination:

Third, there is also no dispute that two cars cannot pass safely through any of the crossings. As explained above, the abutments themselves, as immovable objects in the roadway clear zone, pose a crash risk regardless of their placement in

¹⁵ *See Frompovich*, discussing *Walker v. Unemployment Compensation Board of Review*, 367 A. 2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*); *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, fn. 8 (Pa. Cmwlth. 2011) (*Chapman*).

relation to the roadway. The Commission reached a similar conclusion in its disposition of the *Putneyville Crossing Decision*, relying in part on I&E's recommendation that the railroad should remove the abutments because they are located in the roadway clear zone.

BPRR points out that Mr. Sinick conceded that if there were rail traffic on the line, he would not take the position that the abutments should be removed. It is important to keep in mind that the risk posed by the abutments as a vehicle hazard is not offset by any public benefit. Indeed the Commission is not limited to any fixed formula in evaluating any crossing that safety can be broadly construed and considers many relevant factors.

R.D. at 31; (notes omitted).

3. Allocation of Costs

On consideration of the position of the Parties, we will adopt the recommendation of the ALJ concerning the initial allocation of costs for the abolition of the crossings. BPRR asserts, and attempts to bring to our attention, that fact that it was not the original owner of the subject crossings as it did not construct them. BPRR notes that a corporate predecessor, Pittsburgh & Shawmut Railroad LLC was the original owner. This point is made to argue that, based on an analysis of which Party has received the benefit of the crossing should be Knox Township.

In addition to our express consideration of the findings in the *Putneyville Crossing Decision*, we also disagree with BPRR that a corporate predecessor is of material consideration in our decision to grant its Exceptions and reject the R.D. Courts have held that maintenance responsibilities and construction costs assigned to railroads which previously operated at a crossing are relevant factors and can serve as a basis for cost allocation to the current railroad operating at the crossing. *D&H Corp. v. Pa. PUC*,

613 A.2d 622, 625 (Pa. Cmwlth. 1992),¹⁶ citing *Consolidated Rail Corp. v. Pa. PUC*, 423 A.2d 1108 (Pa. Cmwlth. 1980); *Pa. PUC v. Southeastern Pennsylvania Transportation Authority*, 343 A.2d 371 (Pa. Cmwlth. 1975).

We find that BPRR, including its predecessor entities, have primarily benefitted from the crossing. The record is that the crossings have been abandoned and the equipment salvaged by BPRR. The present condition of the abutments, in addition to posing a hazard to the travelling public, have no countervailing purpose or value. R.D. at 32. Respondent does not have any plans for the crossings. Finding of Fact Nos. 117-118. The concrete abutments at each of the crossings create a condition that the ALJ has correctly concluded represents an untoward impediment to any efforts at widening the crossing for the purpose of preventing the modification to accommodate vehicle traffic in the township.

Additionally, we find that BPRR's bears responsibility for the deteriorated condition of the crossings. Finding of Fact Nos. 120-123. The crossings are, admittedly, aged. However, the maintenance of the crossings as noted by the ALJ, has been the subject of decades of neglect. Finding of Fact Nos. 120-121. And, the Bridge Maintenance Program touted by BRPP is a post-hoc measure in this regard. See R.D. at 127. Whether a party is responsible for the deterioration of the crossing, which has led to the need for its repair, replacement or removal is a factor that the Commission may consider in allocating costs and assigning maintenance. *Pennsylvania Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983).

¹⁶ *Appeal denied*, 534 Pa. 642, 626 A.2d 1160 (Table).

Conclusion

On consideration of the Recommended Decision of ALJ Long, the Exceptions, Replies to Exceptions, and review of the record, we shall adopt the Recommended Decision. The Exceptions of BPRR are denied, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, in the matter of the formal complaint of Knox Township versus Buffalo & Pittsburgh Railroad, Inc. at Docket No. C-2019-3009358 is adopted, consistent with the discussion in this Opinion and Order.

2. That the Motion (as Amended) of Buffalo & Pittsburgh Railroad, Inc. filed July 15, 2022, Requesting the Commission to Accept the Filing of Buffalo & Pittsburgh Railroad, Inc.'s Exceptions to Recommended Decision *Nunc Pro Tunc*, or in the Alternative, to Extend the Time Period for Filing to the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, at Docket No. C-2019-3009358, is granted and the Exceptions are considered on their merits.

3. That the Exceptions of Buffalo & Pittsburgh Railroad, Inc. filed July 15, 2022 (*Nunc Pro Tunc*) to the Recommended Decision of Administrative Law Judge Mary D. Long issued June 24, 2022, at Docket No. C-2019-3009358, are denied, consistent with the discussion in this Opinion and Order.

4. That the formal complaint of Knox Township filed against Buffalo & Pittsburgh Railroad, Inc. at Docket No. C-2019-3009358 is sustained consistent with the discussion in this Opinion and Order.

5. That the public crossings, Ramsaytown Road (T-841) - (DOT 863 298 X); Harriger Hollow Road (T-420) - (DOT 863 296 J); and East Bellport Road (T-405) - (DOT 863 302 K) cross, below grade, the right of way of Buffalo & Pittsburgh Railroad Inc., in Knox Township, Jefferson County, shall be altered in accordance with the work ordered herein.

6. That Buffalo & Pittsburgh Railroad, Inc., at its sole cost and expense, within nine (9) months of the date of service of the Commission's Order, shall furnish all material and perform all work necessary to alter the public crossings at Ramsaytown Road 38 (T-841), Harriger Hollow Road (T-420), and East Bellport Road (T-405) by: (1) demolishing and removing the existing railroad structures, which includes the reinforced concrete arch structures, reinforced concrete abutments, and/or bridge structure material, in their entirety from the public crossing locations and surrounding areas; (2) backfilling and grading the area thus disturbed; (3) providing 28-foot minimum of graded roadway and shoulder area between the embankments at Ramsaytown Road (T-841) before sloping the embankments behind the removed structures to a safe 2:1 grade; (4) providing a 24-foot minimum of graded roadway and shoulder area between the embankments at Harriger Hollow Road (T-420) and East Bellport Road (T-405) before sloping the embankments behind the removed structures to a safe 2:1 grade; and (5) grading and seeding the area thus disturbed on the embankments and surrounding areas to prevent soil erosion, all in safe and satisfactory condition.

7. That Buffalo & Pittsburgh Railroad, Inc., at its initial cost and expense, shall furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work by furnishing any watchmen, flagmen and/or inspectors that may be deemed necessary to protect the railroad's operations or facilities during the time of the removal of the abutment substructures.

8. That Buffalo & Pittsburgh Railroad, Inc., at least thirty (30) days prior to the start of work, shall prepare and submit to the Commission's Bureau of Technical Utility Services for approval, and to all parties of record for examination, complete and detailed final plans that include proposed final grading dimensions, slope of embankments, and dimensioned area available for roadway and shoulders between the toe of embankments at the crossing locations.

9. That Knox Township at its sole cost and expense, within twelve (12) months of the date of service of the Commission's Order, shall furnish all material and perform all work necessary: (1) to finish grade the roadway and shoulder approaches to the crossings in a safe manner by widening the one-lane roadway crossings to two-lanes to match, at a minimum, the existing roadway approaches in dimension and with in-kind roadway and shoulder material once the bridge structures are removed; and (2) to grade and seed the highway approaches to the 39 crossing and areas disturbed to match the surrounding existing topography, all in safe and satisfactory condition.

10. That Knox Township and Jefferson County, at their equally shared cost and expense, shall furnish all material, and perform 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 time of the removal of the railroad bridge structures and reestablishment of the roadway and shoulder areas at the crossings.

11. That Knox Township and Buffalo & Pittsburgh Railroad, Inc., at their sole cost and expense, 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.

12. That any non-carrier public utility company or municipal authority, upon notification from Buffalo & Pittsburgh Railroad, Inc., and Knox Township of this proceeding and work prescribed herein, which may be required to relocate, change or move their facilities or structures in accordance with ordering paragraphs specified here within, shall immediately file under Docket No. C-2019-3009358 as a party of record to this proceeding including a contact name, address, phone number, email address and include a brief narrative description of the facilities impacted.

13. 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, which may be required as incidental to the removal of the bridge structures, shall be made by said public utility company or municipal authority, at its initial cost and expense, and in such a manner as will not interfere with the alteration of the crossing; and such relocated or altered facilities thereafter shall be maintained by said public utility company or municipal authority, at its sole cost and expense.

14. That all Parties involved herein shall cooperate fully with each other so that during the time the work is being performed, vehicular and pedestrian 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.

15. That all work necessary to complete the removal of the railroad structures and grading at the subject crossings shall be done in a manner satisfactory to the Commission within nine (9) months of the date of the final Commission Order, and that on or before said date, Buffalo & Pittsburgh Railroad, Inc., shall notify the Commission's Bureau of Technical Utilities, Rail Safety Division by electronic mail, as to the date of actual completed work. Buffalo & Pittsburgh Railroad, Inc. shall also file with the Commission's Secretary's Bureau, under Docket No. C-2019-3009358, notice of the date of actual completion of their work, with a copy of the notice to all parties.

16. That all work necessary to complete the re-establishment of the roadway and shoulder areas with in-kind material at the subject crossings shall be done in a manner satisfactory to the Commission within twelve (12) months of the final Commission Order, and that on or before said date, Knox Township shall notify the Commission's Bureau of Technical Utilities, Rail Safety Division by electronic mail, as to the date of actual completed work. Knox Township shall also file with the Commission's Secretary's Bureau, under Docket No. C-2019-3009358, notice of the date of actual completion of their work, with a copy of the notice to all parties.

17. That Buffalo & Pittsburgh Railroad, Inc., pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of their construction activities at the crossings described herein.

18. That Knox Township pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of their construction activities at the crossings described herein.

19. That upon completion of all work described herein, Knox Township, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain the roadways, shoulders, drainage facilities, signing, guiderail if necessary, and any other roadway ancillary features of the improvement constructed herein, including snow, debris and ice removal on the roadways.

20. That upon completion of all work described herein, Buffalo & Pittsburgh Railroad Inc., at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain its property, railroad grade, embankments, drainage facilities, and any other railroad facilities of the improvement constructed herein.

21. That upon completion of the removal of the railroad bridge structures and re-establishment of the roadway and shoulder areas, 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, existing or altered, located within the limits of the public right-of-way.

22. That upon completion of the work herein directed, and upon a written request by any Party hereto, this proceeding shall be scheduled for a further 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.

23. That upon the Commission receiving notice from both Buffalo & Pittsburgh Railroad, Inc., and Knox Township of the completion of 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 Division, and there are no outstanding issues, the Complaint of Knox Township filed at Docket No. C-2019-3009358 shall be deemed satisfied.

24. That upon the Commission findings that all work has been satisfactorily completed as described herein, all three public crossings (DOT 863 298 X), (DOT 863 296 J) and (DOT 863 302 K) at Ramsaytown Road (T-841), Harriger Hollow Road (T-420), and East Bellport Road (T-405), respectively, shall hereby be abolished.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2023

ORDER ENTERED: April 20, 2023