

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

Public Meeting held May 23, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn Zerfuss
John F. Coleman, Jr.

David A. Romanoski

C-2023-3043702

v.

Pennsylvania Public Utility Commission
Pennsylvania Department of Transportation
Norfolk Southern Railway Company
Dauphin County
Derry Township

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of David A. Romanoski (Complainant or

Mr. Romanoski), filed on March 1, 2024, in the above-captioned proceeding.¹ The Exceptions were filed in response to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Alphonso Arnold III, served on the Parties on February 28, 2024.² On March 11, 2024, PennDOT filed Replies to Exceptions. On March 13, 2024, Norfolk filed Replies to Exceptions. On March 29, 2023, Dauphin and Derry each filed a Motion to Join In Reply Exceptions to the Exceptions of the Complainant.³ For the reasons discussed below, we shall deny the Complainant's Exceptions, adopt the ALJ's Initial Decision, and dismiss the Complaint, consistent with this Opinion and Order.

¹ By letter dated March 1, 2024 (*March 2024 Secretarial Letter*), the Commission's Secretary: (1) issued a notice to the Parties indicating that there was no Certificate of Service or other indication that the Exceptions were served on the Parties; and (2) enclosed the Exceptions, in order to constitute service under 52 Pa. Code § 5.533. Therefore, pursuant to 52 Pa. Code § 5.535, the Pennsylvania Department of Transportation (PennDOT); Derry Township (Derry); Dauphin County (Dauphin); and Norfolk Southern Railway Company (Norfolk) (collectively, Respondents) were given until March 11, 2024, to file Reply Exceptions. *See, March 2024 Secretarial Letter.*

² The Complaint was initially docketed at Docket No. T-2023-3040729. As discussed, *infra*, by Secretarial Letter issued October 30, 2023 (*October 2023 Secretarial Letter*), the Commission notified the Parties that all the pleadings, answers, motions, and preliminary objections filed at Docket No. T-2023-3040729 were transferred to Docket No. C-2023-3043702. *See, I.D. at 2.*

³ Under 52 Pa. Code § 1.2, the Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Here, given that the Parties were provided notice of the opportunity to respond to the Initial Decision and reply to any exceptions filed, the substantive rights of the other Parties will not be affected by the treatment of Dauphin's filing and Derry's filing on March 29, 2023, as Replies to Exceptions. Therefore, pursuant to 52 Pa. Code § 1.2, and in order to secure the just, speedy, and inexpensive determination in this proceeding, we shall consider Dauphin's filing on March 29, 2023, as Replies of Exceptions, and Derry's filing on March 29, 2023, as Replies to Exceptions.

I. History of the Proceeding

On September 28, 2023, the Complainant filed the instant Complaint.⁴ In his Complaint, Mr. Romanoski argued that a retaining wall in Derry Township, Pennsylvania has deteriorated and poses a danger to the public. The Complainant identified the Commission, PennDOT, Derry, Dauphin, and Norfolk as respondents. I.D. at 1-2; Complaint at 3. As support, the Complainant included thirty (30) pages of documentation as attachments to his Complaint, labeled as Exhibits 1 through 23. I.D. at 2; Complaint at 11-40.

Attached to the Complaint as Exhibit 11 is an Order entered by the Public Service Commission (PSC) on May 20, 1919, wherein the PSC ordered the elimination of five grade crossings in Derry Township, Dauphin County (Derry Township) (1919 Order).⁵ I.D. at 2; Complaint at 24-28. The 1919 Order, *inter alia*: (1) ordered the elimination of an at-grade crossing where the tracks of the Philadelphia & Reading Railway Company (PRRC) crossed the Hockersville Road at the Swatara Station in Derry Township (Swatara Crossing);⁶ (2) directed that the Swatara Crossing be replaced with a pedestrian subway to be built at the Hockersville Road, along with a public highway underneath the subway; and (3) directed that the PRRC construct a retaining wall adjacent to the highway. I.D. at 2. This retaining wall is the subject of the Complaint. Further, the 1919 Order assigned maintenance responsibilities to the PRRC over the subway and to the State Highway Department with respect to the highway underneath the subway but was silent regarding which party would be responsible for future maintenance of the wall. *Id.* As relief, the Complainant requested to have the retaining wall

⁴ On October 23, 2023, the Complainant refiled the first twelve (12) pages of the Complaint.

⁵ The PSC is the predecessor of the Commission. The Act of March 31, 1937, P.L. 160, abolished the PSC and created the Commission. I.D. at 2.

⁶ The PRRC is the predecessor of Norfolk. I.D. at 2.

“inspected and maintained as needed to prevent the railroad-highway crossings from becoming unsafe for the public pursuant to Sections 2702 and 2704 of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. §§ 2702, 2704.” Complaint at 10; I.D. at 2-3.

On October 13, 2023, PennDOT filed an Answer to the Complaint and Motion to Dismiss (PennDOT Answer and Motion), which admitted and denied averments in the Complaint.⁷ I.D. at 3; PennDOT Answer and Motion at 1-4. In its Answer and Motion, PennDOT raised three arguments in support of its Motion to Dismiss: (1) that the Board of Property has exclusive jurisdiction over this matter because the matter involves a disagreement between the Complainant and PennDOT over whether the retaining wall is within PennDOT’s right of way;⁸ (2) that, pursuant to State Highway Law, PennDOT is not responsible for the maintenance of structures that are a part of the rural State highway system, such as the retaining wall in question;⁹ and (3) that the 1919 Order abolished the crossing cited in the Complaint and, therefore, the Commission lacks jurisdiction over the Complaint.¹⁰ As such, PennDOT requested that the Complaint be dismissed. I.D. at 3; PennDOT Answer and Motion at 4-6.

On October 16, 2023, Norfolk filed an Answer with New Matter (Norfolk Answer with New Matter), which admitted and denied certain averments in the

⁷ On November 6, 2023, PennDOT refiled its Answer and Motion. I.D. at 6.

⁸ *See*, 71 P.S. §337. I.D. at 3.

⁹ *See*, 36 P.S. § 670-501. I.D. at 3.

¹⁰ In its Answer and Motion, Paragraph 47 represented the following: “The May 20, 1990 Commission order, attached to the Complaint as Exhibit 11, abolished the crossing that is cited as the basis of the Complaint.” PennDOT Answer and Motion at 6, ¶ 47. As previously noted, attached to the Complaint as Exhibit 11 is an Order entered by the PSC on May 20, 1919. I.D. at 2; Complaint at 24-28. Given the context of Paragraph 47 in PennDOT’s Answer and Motion, we believe that PennDOT was referring to the PSC’s 1919 Order. Therefore, we believe PennDOT’s reference to “[t]he May 20, 1990 Commission order” to be an inadvertent misstatement.

Complaint.¹¹ In its Answer and New Matter, Norfolk argued that the Commission has no jurisdiction over the retaining wall because the 1919 Order abolished the five grade crossings in question. Further, Norfolk argued that the Complaint included no allegations related to Norfolk and, as such, requested dismissal of the Complaint. Alternatively, Norfolk requested that it be dismissed as a respondent. I.D. at 4; Norfolk Answer with New Matter at 1-6.

Also, on October 16, 2023, Norfolk filed Preliminary Objections to the Complaint (Norfolk P.Os.), wherein Norfolk argued that the Commission lacks jurisdiction over the retaining wall in question because the five grade crossings in question were abolished with the 1919 Order.¹² As such, Norfolk argued that the Complaint should be dismissed for lack of Commission jurisdiction, pursuant to 52 Pa. Code § 5.101(a)(1). Alternatively, Norfolk argued that because the Complainant failed to state a claim against Norfolk upon which relief may be granted, it should be dismissed as a respondent to these proceedings.¹³ I.D. at 4; Norfolk P.O. at 2-3.

On October 18, 2023, Dauphin filed an Answer to the Complaint and Motion to Dismiss (Dauphin Answer and Motion), which admitted and denied averments in the Complaint. I.D. at 5; Dauphin Answer and Motion at 1-2. In its Answer and Motion, Dauphin argued that the 1919 Order abolished the crossing near the retaining wall and, therefore, the Commission lacked jurisdiction over the Complaint. As such, Dauphin requested dismissal of the Complaint. I.D. at 5; Dauphin Answer and Motion at 2-3.

¹¹ On November 6, 2023, Norfolk refiled its Answer with New Matter. I.D. at 6.

¹² On November 6, 2023, Norfolk refiled its Preliminary Objections. I.D. at 6.

¹³ In the Initial Decision, the ALJ noted that this is an argument that the Complaint is legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4). I.D. at 4.

On October 23, 2023, the Complainant filed an Answer to PennDOT's Answer and Motion (Answer to PennDOT Motion), arguing that the 1919 Order abolished the Swatara Crossing and the crossing was converted into a subway crossing for which the retaining wall was built. Further, Mr. Romanoski argued that the retaining wall is a part of a railroad-highway crossing and the Commission has the power to regulate such crossings. As such, the Complainant requested that PennDOT's Answer and Motion be dismissed. I.D. at 3; Answer to PennDOT Motion at 2-3.

Also, on October 23, 2023, the Complainant filed an Answer to Norfolk's Answer with New Matter (Answer to Norfolk New Matter). In his Answer to Norfolk's New Matter, Mr. Romanoski cited to *Norfolk Southern Railway Company v. Pa. PUC*, 971 A.2d 545 (Pa. Cmwlth. 2009) (*Norfolk 2009*) to argue that the Swatara Crossing was converted to a subway crossing and, as such, a railroad-highway crossing exists over which the Commission has jurisdiction. The Complainant added that Norfolk's involvement in *Norfolk 2009* is identical to Norfolk's involvement in the present case. I.D. at 4; Answer to Norfolk New Matter at 2.

Also, on October 23, 2023, the Complainant filed an Answer to Norfolk's Preliminary Objections (Answer to Norfolk P.O.), arguing that the retaining wall was built in connection with the abolishment of the Swatara Crossing and a subway crossing was constructed in its place. Mr. Romanoski continued that in the 1919 Order, the PSC directed Norfolk's predecessor to construct the wall and, therefore, it was Norfolk's responsibility to maintain the wall. As such, the Complainant requested that Norfolk's P.O. be dismissed. I.D. at 4-5; Answer to Norfolk P.O. at 2-3.

On October 24, 2023, the Complainant filed an Answer to Dauphin's Answer and Motion (Answer to Dauphin Motion), arguing that the Swatara Crossing was converted to a subway crossing and the retaining wall was built to support this conversion. The Complainant continued that a railroad-highway crossing exists adjacent

to the retaining wall and, therefore, the Commission has jurisdiction over the Complaint. I.D. at 5; Answer to Dauphin Motion at 2.

Also, on October 24, 2023, Derry filed a Motion to Join In Dauphin’s Answer and Motion to Dismiss (Derry Answer and Motion), wherein it incorporated and joined in Dauphin’s Answer and Motion.¹⁴ I.D. at 5; Derry Answer and Motion at 1.

On October 27, 2023, the Complainant filed an Answer to Derry’s Answer and Motion (Answer to Derry Motion), which, aside from the attached Cover Letter and the date at the bottom of the attached Certificate of Service, is identical to the Complainant’s Answer to Dauphin Motion. I.D. at 5; Answer to Derry Motion at 1-3.

As previously noted, on October 30, 2023, the Commission issued the *October 2023 Secretarial Letter*, which notified the Parties that all the pleadings, answers, motions, and preliminary objections filed at Docket No. T-2023-3040729 were transferred to Docket No. C-2023-3043702. I.D. at 2; *See, October 2023 Secretarial Letter* at 1.

Also, on October 30, 2023, the Complainant filed a copy of a document from the Court of Common Pleas of Dauphin County, Pennsylvania Civil Division, labeled as “PRAECIPE AND POWER OF ATTORNEY FOR SATISFACTION AND/OR TERMINATION.”¹⁵

¹⁴ We note that Derry referred to this filing as its “Motion to Join In Answer and Motion to Dismiss.” *See*, Derry Answer and Motion at 1 (emphasis omitted).

¹⁵ According to the *October 2023 Secretarial Letter*, a copy of this document was served to the Parties with the *October 2023 Secretarial Letter*. *See, October 2023 Secretarial Letter* at 1.

In the Initial Decision issued on February 28, 2024, the ALJ granted the Respondents' Preliminary Objections and dismissed the Complaint for lack of Commission jurisdiction.¹⁶ I.D. at 1, 6.

As previously noted, the Complainant timely filed Exceptions on March 1, 2024. PennDOT and Norfolk timely filed Replies to Exceptions on March 11, 2024, and March 13, 2024, respectively. On March 29, 2024, Derry filed Replies to Exceptions.

II. Discussion

A. Legal Standards

1. Burden of Proof

As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. More is required 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).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent utility is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of*

¹⁶ As discussed, *infra*, the ALJ reasoned that the Motions to Dismiss filed by PennDOT, Dauphin, and Derry are, in effect, Preliminary Objections. I.D. at 6, 8.

Pennsylvania, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a Commission Regulation or Order, or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. 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, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense. *See, id.* It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See, Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence. *See, Moore*.

If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant’s burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant’s claim. *See, Milkie*, 768 A.2d at 1220; *see also, Burlison v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n. 11 (Pa. Cmwlth. 1993); *see also, Burlison*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore*. In determining whether a complainant has met the burden of persuasion, the fact-finder¹⁷ may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore*, citing *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005) (*Suber*).

2. Preliminary Objections

Section 5.101(a) of our Rules of Practice and Procedure states that preliminary objections are available to parties and may be filed in response to a pleading. 52 Pa. Code § 5.101(a). Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon, and be limited to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

¹⁷ In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa. C.S. § 335(a)).

2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

The Commission's preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994) (*Equitable Small*). Preliminary objections seeking dismissal of a pleading will only be granted where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979) (*Interstate*); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991) (*Rivera*), adopted by the Commission in *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988) (*Montague*).

The party filing preliminary objections may not rely only on its own factual assertions but must accept, for the purposes of disposing of the preliminary objection, all well-pleaded material facts of the other party, including fairly determined inferences from those facts. *Raynor v. D'Annunzio*, 243 A.3d 41 (Pa. 2020); *County of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985). In ruling on a preliminary objection, the

Commission must assume the factual allegations included in the Complaint are true and resolve any doubt in favor of the non-moving party by rejecting the preliminary objections. *Id.*; *see also*, *Commonwealth v. UPMC*, 208 A.3d 898 (Pa. 2019); *Department of the Auditor General v. State Employees' Retirement System*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (*SERS*) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002) (*Ward*)).

B. ALJ's Initial Decision

In the Initial Decision, ALJ Arnold made thirteen Findings of Fact (FOF) and reached twelve Conclusions of Law (COL). I.D. at 6-7, 12-13. The FOF and COL are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

At the outset, the ALJ addressed PennDOT's Motion to Dismiss;¹⁸ Dauphin's Motion to Dismiss;¹⁹ and Derry's Motion to Dismiss.²⁰ The ALJ reasoned that the Motions to Dismiss filed by PennDOT, Dauphin, and Derry are, in effect, Preliminary Objections. I.D. at 6, 8. Specifically, the ALJ explained that pursuant to 52 Pa. Code § 1.2(a), which provides that the presiding officer may disregard an error or defect of procedure which does not affect the substantive rights of the parties, "Mr. Romanoski's substantive rights are not affected by my treatment of the Motions to Dismiss filed by [PennDOT, Dauphin, and Derry] as Preliminary Objections" because

¹⁸ As noted, *supra*, on October 13, 2023, PennDOT filed an Answer to the Complaint and Motion to Dismiss. *See*, PennDOT Answer and Motion.

¹⁹ As noted, *supra*, on October 18, 2023, Dauphin filed an Answer to the Complaint and Motion to Dismiss. *See*, Dauphin Answer and Motion.

²⁰ As noted, *supra*, on October 24, 2023, Derry filed an Answer to the Complaint and Motion to Dismiss. *See*, Derry Answer and Motion.

Mr. Romanoski had notice of the issues raised in those Motions and had the opportunity to, and did, respond to those Motions. I.D. at 8 (citing 52 Pa. Code § 1.2(a)).

The ALJ then addressed the Commission's procedure regarding the filing and disposition of preliminary objections. I.D. at 8 (citing *Equitable*; 52 Pa. Code § 5.101(a)(1)-(7)). Specifically, the ALJ noted that: (1) any doubt as to the sufficiency of the preliminary objections must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections; (2) the Commission must view the complaint in the light most favorable to the Complainant and should dismiss the complaint only if it appears that the complainant would not be entitled to relief under any circumstances as a matter of law; and (3) in civil practice, preliminary objections requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. I.D. at 8-9 (citing *SERS*; *Ward*; *Equitable*; *Interstate*; *Rivera*; *Montague*). The ALJ further noted that the Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. I.D. at 9 (citing 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d)). The ALJ added that a hearing is necessary only to resolve disputed questions of fact, and the Commission need not hold a hearing when the question presented is one of law. I.D. at 9 (citing *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth 1993)).

Next, the ALJ turned to the Preliminary Objections filed by Norfolk, PennDOT, Dauphin, and Derry, noting that they all averred that the Complaint should be dismissed on the ground that the Commission lacks jurisdiction over the Complaint, pursuant to 52 Pa. Code § 5.101(a)(1).²¹ The ALJ provided that given this, the Commission has only the powers and authority granted to it by the General Assembly,

²¹ The ALJ noted that because the Complaint will be dismissed for lack of Commission jurisdiction, it is not necessary to address the other arguments raised by the Respondents in their Preliminary Objections. I.D. at 9.

and must act within, and cannot exceed, its jurisdiction. I.D. at 9-10 (citing *Shedlosky v. Pennsylvania Electric Company*, Docket No. C-20066937 (Opinion and Order entered May 28, 2008); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1977); *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945)). Further, the ALJ noted that a party to a proceeding cannot confer jurisdiction upon the Commission where jurisdiction does not exist. I.D. at 10 (citing *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967)). Moreover, the ALJ also noted that the Commission must have subject matter jurisdiction as a prerequisite to the exercise of its power before it can decide a controversy. I.D. at 10 (citing *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992)).

The ALJ also noted that Section 2702 of the Code, 66 Pa.C.S. § 2702, bestows the Commission with exclusive jurisdiction to determine the manner in which: (1) a railroad-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished; and (2) a railroad-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety. The ALJ continued that 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 going forward. I.D. at 10 (citing *Southeastern Pennsylvania Transportation Authority (SEPTA) v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991) (*SEPTA*)). Further, the ALJ pointed out that the Commission's jurisdiction extends to the approaches of a crossing. I.D. at 10 (citing *Department of Transportation v. Pa. PUC*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springettsbury v. Pa. PUC*, 289 A.2d 762 (Pa. Cmwlth. 1972)).

Further, the ALJ noted that a highway is defined as “[a] way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular traffic.” I.D. at 10 (citing 66 Pa.C.S. § 102). The ALJ added that a “railroad-highway crossing” is an intersection of a highway with a railroad right-of-way, upon which railroad tracks lie and can be at, above, or below the grade of the railroad tracks. I.D. at 10 (citing *SEPTA*, 592 A.2d 797, 800).

The ALJ granted the Preliminary Objections and dismissed the Complaint for lack of Commission jurisdiction. I.D. at 10. The ALJ reasoned that the Complaint does not involve a railroad-highway crossing or a component of a railroad-highway crossing. The ALJ explained that the 1919 Order approved the abolishment of five at-grade crossings, including the Swatara Crossing, and the PSC directed that the retaining wall in question be constructed to abolish the Swatara Crossing. The ALJ continued that because the 1919 Order abolished the Swatara Crossing, the wall in question is not associated with, or adjacent to, an existing railroad-highway crossing. Further, the ALJ highlighted that the Commission's power over crossings is limited and applies only to railroad-highway crossings. I.D. at 10-11 (citing 66 Pa. C.S. §§ 2702, 2704). Moreover, the ALJ noted that although the PSC, through its 1919 Order, tasked Norfolk with the responsibility of building the retaining wall, the 1919 Order was silent with respect to the responsibility of maintaining the retaining wall, which the Complainant acknowledges in his Complaint. I.D. at 11. The ALJ continued that if the PSC, in its 1919 Order, had directed that the PRRC maintain the retaining wall, then Norfolk arguably would have been responsible for the continued maintenance of the wall through enforcement of the 1919 Order. I.D. at 11 (citing 66 Pa. C.S. § 103(b)).

The ALJ also addressed the Complainant's reference to *Norfolk 2009*. I.D. at 11 (citing Answer to Norfolk New Matter). Specifically, the ALJ clarified that *Norfolk 2009* concerned the assignment of responsibility and costs for the future maintenance of a retaining wall that ran alongside a railroad-highway crossing and on appeal to the Pennsylvania Commonwealth Court, Norfolk challenged the Commission's allocation of costs for the repair and future maintenance of the wall. I.D. at 11 (citing *Norfolk 2009*). Further, the ALJ noted that in *Norfolk 2009*, whether the Commission had jurisdiction over the retaining wall was not at issue because the wall was a component of, and adjacent to, an existing railroad-highway crossing. The ALJ reasoned that, given that the 1919 Order abolished the railroad-highway crossing for which the

retaining wall was built, the wall is not a component of or adjacent to a railroad-highway crossing. I.D. at 11.

The ALJ also referred to *County of Bucks v. Pa. PUC*, 684 A.2d 678 (Pa. Cmwlth. 1996) (*Bucks*), wherein the Commission held Bucks County responsible for most of the costs associated with the closing of a pedestrian bridge within Bucks County. The ALJ noted that the bridge was constructed pursuant to a 1917 PSC Order (1917 Order), in which the PSC ordered that an at-grade railroad-highway crossing be abolished and that a pedestrian bridge be constructed in its place. On appeal, the Commonwealth Court determined that the Commission had no jurisdiction over the pedestrian bridge that was constructed in place of the abolished railroad-highway crossing.²² I.D. at 11-12 (citing *Bucks*). The ALJ continued that similarly in the instant matter, once the Swatara Crossing was abolished, the Commission had no jurisdiction over the retaining wall that was built as a condition of the abolishment of the crossing. I.D. at 12.

The ALJ concluded that the Commission does not have jurisdiction over the maintenance of the retaining wall because the railroad-highway crossing adjacent to the retaining wall was abolished and the Complaint does not involve a railroad-highway crossing or a structure that is adjacent to or a component of a railroad-highway crossing. As such, the ALJ granted the Respondents' Preliminary Objections and dismissed the Complaint for lack of Commission jurisdiction. I.D. at 12.

²² The ALJ noted that although Amtrak's predecessor, the Pennsylvania Railroad, was directed by the 1917 Order to maintain the pedestrian bridge, Amtrak was exempt under federal law from paying the costs associated with the closing of the pedestrian bridge. I.D. at 12.

C. Exceptions²³

In his Exceptions, the Complainant disputes the accuracy of FOF No. 9, arguing that the ALJ mistook the Hockersville Crossing with the Swatara Station Crossing. Exc. at 1 (citing I.D. at 7, FOF No. 9). Specifically, Mr. Romanoski argues that the Hockersville Crossing is the junction between Hockersville Road and the Lebanon Valley Branch railway, and, in the 1919 Order, the PSC directed that the Hockersville Crossing be replaced with a pedestrian subway. Further, the Complainant argues that the Swatara Station Crossing is the junction between State Route 139 and the Lebanon Valley Branch railway, and that both the Hockersville Crossing and Swatara Station Crossing are adjacent to each other. Exc. at 1 (citing Complaint at ¶ 8). The Complainant also disputes the accuracy of FOF No. 10. Exc. at 2 (citing I.D. at 7, FOF No. 10). Mr. Romanoski refers to copies of plans included in his original Complaint to contend that those plans are for the construction of a railroad underpass and not a pedestrian walkway. Exc. at 2 (citing Complaint at Exhs. 12-13). The Complainant also disputes COL No. 10, arguing that the ALJ misinterpreted the location at issue as the Hockersville Crossing instead of the Swatara Station Crossing, which intersects Old West Chocolate Avenue and Norfolk Southern Railways. Exc. at 2 (citing I.D. at 13, COL No. 10). The Complainant counters that the jurisdiction does fall under the Commission because both the road and the railway are operational, and a railroad-highway crossing encompasses the area at issue. Exc. at 2.

²³ We acknowledge that the Exceptions were filed electronically on the Commission's e-filing system. However, the execution of that electronic filing does not strictly comply with 52 Pa. Code § 1.35(2)(i)-(ii), which requires, *inter alia*, a notation on the first page that it has been electronically filed and the email address of the filing user. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), to secure a just, speedy, and inexpensive determination.

D. Replies to Exceptions

In its Replies to Exceptions, Norfolk counters that the ALJ properly concluded that the Commission lacks subject matter jurisdiction over the Complaint. Norfolk contends that it is uncontested that the 1919 Order abolished both the Hockersville Crossing and the Swatara Station Crossing. Further, Norfolk denies that the retaining wall has any connection to the existing above-grade crossing of the tracks of Norfolk Southern and Old West Chocolate Avenue. R. Exc. at 1-2.

In its Replies to Exceptions, PennDOT argues that the Complainant's Exceptions lack merit. Specifically, PennDOT counters that regardless of whether the ALJ confused Hockersville Crossing with Swatara Station Crossing, the essential issue is that both crossings were abolished, consistent with the 1919 Order.²⁴ Further, PennDOT notes that the Complainant does not argue that the abolishment did not occur, adding that Mr. Romanoski admitted that the Swatara Station Crossing was eliminated as part of the 1919 Order. PennDOT R. Exc. at ¶ 1 (citing Complaint at ¶¶ 11-12). Moreover, PennDOT argues that the Exhibits attached to the Complaint do not show that the construction was for a railroad underpass, nor does the remainder of the record demonstrate that the construction of the retaining wall in question was for a railroad underpass. PennDOT R. Exc. at ¶ 2 (citing Complaint at Exhs. 12-13). Furthermore, PennDOT contends that the Complainant's Exception to COL No. 10 is based on a misinterpretation of the Initial Decision. PennDOT R. Exc. at ¶ 3 (citing I.D. at 13, COL No. 10). Specifically, PennDOT notes that throughout the Initial Decision, the ALJ referred to the crossing at issue as the Swatara Station Crossing, not the Hockersville Crossing. PennDOT continues that if the ALJ was referring to the Hockersville Crossing, then the Swatara Station Crossing, which the Complainant clarifies is the focus of the matter, was abolished by the 1919 Order. Therefore, PennDOT submits that because the

²⁴ PennDOT notes that it does not admit to whether the ALJ confused the Hockersville Crossing with the Swatara Station Crossing. R. Exc. at ¶ 1.

1919 Order abolished the railroad-highway crossing for which the retaining wall at issue was built, the Commission should reject the Complainant’s Exceptions. PennDOT R. Exc. at ¶ 3.

In its Replies to Exceptions, Dauphin “incorporates by reference and joins in” PennDOT’s Reply Exceptions. Dauphin R. Exc. at 1. Similarly, in its Replies to Exceptions, Derry “incorporates by reference and joins in” PennDOT’s Reply Exceptions. Derry R. Exc. at 1.

E. Disposition

At the onset, we note that any argument or Exception that we do not specifically address 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. Extra-Record Material Not Considered

As a preliminary matter, we note that the Complainant has filed extra-record materials with their Exceptions.²⁵ We will disregard the extra-record materials – specifically: (1) the two-page item identified as “Exhibit # 24;” and (2) the image identified as “Exhibit # 25” – as the use of this extra-record information by the Commission would violate the Respondents’ due process rights.

²⁵ As previously noted, on March 14, 2024, the Complainant filed two additional items, labeled as “Exhibit #24 to the Exceptions” and “Exhibit #25 to the Exceptions,” in the Commission’s case management system.

It is well-established that parties cannot introduce new evidence at the exceptions stage. *Application of Apollo Gas Co.*, 1994 Pa. PUC LEXIS, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). The items labeled as “Exhibit # 24” and “Exhibit # 25” are introduced for the first time in the Exceptions stage of the proceeding and are not in the record. The Complainant’s extra-record evidence cannot be admitted into the record at this current procedural stage of the case. Therefore, we must reject this extra-record evidence introduced by the Complainant in the Exceptions. *Apollo Gas*.

2. Substance of the Exceptions

Next, we will address the Complainant’s argument regarding the accuracy of FOF No. 9, which states as follows:

The [PSC’s] 1919 Order ordered the elimination of five at-grade crossings in Derry Township, including a crossing where the tracks of the [PRRC] crossed the Hockersville Road at the Swatara Station in Derry Township (“Swatara Crossing”). This 1919 Order was attached as an exhibit to the Complaint.

I.D. at 7, FOF No. 9. According to the 1919 Order, Hockersville Road crosses at grade the tracks of the PRRC. *See*, Complaint, Exh. 11 at 1. Further, the 1919 Order ordered that one of the five grade crossings to be eliminated includes the Hockersville Road at Swatara Station. *See*, Complaint, Exh. 11 at 2.

The Complainant also challenges the accuracy of FOF No. 10, which states as follows:

The PSC in its 1919 Order directed that the Swatara Crossing be replaced with a pedestrian subway to be built at the Hockersville Road along with a public highway underneath the subway.

I.D. at 7, FOF No. 10. According to the 1919 Order, on Hockersville Road at Swatara Station, a pedestrian subway is to be constructed “carrying the highway under the railroad in a straight line.” *See*, Complaint, Exh. 11 at 2. Further, the 1919 Order directed that under the subway, “[a] new public highway will be laid out, commencing on said Hockersville road ... continuing eastwardly parallel to the state highway ... terminating in said state highway.” *See*, Complaint, Exh. 11 at 3.

Upon review of the pertinent language in the 1919 Order, we find no errors with FOF Nos. 9 or 10. Indeed, as noted in FOF No. 9, the 1919 Order directed the elimination of the at-grade crossing where the PRRC tracks crossed the Hockersville Road at the Swatara Station (*i.e.*, the Swatara Crossing). Further, as noted in FOF No. 10, the 1919 Order directed that at Hockersville Road, a pedestrian subway be constructed along with a highway underneath the subway. Moreover, contrary to the Complainant’s arguments otherwise, there is no indication in FOF Nos. 9 or 10 that the ALJ mistook the location of one crossing for another crossing. Therefore, we find the Complainant’s claims challenging the accuracy of FOF Nos. 9 and 10 are without merit.

The Complainant also challenges the accuracy of COL No. 10, which states as follows:

The 1919 Order of the PSC abolished the railroad-highway crossing for which the retaining wall in question was built. Therefore, the Commission lacks jurisdiction over the Complaint.

I.D. at 13, COL No. 10. According to the 1919 Order, the PSC ordered the construction of retaining walls based on the elimination of five grade crossings. *See*, Complaint, Exh. 11 at 2-3. In his Complaint, the Complainant provided images of the retaining wall at issue. *See*, Complaint at Exhs. 1-3. Upon review of those images, we agree with the ALJ that the retaining wall at issue in the Complaint is not associated with, or adjacent to,

an existing railroad-highway crossing (*i.e.*, an intersection of a highway with a railroad right-of-way, upon which railroad tracks lie and can be at, above, or below the grade of the railroad tracks) or a component of a railroad-highway crossing. As such, we agree with the ALJ that the Complaint does not involve a railroad-highway crossing. *See*, I.D. at 10.

To the extent that the Complainant challenges the ALJ's conclusion that the Commission does not have jurisdiction over the retaining wall at issue in the Complaint, we agree with the ALJ that the Commission's power over crossings applies only to railroad-highway crossings and the Commission has no jurisdiction over the structure(s) built in place after a railroad-highway crossing has been abolished.²⁶ Accordingly, given that the Complaint does not involve a railroad-highway crossing or structure that is adjacent to, or a component of, a railroad-highway crossing, we agree with the ALJ that the Commission lacks jurisdiction over the Complaint and, therefore, must be dismissed. *See*, I.D. at 12-13, COL. Nos. 9-10 (citing *Bucks*; 66 Pa. C.S. §§ 2702, 2704). Accordingly, we shall adopt the ALJ's Initial Decision and dismiss the Complaint.

IV. Conclusion

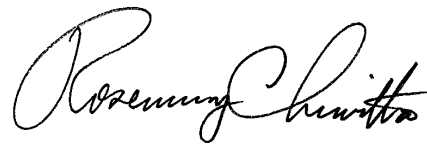
Based upon our review of the record and the applicable law, and for the reasons set forth above, we shall deny the Complainant's Exceptions and adopt the Initial Decision, consistent with this Opinion and Order; **THEREFORE**,

²⁶ *See*, I.D. at 11 (citing 66 Pa. C.S. §§ 2702, 2704). However, as noted by the ALJ, had the PSC, in its 1919 Order, directed that the PRRC maintain the retaining wall, then Norfolk arguably would have been responsible for the continued maintenance of the wall through enforcement of the 1919 Order. I.D. at 11(citing 66 Pa. C.S. § 103(b); *See also*, *Norfolk Southern Railway Co. v. Pennsylvania Public Utility Commission*, 875 A.2d 1243 (Pa. Cmwlth. 2005).

IT IS ORDERED:

1. That the Exceptions filed by David A. Romanoski on September 28, 2023, at Docket No. C-2023-3043702, are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Alphonso Arnold III, issued on February 28, 2024, at Docket No. C-2023-3043702, is adopted, consistent with this Opinion and Order.
3. That the Formal Complaint of David A. Romanoski against the Pennsylvania Department of Transportation, Derry Township, Dauphin County, and Norfolk Southern Railway Company, filed on March 1, 2024, at Docket No. C-2023-3043702, is dismissed.
4. That this proceeding at Docket No. C-2023-3043702 be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 23, 2024

ORDER ENTERED: May 23, 2024