

**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.

Reading Blue Mountain & Northern
Railroad c/o Jolene Busher

C-2020-3016906

v.

Pennsylvania Department of Transportation,
Pittston Township and Luzerne County

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Reading Blue Mountain & Northern Railroad Company (RBMN or the Railroad), on January 3, 2023, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Emily I. DeVoe, which was issued on December 14, 2022. The Commonwealth of Pennsylvania, Department of Transportation (PennDOT) filed Reply Exceptions on January 12, 2023, and the Commission's Bureau of Investigation and Enforcement (I&E) filed Reply Exceptions on January 13, 2023. For the reasons stated below, we shall deny the

Exceptions of RBMN and adopt the Recommended Decision, consistent with this Opinion and Order.

I. History of the Proceeding

On January 13, 2020, RBMN filed a Complaint against PennDOT for the deteriorated condition of the railroad crossing surface and roadway approaches at the public crossing (DOT 361 425 J) where State Route 2019 (Oak Street) crosses, at grade, the tracks of RBMN, located in Pittston Township, Luzerne County (the Crossing).¹ RBMN requested that PennDOT be required to repair the roadway approaches at PennDOT's expense. Complaint at 2.

On February 14, 2020, PennDOT filed an Answer and New Matter which admitted, in part, and denied, in part, various material allegations of the Complaint. PennDOT denied that it is failing to maintain the roadway approaches at the Crossing and averred that RBMN's failure to properly repair or replace the Crossing is causing the premature breakdown in the pavement of PennDOT's roadway approaches. PennDOT Answer at 1-2. On February 18, 2020, Pittston Township (Pittston) filed a letter Answer stating that it has no liability to fix or maintain the Crossing because Oak Street is a state road and the Crossing is owned and maintained by RBMN. Pittston Answer at 1.

After a field investigation and conference, RBMN and PennDOT reached an agreement to reconstruct and repair the Crossing, which was memorialized in a Secretarial Letter dated April 30, 2021, and later modified by a Secretarial Letter dated

¹ The Crossing is a highway/rail crossing which crosses at-grade two tracks of RBMN. It has an average daily traffic of 12,178 vehicles, including an average daily truck traffic of 745 in the vicinity of the Crossing. Oak Street is used to access Interstate 81 and Interstate 476 for interstate and local commerce, and is classified as Minor Arterial. Oak Street is maintained by PennDOT and the two sets of railroad tracks are maintained by RBMN. R.D. at 1-2 (citing I&E St. 1 at 2; PennDOT St. 1 at 3).

June 28, 2021 (Secretarial Letters). R.D. at 2. RBMN was ordered to replace the high-type concrete panel railroad crossing surfaces with a rubber flangeway and asphalt crossing surface across both sets of tracks from two feet outside of each outside rail and all area in between both sets of tracks, and remove five feet of roadway on each roadway approach and furnish, place, and compact hot mix bituminous asphalt base material to two inches of existing grade as measured to the existing roadway approaches and to within two inches from the top of the rail on each set of tracks. PennDOT was ordered to establish and maintain the detour and traffic controls for all vehicular traffic necessary for a seven-day roadway closure, and furnish, place, and compact two inches of hot mix bituminous asphalt wearing course material to finish the grade across the roadway approaches and railroad crossing surfaces. *See* Secretarial Letter dated April 30, 2021; Secretarial Letter dated June 28, 2021.

Soon after construction at the Crossing was completed in July 2021, PennDOT received multiple complaints concerning the crossing. R.D. at 3 (citing Tr. at 72; PennDOT St. 1 at 14). PennDOT contacted RBMN to discuss the condition at the crossing; however, PennDOT erected “Bump” warning signs at the crossing and, on December 14, 2021, filed a Motion to Schedule Matter for Hearing after a mutually agreeable resolution was unable to be reached with RBMN. R.D. at 3 (citing PennDOT St. 1 at 15); PennDOT Motion to Schedule Matter for Hearing. In its Motion to Schedule Matter for Hearing, PennDOT averred that the work completed by RBMN pursuant to the Secretarial Letters was unsatisfactory and created a dangerous condition because RBMN raised the two tracks located within the Crossing beyond what previously existed, which resulted in a dangerous transition for the travelling public, including vehicles bottoming out when traversing the Crossing and concerns that plow trucks would not be able to clear the road without damaging the tracks or the trucks. *See* PennDOT Motion to Schedule Matter for Hearing at 2-3.

On May 24, 2022, an evidentiary hearing was held in this matter. Counsel from I&E, PennDOT, RBMN, and Luzerne County were present. RBMN presented the written direct testimonies of two witnesses, PennDOT presented the written direct testimony of one witness and offered ten exhibits, and I&E presented the written direct and rebuttal testimony of one witness and offered one exhibit, all of which were admitted into the record. In addition, the witnesses for the Parties provided additional testimony during the evidentiary hearing. The hearing resulted in a transcript of 129 pages, and the evidentiary record was closed on September 23, 2022. R.D. at 5.

On December 14, 2022, the Commission issued the Recommended Decision of ALJ DeVoe, in which she recommended that RBMN, at its sole cost and expense, furnish all materials and do all the work necessary to make the Crossing safe. R.D. at 1.

As noted, *supra*, RBMN filed Exceptions on January 3, 2023. PennDOT filed Reply Exceptions on January 12, 2023, and I&E filed Reply Exceptions on January 13, 2023.

II. Discussion

A. Legal Standards

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v.*

Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. Burden of Proof

Section 332(a) of the Public Utility Code (Code) provides that the proponent of a ruling or order from the Commission bears the burden of proof. 66 Pa. C.S. § 332(a). RBMN, as the original complainant, initially held the burden of proof to show that PennDOT was the party responsible for the deteriorated condition of the Crossing. However, due to the progression of the proceeding, PennDOT has the burden of proving that the work completed by RBMN caused the unsafe and dangerous condition currently existing at the Crossing. *See* 66 Pa. C.S. § 332(a). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, PennDOT's evidence must be more convincing, by even the smallest amount, than that presented by RBMN. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The Commission's decision must be supported by substantial evidence in the record. Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

2. Crossing Maintenance Work and Cost Allocation

It is well established that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, *i.e.*, to ensure and promote the protection, safety, convenience, and welfare of the travelling public. *Application of the Dep't of Transp. of the Commonwealth of Pa. for Approval to Abolish the Existing*

Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135) in Cromwell Twp., Huntingdon County, and the Allocation of Costs & Expenses Incident Thereto, Docket No. A-00114338, (Opinion and Order entered Mar. 14, 2002).*

Section 2702 of the Code vests the Commission with exclusive jurisdiction to determine the manner in which a rail-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished, as well as the manner and conditions under which a rail-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety. 66 Pa. C.S. § 2702. The Commission may order any public utility or municipal corporation concerned or the Commonwealth to perform work associated with any order issued regarding a crossing, 66 Pa. C.S. § 2702(c), and the Commission is empowered to order the reconstruction of a crossing upon such reasonable terms and conditions as it shall prescribe. *Pa. Game Comm'n v. Pa. PUC*, 651 A.2d 596 (Pa. Cmwlth. 1994). The Commission has the exclusive authority to determine and order which parties shall perform the work at the crossing and which parties shall maintain the crossing in the future to prevent accidents and promote the safety of the public. *SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (1992).

The costs of such work may be assessed and allocated among parties “in such proper proportion as the Commission may . . . determine.” 66 Pa. C.S. § 2704(a). The Commission determines which parties are concerned within the meaning of 66 Pa. C.S. §2704(a) and 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979).

In apportioning costs, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement is that its order must be just and reasonable. *East Rockhill Twp. v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth. 1988). To

that end, the Commission has considered many factors when allocating highway-rail maintenance responsibilities, such as:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit conferred on each party with the construction of the crossing.
4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.
5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

N. Lebanon Twp. v. Pa. PUC, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

The Commission is not restricted to the above-cited factors. *Millcreek Twp. v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000) (citing *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999)). The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. PUC*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. PUC*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981). Moreover, the Commission may “determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. PUC*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

B. Positions of the Parties

1. RBMN

RBMN argues that PennDOT should be responsible to pay for the necessary work that takes place two feet outside of the outer rails for the further alteration of the Crossing. RBMN states that the Secretarial Letters set forth the initial agreement between PennDOT and RBMN for allocation of the costs to repair the Crossing, and that after the work was performed in the summer of 2021 and PennDOT was dissatisfied with the results, no further agreement between PennDOT and RBMN was reached. RBMN contends that the Commission has the authority to allocate costs to PennDOT and should do so in this matter. RBMN M.B. at 12-13.

2. I&E

I&E posits that the Crossing provides a step-like transition over the railroad tracks which poses a hazard and unsafe condition to the traversing public. I&E contends that this hazardous condition was caused by RBMN when it unilaterally, and without Commission review or approval, raised the tracks and changed the superelevation, which affected the grade of the crossing. I&E argues that RBMN should be ordered to reconstruct the Crossing to its prior grade at its sole cost and expense, and that RBMN should provide construction plans to the Commission for approval prior to the start of construction. I&E M.B. at 6.

3. PennDOT

PennDOT avers that the Crossing creates an ongoing public safety hazard to the traversing public and requires immediate reconstruction. PennDOT submits that RBMN is solely responsible for the hazard it created by raising the tracks. PennDOT

further argues that RBMN failed to mention the raising of the tracks prior to construction, and it acted contrary to and outside the scope of the Secretarial Letters. Moreover, PennDOT states that had RBMN identified a need to raise the tracks prior to the replacement project, these issues could have been addressed prior to construction, thus eliminating the need for additional redundant work and expenses. PennDOT contends that it would be unjust and unreasonable to order it to pay for any costs associated to reconstruct the Crossing because PennDOT completed its portion of work consistent with the Secretarial Letters and was not the cause for the hazardous condition existing at the Crossing today. Accordingly, PennDOT posits that the Crossing be found to be unsafe and to order its immediate reconstruction at the sole cost and expense of RBMN. PennDOT M.B. at 6.

C. The ALJ's Recommended Decision

The ALJ made eighty-eight Findings of Fact and reached eight Conclusions of Law. R.D. at 6-19, 36-38. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

The ALJ first concluded that the work conducted by RBMN to change the elevation by raising the tracks and increase the superelevation of the tracks at the Crossing was not authorized by the Secretarial Letters.² The ALJ's finding here was based upon the fact that RBMN did not claim that its work at the Crossing was consistent with the Secretarial Letters, as well as the testimony of I&E's witness, Mr.

² Raising the tracks means setting the grade or changing the elevation of the entirety of the crossing. Superelevation relates to the relationship between one rail to the other rail on the tracks, noting that there are two sets of railroad tracks at the Crossing. Superelevation is like banking on a racetrack where one set of tracks is set higher than the other through a curve. R.D. at 21, citing Tr. at 105; I&E St. No. 1 at 2; I&E St. No. 1-R at 2.

William Sinick. Mr. Sinick, a professional engineer, testified that the Crossing was not constructed in accordance with the Secretarial Letters because RBMN raised the grade or elevation of the railroad tracks approximately six inches, or more, in places, as compared to the grade prior to the reconstruction and RBMN increased the superelevation of each set of tracks; however, the raise in grade and change in superelevation were not approved as part of the work to be performed under the Secretarial Letters. Rather, Mr. Sinick explained that the Secretarial Letters ordered reconstruction to be performed such that a smooth, safe, and satisfactory condition would be maintained throughout the crossing for the full width of the roadway and paved shoulders located between the rails and the area between each set of tracks and for a distance of twenty-four inches beyond the outermost rails. R.D. at 21-23, citing I&E St. No. 1 at 5 and No. 2 at 3.

Next, while the Parties argued whether raising the superelevation of the railroad tracks at the Crossing was necessary, the ALJ determined that whether RBMN was required or had the authority to superelevate the railroad tracks under Federal regulations is not an issue in this case. The ALJ concluded that if superelevation was required, then RBMN should have raised this issue with the Commission and PennDOT during the planning phase of this project and/or filed a separate application with the Commission; however, the ALJ found no evidence that at any point leading up to the Crossing replacement was elevation or safety discussed or mentioned. The ALJ further noted that RBMN's witness, Mr. Chris Goetz, had no explanation as to why RBMN did not raise the issue of superelevation during the planning phase of this project. R.D. at 23-24.

In addition, the ALJ found that RBMN's decision to raise the elevation and increase the superelevation of the railroad tracks in excess of one-and-a-half inches at the Crossing are both material alterations that required Commission review and approval, which did not occur here. The ALJ agreed with I&E that raising the

superelevation of the tracks from two-and-a-half inches to over five inches, affecting the approach roadway at the Crossing, is an alteration that would require the filing of an application with the Commission prior to changing the superelevation. Also, the ALJ found that RBMN changed the grade of the tracks by raising the elevation of the railroad tracks approximately six inches as compared to the existing grade prior to the reconstruction. The ALJ concluded that the record is clear that the raising of the tracks and change in superelevation drastically affected the roadway grade and approaches and the transition through the Crossing between the railroad tracks, and RBMN's actions changing the condition and layout of the Crossing are alterations subject to the Commission's jurisdiction and approval process pursuant to 66 Pa. C.S. § 2702. R.D. at 24-26.

Furthermore, the ALJ found that the Crossing poses an ongoing safety hazard to the travelling public. The ALJ noted multiple complaints received by PennDOT relating to the elevation and grade change through the Crossing resulting in vehicle damage, injuries, and near-miss accidents. The ALJ found the witness testimony credible that the Crossing does not have a safe and smooth transition throughout because the change of grade and elevation of the tracks created a step-like transition through the Crossing, that vehicles bounce dangerously and erratically when driving through the Crossing, and that this safety problem did not exist prior to the replacement project as the elevation leading up to and throughout the Crossing previously presented a smooth and safe transition. The ALJ also noted that RBMN never disputed that the Crossing is unsafe. R.D. at 27-28.

Moreover, the ALJ concluded that the current signage alerting the travelling public to a "Bump," which was erected at the Crossing by PennDOT after RBMN refused, is insufficient to alleviate the safety hazard. The ALJ stated that I&E's witness made it clear that the Crossing needs to be completely reconstructed in order to make the Crossing satisfactory, smooth, and safe at the posted speed limit. RBMN did

not argue against the positions that the current signage is insufficient to alleviate the unsafe condition at the Crossing or that the Crossing needs to be completely reconstructed. R.D. at 28-29.

Next, the ALJ found that RBMN is the party responsible for, and the party which caused, the hazardous condition currently existing at the Crossing because RBMN failed to follow the directives of the Secretarial Letters and raised the grade and superelevation of the railroad tracks without Commission approval or notice to PennDOT. The ALJ further concluded that the unsafe condition at the Crossing could have been avoided had RBMN expressed its intent to raise the railroad tracks with PennDOT or the Commission at any point during the planning phase of this project. The ALJ noted the general consensus among the Parties that the raising of the railroad tracks and altering the superelevation was not discussed prior to the replacement project and was not approved as part of the work to be performed pursuant to the Secretarial Letters. The ALJ also stated that it is undisputed that RBMN did not file an application with the Commission or otherwise seek approval prior to changing the grade or superelevation.

With respect to RBMN's argument that PennDOT shares in some of the blame because it should have asked RBMN if it was planning on raising the tracks, the ALJ found it unreasonable for RBMN to expect PennDOT to have asked whether RBMN had plans to raise the tracks. PennDOT had no reason to think RBMN would do so and it is not PennDOT's responsibility to anticipate or foresee what RBMN might do. The ALJ concluded that there is no evidence to suggest PennDOT was aware that a safety hazard existed until the project was completed and the roadway was re-opened to the public. Moreover, the ALJ noted that even if PennDOT had been aware that a safety hazard would have resulted after it completed its portion of the work, there was nothing PennDOT could have done to fix the problem at that time because the base course, which was prepped and completed by RBMN, sets the elevation of the crossing

and roadway approaches. Accordingly, the ALJ concluded that PennDOT followed its obligations under the Secretarial Letters and placed the two inches of wearing course over the base course, as directed. R.D. at 29-32.

Finally, upon consideration of the factors the Commission considers in assigning costs and maintenance responsibilities, along with the Parties' arguments, the ALJ concluded that it is hard to speculate as to what would have happened had RBMN made PennDOT aware of its plans to raise the tracks or increase the superelevation of the tracks during the planning phase of this project. It is also hard to speculate as to what PennDOT would have agreed to, or what the total costs or cost allocation might have been for the Parties. The ALJ summarized that RBMN did not disclose its intent to raise the tracks or increase the superelevation of the tracks with either PennDOT or the Commission prior to doing so. And, the change in superelevation and the raising of the tracks constitutes an alteration for which RBMN should have first sought Commission approval. Therefore, the ALJ concluded that RBMN created the unsafe condition at the Crossing and should bear the sole cost of reconstructing the Crossing to make it safe for the travelling public. R.D. at 33-36.

D. Exceptions, Reply Exceptions,³ and Dispositions

1. RBMN Exception Nos. 1 and 2, I&E and PennDOT Reply Exceptions, and Disposition

In its Exception No. 1, RBMN excepts to the finding at Page 24 of the Recommended Decision that RBMN should have raised the issue of superelevation of the

³ Initially, I&E argues that RBMN's Exceptions should be denied because RBMN fails to follow 52 Pa. Code § 5.533 because it generally excepts to pages of the ALJ's analysis in the Recommended Decision and does not specifically identify a Finding of Fact or Conclusion of Law. I&E avers that, under 52 Pa. Code § 5.533, exceptions must be numbered, must identify the Finding of Fact or Conclusion of Law to

tracks with the Commission or filed a separate application regarding superelevation of the tracks with the Commission. RBMN argues that the ALJ cites to no Commission Regulation in support of this finding, and that the record in this case includes no evidence of any Commission Regulation, or any other regulation, rule, or authority, in support of this finding. Also, RBMN avers that the record in this case, which is absent of the existence of any evidence of any Commission Regulation, or any other regulation, rule or authority, demonstrates that this finding is improperly based solely on the personal opinion of I&E's witness, Mr. Sinick. RBMN Exc. at 1-2.

In its Exception No. 2, RBMN excepts to the finding at Page 25 of the Recommended Decision that Mr. Sinick's testimony was clear regarding a railroad's authority to superelevate tracks without filing an application with the Commission and when a railroad has to file an application with the Commission to superelevate tracks. RBMN offers the same arguments in support of this Exception as it did in its Exception No. 1. That is, RBMN argues that the ALJ cites no Commission Regulation in support of this finding, and that the record in this case includes no evidence of any Commission Regulation, or any other regulation, rule, or authority, in support of this finding. In addition, RBMN avers that the record in this case which is absent the existence of any evidence of any Commission Regulation, or any other regulation, rule or authority, demonstrates this finding is improperly based solely on the personal opinion of Mr. Sinick. RBMN Exc. at 2.

In reply to RBMN's Exception No. 1, I&E contends that the ALJ correctly concluded that RBMN should have raised the issue of superelevation of the railroad tracks with the Commission and PennDOT during the planning phase or should have filed a separate application with the Commission as it is supported by the record evidence

which the exception is taken, must have supporting reasons for each specific exception, and must be concise. I&E R. Exc. at 3.

and the Code. I&E argues that the ALJ explained that the change of superelevation at the Crossing would affect the roadway approach, and, therefore, is an alteration subject to the Commission's jurisdiction, in accordance with the Code and Commission precedent because the raising of the tracks and change in superelevation drastically affected the roadway grade, roadway approaches, and vehicle transition through the Crossing. Furthermore, I&E argues that the ALJ found that I&E's witness, 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. I&E submits that 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 the credibility determinations in the Recommended Decision. In addition, I&E notes that RBMN did not provide any support for its argument that a Finding of Fact cannot be based upon an expert witness's testimony. I&E contends that the ALJ's analysis and conclusion should not be disturbed. I&E R. Exc. at 3-4.

In reply to RBMN's Exception No. 2, I&E contends that the ALJ correctly found that the testimony of I&E's witness, Mr. Sinick, regarding alterations and track superelevation was clear. I&E argues that the ALJ is not required to cite to the Code for her credibility determination because 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 to support the determination that the track superelevation was an alteration. I&E states that the ALJ's finding should not be disturbed. I&E R. Exc. at 4-5.

PennDOT replies to RBMN's Exception Nos. 1 and 2 by arguing that the record is clear, and RBMN does not dispute, that RBMN raised the superelevation from two-and-a-half inches to over five inches, and such alteration greatly affects the highway approaches and public safety. PennDOT agrees with the ALJ that RBMN's raising of the

tracks is an alteration and 66 Pa. Code § 2702(a) requires RBMN to file an application and obtain approval from the Commission for the increase in track elevation. For these reasons, PennDOT requests that RBMN's Exception Nos. 1 and 2 be rejected. PennDOT R. Exc. at 1-2.

a. Disposition

Upon review, we conclude that the Code and the record evidence support the ALJ's finding that RBMN should have raised the issue of superelevation of the tracks or filed a separate application regarding superelevation of the tracks with the Commission because the change in superelevation at the Crossing would affect the roadway and is an alteration subject to the Commission's jurisdiction. *See generally*, 66 Pa. C.S. § 2702; *Manchester Twnshp. v. Pa. PUC*, 401 A.2d 1237 (Pa. Cmwlth. 1979) ("We believe that the PUC's order requiring the installation of signs and flashing signals can be characterized as an alteration to or protection of a crossing subject to the PUC's control."); *Application of Consol. Rail Corp. For abolition of one (1) at grade crossing on Conrail's Chester Secondary rail line located on 49 Street in Philadelphia, Pennsylvania*, Docket No. A-00115212 (Order entered 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 (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 Co. 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."). Without raising the

issue or seeking the Commission's approval, RBMN raised the overall grade of the railroad tracks after reconstruction to six inches with respect to the existing roadway and changed the superelevation from one rail to another from two-and-one-half inches to approximately five-and-one-half inches, causing a safety concern that did not exist at the Crossing prior to the replacement project. Tr. at 105-107; PennDOT St. No. 1 at 12. The record demonstrates that RBMN's decision to change the superelevation without Commission review or approval was not in accordance with the directives in the Secretarial Letters which required a safe, smooth, and satisfactory condition of the surface at the Crossing. *See* I&E St. No.1 at 5; April 30, 2021 Secretarial Letter at 5; 66 Pa. C.S. § 316. Moreover, the ALJ noted that at no time throughout the proceedings did RBMN claim that its work at the Crossing was consistent with the Secretarial Letters. R.D. at 23. Accordingly, we agree with the ALJ that the change in elevation and increase in superelevation of the railroad tracks was not authorized by the Secretarial Letters, and RBMN should have raised the issue of superelevation of the tracks or filed an application regarding superelevation of the tracks with the Commission.

In addition, the ALJ found that I&E expert witness Mr. Sinick's testimony was credible and clear. Based upon RBMN's Exceptions, we find no reason to conclude otherwise. Mr. Sinick's expert testimony was that a railroad has the authority to superelevate its tracks without filing an application with the Commission unless the superelevation affects a highway crossing and constitutes an alteration of the crossing. Mr. Sinick further testified that the raising of the railroad tracks, as was done by RBMN at the Crossing, is not a minor change, but rather is an alteration subject to the Commission's jurisdiction and application process for which RBMN should have first sought Commission approval. *See* R.D. at 25. We agree with the ALJ that the raising of the railroad tracks and change in superelevation significantly affected the roadway grade, approaches, and transition through the Crossing between the tracks. Furthermore, the changes made by RBMN are akin to other changes at public crossings, as discussed above, that were determined to be alterations subject to the filing of an application for the

Commission's review and approval. Inasmuch as RBMN's actions changed the condition and layout of the Crossing, those alterations were subject to the Commission's review and approval process.

For the reasons set forth above, we shall deny RBMN's Exceptions No. 1 and No. 2.

2. RBMN Exception No. 3, I&E and PennDOT Reply Exceptions, and Disposition

RBMN, in its Exception No. 3, excepts to the finding at Page 30 of the Recommended Decision regarding the testimony of I&E's witness, Mr. Sinick, and PennDOT's witness, Ms. Sarah Fenton, and the Secretarial Letters. In support of this Exception, RBMN argues that the Secretarial Letters are written documents which speak for themselves, and counsel for RBMN objected to the preserved Direct Testimony of Mr. Sinick beginning on Page 3, Line 13 through Page 4, Line 6 and the Direct Testimony of Ms. Fenton on Page 8, Line 18 to Page 9, Line 10. While RBMN avers that Ms. Fenton's testimony described above was stricken by the ALJ, it contends that the ALJ erred in allowing the testimony of Mr. Sinick regarding his understanding of the responsibilities of the Parties in the Secretarial Letters; therefore, RBMN argues that the findings at Page 30 of the Recommended Decision regarding Mr. Sinick's testimony and the Secretarial Letters is based on testimony which should not have been allowed into the record. RBMN further avers that the ALJ erred in making findings on Page 30 of the Recommended Decision regarding the testimony of Ms. Fenton and the Secretarial Letters because that testimony was stricken. RBMN Exc. at 3.

In reply to RBMN's Exception No. 3, I&E argues that the ALJ correctly found that the alterations completed by RBMN were not work approved to be performed pursuant to the Secretarial Letters, and that the testimony of its witness, Mr. Sinick, is

credible and consistent with the ALJ's conclusion. I&E also avers that RBMN did not provide any testimony to contradict the ALJ's interpretation. Moreover, I&E argues that, contrary to RBMN's arguments, the portion of testimony of PennDOT witness, Ms. Fenton, cited in the Recommended Decision was not stricken. Therefore, I&E contends that the finding on Page 30 of the Recommended Decision is supported by the record and should not be deleted. I&E R. Exc. at 5-6.

PennDOT, in reply to RBMN's Exception No. 3, argues that the testimony of Ms. Fenton referenced on Page 30 of the Recommended Decision was neither objected to by RBMN nor agreed to be stricken from the record by PennDOT. Therefore, PennDOT submits that the ALJ did not err in making findings on Page 30 of the Recommended Decision regarding the testimony of Ms. Fenton. In addition, PennDOT contends that the ALJ did not err in allowing Mr. Sinick's testimony beginning on Page 3, Line 13 through Page 4, Line 6, because, as the Senior Civil Engineer Manager in the Rail Safety Division of the Commission, Mr. Sinick is in the best position to summarize PennDOT's and RBMN's responsibilities pursuant to the Secretarial Letters, and Mr. Sinick's understanding, interpretation, and review of the Secretarial Letters is essential to this proceeding. PennDOT also notes that the ALJ specifically accepted Mr. Sinick's testimony with the caveat that it is Mr. Sinick's understanding of the Parties in the Secretarial Letters, and that the ALJ is not bound by that interpretation and will not find it any more or less plausible. PennDOT requests that RBMN's Exception No. 3 be rejected.

a. Disposition

Upon review, we agree with the ALJ's conclusion that alterations completed by RBMN were not approved to be performed pursuant to the Secretarial Letters, which is consistent with the testimony of I&E's witness, Mr. Sinick, and PennDOT's witness, Ms. Fenton. With respect to the specific testimony of Mr. Sinick

challenged by RBMN, we conclude that the ALJ accepted this testimony with the caveat that the ALJ is not bound by the witness' interpretation therein and will not find it any more or less plausible. *See* Tr. at 94-95. In addition, we find that the testimony of PennDOT witness, Ms. Fenton, cited in the Recommended Decision and challenged by RBMN was not stricken. *See* Tr. at 62-65. Ms. Fenton testified that the Secretarial Letters did not mention anything about RBMN raising the tracks during the replacement project, and this testimony was not objected to by RBMN nor was it stricken. *See* PennDOT St. No. 1 at 9 (Lines 11-13); Tr. at 62-65. Therefore, we find that the ALJ's conclusion on Page 30 of the Recommended Decision is supported by the record and should not be deleted. Accordingly, RBMN's Exception No. 3 will be denied.

3. RBMN Exception Nos. 4 and 5, I&E and PennDOT Reply Exceptions, and Disposition

In its Exception No. 4, RBMN excepts to the findings on Pages 31 and 32 of the Recommended Decision that PennDOT has no responsibility for the condition of the Crossing. RBMN argues that Ms. Fenton assigned her assistant, Mr. Richard Cooper, to inspect the work being performed at the Crossing, that Ms. Fenton's testimony regarding the amount of time Mr. Cooper was inspecting the work at the Crossing was vague, and the ALJ erred in concluding that there was nothing that PennDOT could have done to fix or remediate the problem, especially since I&E and PennDOT provided testimony showing obvious problems with the grading at the Crossing. In addition, RBMN avers that if the problems with the grading of the Crossing were as obvious as suggested by I&E and PennDOT, then PennDOT's failure to bring this problem to the immediate attention of anyone foreclosed any chance of any problems being rectified or addressed while work crews were mobilized and on-site. Finally, RBMN contends that the ALJ erred in concluding that RBMN is solely the party responsible since PennDOT failed to raise any objections to the manner in which the work was being performed at the time the work was being performed. RBMN Exc. at 3-4.

RBMN, in its Exception No. 5, excepts to the findings on Page 34 of the Recommended Decision that RBMN should bear the sole cost of reconstructing the Crossing. In support of this Exception, RBMN avers that numerous factors are relevant for determining the allocation of costs between a railroad and PennDOT, that the Secretarial Letters establish that RBMN and PennDOT agreed to repair the Crossing, and that the record unequivocally establishes that RBMN had to increase the elevation in the curves of the two tracks according to Federal Railroad Administration requirements. Assuming arguendo that RBMN should have filed an application with the Commission, RBMN submits that consideration of the relevant factors as required by applicable law for allocation of costs would still have resulted in an allocation of costs between RBMN and PennDOT; therefore, RBMN contends that placing sole responsibility for costs of the reconstruction of the Crossing on RBMN is in error. Moreover, RBMN argues that placing sole responsibility on RBMN for reconstructing the Crossing ignores all of the relevant factors which should be considered in allocating the costs of reconstruction, and that consideration of all the relevant factors and the evidence of record shows that costs for the reconstruction of the Crossing should be placed on PennDOT. RBMN Exc. at 4-5.

In reply to RBMN's Exception No. 4, I&E argues that the ALJ correctly found that RBMN is the sole party responsible for the hazardous condition existing at the Crossing. I&E agrees with the ALJ's dismissal of RBMN's arguments that PennDOT's representative should have asked RBMN if it intended to raise the tracks and/or elevation during RBMN's completion of its portion of the work because it is unreasonable to expect PennDOT to ask RBMN whether it intended to raise the tracks since it had no reason to expect or think RBMN would do so. Further, I&E submits that the ALJ noted PennDOT's representative was present during some of RBMN's work, that there is no evidence on the record to suggest that he was aware or should have been aware of the change in superelevation or grade while observing some of the work, and that the uncontroverted testimony of Ms. Fenton stated that the hazardous condition of the

Crossing was not realized until the Crossing was opened to the public and vehicular traffic. Finally, I&E avers that 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.

In reply to RBMN's Exception No. 5, I&E contends that the ALJ correctly found that RBMN should bear the full cost of reconstructing the Crossing. I&E agrees with the ALJ that as the party responsible for the unapproved and unsafe condition existing at the Crossing, it is just and reasonable for RBMN to be assigned the sole cost and expense of reconstructing the Crossing. I&E argues that RBMN's speculation as a basis to challenge the Recommended Decision should fail. I&E submits that RBMN has no evidence to support its position, and the finding on Page 34 of the Recommended Decision should not be disturbed. I&E R. Exc. at 7-8.

PennDOT replies to RBMN's Exception No. 4, arguing that the record is clear that PennDOT was not aware that a safety hazard existed until the project was completed and the roadway was re-opened to the traveling public because it started receiving complaints and learned that there was an elevation change after the road re-opened. PennDOT avers that it could have no way of knowing that vehicles were bouncing dangerously and erratically and scraping on the ground until the construction was completed and the road was re-opened to vehicular traffic again; therefore, PennDOT could not raise an objection to the manner in which the work was being performed until it was made aware that there was a problem.

Alternatively, PennDOT states that even if it was aware of the safety hazard prior to completing its portion of construction, there was nothing it could do to fix the problem at that time because the base course, which was prepped and completed by RBMN, sets the elevation of the Crossing and roadway approaches, and once the base course is set, there is nothing that PennDOT could do to fix the problem. PennDOT

submits that in order to maintain a smooth and safe transition throughout the Crossing and ensure that the rail was protected from traffic impact, the wearing course needed to be placed at the proper grade with the rail because increasing the depth of the wearing course would cause the tracks to be covered with the wearing course, and placing less than two inches of wearing course would leave the tracks exposed. PennDOT requests that RBMN's Exception No. 4 be rejected. PennDOT R. Exc. at 3-4.

In reply to RBMN's Exception No. 5, PennDOT contends it is proper to place the sole responsibility for the costs of the reconstruction of the Crossing on RBMN because the raising of the tracks solely benefits RBMN and has a negative impact on PennDOT and the travelling public, RBMN is responsible for the safety hazard that currently exists at the Crossing, and the safety hazard RBMN created could have been completely avoided had RBMN disclosed to PennDOT or the Commission its intention to raise the tracks prior to the replacement project. PennDOT argues that RBMN unilaterally decided to raise the elevation of the grade through the Crossing, resulting in the safety issue that currently exists. PennDOT avers that had RBMN identified the need to raise the tracks prior to the replacement in 2021, the issues could have been addressed during the replacement project, thus eliminating additional redundant work and expenses. PennDOT further argues that although RBMN asserts that placing sole responsibility on it for reconstructing the Crossing ignores all of the relevant factors which should be considered in allocating the costs of reconstruction, RBMN fails to identify any factors that were ignored. Finally, PennDOT submits that RBMN's assertion that the record establishes that RBMN had to increase the elevation in curves of two tracks according to Federal Railroad Administration requirements is erroneous. PennDOT avers that RBMN failed to present any testimony or evidence as to the existing speed and existing degree of curvature of the tracks to support its contention that raising the elevation was necessary. Therefore, PennDOT requests that RBMN's Exception No. 5 be rejected. PennDOT R. Exc. at 4-6.

a. Disposition

Upon review of the record and the arguments, we agree with the ALJ's finding that RBMN is the sole party responsible for the hazardous condition existing at the Crossing. We conclude that it is unreasonable to expect PennDOT or any other party to have asked RBMN whether it had plans to raise the railroad tracks because there was no reason to anticipate or foresee that RBMN would do so. Further, there is no evidence in the record to suggest that PennDOT was aware of the safety issues until after the project was completed. Tr. at 84, 90. Rather, RBMN failed to follow the directives of the Secretarial Letters and raised the grade and superelevation of the railroad tracks without Commission approval or notice to PennDOT creating the unsafe situation at the Crossing.

If RBMN had complied with the directives in the Secretarial Letters or expressed its intent to raise the tracks with PennDOT or the Commission during the planning phase of the project, an unsafe situation could have been avoided and there would be no additional work or costs needed. However, RBMN failed to do so and instead unilaterally decided to raise the elevation of the grade through the Crossing. As a result, RBMN is responsible for the unsafe condition currently existing at the Crossing. Inasmuch as RBMN is the party responsible for the unapproved and unsafe condition existing at the Crossing, we agree with the ALJ that RBMN should, therefore, bear the full cost of reconstructing the Crossing. Therefore, RBMN's Exceptions Nos. 4 and 5 shall be denied.

4. RBMN Exception No. 6 and Disposition

In its Exception No. 6, RBMN excepts to the Recommended Decision's Ordering Paragraph Nos. 2, 3, 4, 5, and 10 "for the reasons hereinbefore set forth." RBMN Exc. at 6.

I&E and PennDOT did not reply to RBMN's Exception No. 6.

Ordering Paragraph Nos. 2, 3, 4, 5 and 10 read, in relevant part, as follows:

THEREFORE,

IT IS RECOMMENDED:

2. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, prior to the start of construction, prepare and submit a crossing surface construction plan that includes an existing and proposed roadway profile grade with elevations that includes the grade on the roadway approaches to the crossing surface and grade through the crossing surfaces, a plan, elevation, and cross-section view of the crossing surfaces which show roadway material specifications, dimensions, elevations of rails/roadway and planned super-elevation and grade of the railroad tracks through the public crossing at Oak Street (DOT 361 425 J). The construction plans shall be submitted to all parties for review and to the Commission for approval.
3. That Reading Blue Mountain & Northern Railroad Company, at its sole cost and expense, shall furnish all material and do all work necessary to reconstruct the existing asphalt/rail seal crossing surface by adjusting the geometry of the tracks to provide and reestablish a constant, safe, smooth roadway profile grade across the two sets of railroad tracks and area in between both sets of tracks for the full width of the roadway and shoulders, and to establish a safe, smooth, and satisfactory transition from the roadway approaches to the asphalt/rail seal crossing surfaces as per and in accordance with the approved plans and this Order.
4. That the Pennsylvania Department of Transportation, at Reading Blue Mountain & Northern Railroad Company's sole cost and expense, shall furnish all

material and do all work necessary to establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway and pedestrian traffic during the reconstruction of the highway/railway public crossing at Oak Street (DOT 361 425 J).

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

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

a. Disposition

Upon review, we find that the Ordering Paragraphs above, to which RBMN takes exception, contain the various directives and requirements ordered by the ALJ for RBMN to complete, at its sole cost and expense, the necessary work to reconstruct the Crossing in order to address and alleviate the existing unsafe condition. In addition, we note that RBMN's Exception No. 6 does not include any reasons in support thereof other than "for the reasons hereinbefore set forth." *See* RBMN Exc. at 6. Since this Exception appears to make similar challenges as RBMN argued for in Exception No. 5 above (*i.e.*, that it should not bear the sole cost of reconstructing the Crossing) without offering any additional or new arguments, we will refrain from considering and addressing those same arguments again here. Accordingly, we will deny RBMN's Exception No. 6.

III. Conclusion

Based on our review of the Exceptions, the ALJ's Recommended Decision, and the record in this proceeding, we shall deny the Exceptions of Reading Blue Mountain & Northern Railroad Company and adopt the ALJ's Recommended Decision, consistent with this Opinion and Order; **THEREFORE,**

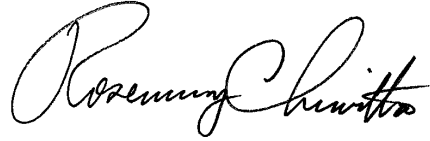
IT IS ORDERED:

1. That the Exceptions of Reading Blue Mountain & Northern Railroad Company, filed on January 3, 2023, to the Recommended Decision of Administrative Law Judge Emily I. DeVoe, issued on December 14, 2022, at this docket, are denied, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Emily I. DeVoe, issued on December 14, 2022, is adopted.

3. That this proceeding be referred to the Bureau of Technical Utility Services
– Rail Safety for monitoring of completion of the project.

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