

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

Public Meeting held November 7, 2024

Commissioners Present:

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

Application of Pennsylvania Department of Transportation for approval to alter two (2) public crossings by the rehabilitation of the existing bridge where State Route 0018 (Seventh Avenue) crosses, above grade, one (1) track of Norfolk Southern Railway Company (DOT 503 768 L) located in New Brighton Borough and two (2) tracks of CSX Transportation, Inc. (DOT 584 878 T) located in the City of Beaver Falls, all in Beaver County, and the allocation of costs incident thereto

A-2024-3045709

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are: (1) the Petition for Reconsideration from Staff Action (Petition), filed by Norfolk Southern Railway Company (Norfolk Southern or Petitioner) on June 17, 2024, requesting reconsideration of the Commission Secretarial Letter issued on May 28, 2024 (*May 2024 Secretarial Letter*); and (2) the Motion to Assign Proceeding

to Office of Administrative Law Judge (OALJ) for Disposition (Motion) filed by Norfolk Southern on July 23, 2024. Answers to the Petition were filed by the Commission's Bureau of Investigation and Enforcement (I&E) and the Pennsylvania Department of Transportation (PennDOT) on June 27, 2024, and July 5, 2024, respectively. No Answers to the Motion were filed.

On consideration of the foregoing pleadings, we will grant Norfolk Southern's Petition, in part, and grant Norfolk Southern's Motion, consistent with this Opinion and Order. Therefore, this matter will be referred to the Commission's OALJ for such proceedings as necessary and appropriate, consistent with this Opinion and Order, and the issuance of an Initial Decision.

### **I. History of Proceeding**

The proceeding before the Commission is an application filed by PennDOT pursuant to, *inter alia*, Section 2702(c) of the Public Utility Code (Code), 66 Pa.C.S. § 2702(c), requesting approval and authority for the rehabilitation of a bridge crossing.

Specifically, on January 22, 2024, PennDOT filed an application (Application) seeking Commission approval to alter a public crossing where State Route 0018 crosses the tracks of Norfolk Southern (DOT 503 768L) and CSX Transportation, Inc. (CSX) (DOT 584 878T) in the Borough of New Brighton and City of Beaver Falls, Beaver County. Application at 1. PennDOT proposed to alter the crossing by rehabilitating an existing bridge at the crossing. *Id.* at 2. By Secretarial Letter dated January 24, 2024, the Commission acknowledged receipt of the Application.

Upon receipt of the Application, the Commission arranged and held a field investigation and conference at the site of the crossing on April 2, 2024. Representatives of PennDOT, AECOM (the consultant engineer representing Norfolk Southern), Colliers

Engineering & Design (the consultant engineer representing CSX), the City of Beaver Falls, and Widmer Engineering (the consultant engineer representing the City of Beaver Falls and New Brighton Borough) were in attendance. Although notified by letters dated February 27, 2024, and April 1, 2024, there were no representatives from Beaver County, Columbia Gas of PA, Inc., Verizon Pennsylvania, LLC, Windstream, or Century Link. *May 2024 Secretarial Letter* at 1. No Party in attendance at the field conference objected to the proposed improvements as discussed. *Id.* at 3.

Based in substantial part on the field conference, the Commission thereafter issued the *May 2024 Secretarial Letter*. The *May 2024 Secretarial Letter* set forth the following statements:

\* \* \*

The Department agrees to furnish all materials and perform all work to rehabilitate the bridge structure, at their sole cost and expense. The Department agrees to maintain and inspect the entire bridge structure, exclusive of the aforementioned items, and provide for the removal of snow, ice and debris from the cartway of the bridge deck, at their sole cost and expense.

The Department agrees to prepare and submit complete detailed structure and traffic control plans for the bridge rehabilitation to each party in interest for review and to this Commission for approval, at their sole cost and expense.

Norfolk Southern Railway Company and CSX Transportation, Inc. agree to furnish and maintain watchmen, flagmen and/or inspectors that may be deemed necessary to protect and safeguard its railroad operations or facilities, at the Department's sole cost and expense. Norfolk Southern Railway Company and CSX Transportation, Inc. agree to maintain their railroad facilities, at their sole cost and expense.

The project will be funded by 80% Federal and 20% State funds with an estimated project cost of \$13,000,000.00.

\* \* \*

The Commission issues the Secretarial Letter in accordance with Section 2702 of the Public Utility Code and finds that the alteration of the crossing is necessary and proper for the service, accommodation, convenience, or safety of the public.

*May 2024 Secretarial Letter* at 3.

The *May 2024 Secretarial Letter* further noted the following:

Upon full consideration of the matters involved and inasmuch as no objection has been filed with the Commission and no party in attendance at the field conference objected to the proposed improvements as discussed, we find that a Secretarial Letter can be issued approving the application without a formal hearing

*Id.*

In pertinent part, our *May 2024 Secretarial Letter* directed, *inter alia*, that:

6. Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and do all work necessary to rehabilitate the subject bridge structure; all constructed in accordance with the approved plans and this Secretarial Letter.

7. Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and do all work necessary to establish and maintain any detours or traffic control that may be necessary to properly and safely accommodate vehicular and pedestrian traffic during the time the crossings are being altered.

8. Norfolk Southern Railway Company and CSX Transportation, Inc., at Pennsylvania Department of Transportation's sole cost and expense, furnish all material and perform all work relating to its facilities which may be

required as incidental to the performance of the proposed work and furnish any watchmen, flagmen, inspectors and/or engineering services that may be deemed necessary to protect the railroad's operations or facilities during the time the facilities are being altered.

9. Pennsylvania Department of Transportation pay all compensation for damages, if any, due to the owners of property taken, injured or destroyed by reason of the alteration of the crossings in accordance with this Secretarial Letter.

10. Any relocation of, changes in and/or removal of any adjacent structures, equipment or facilities of any non-carrier public utility or municipal authority, which may be required as incidental to the alteration of the crossings be made by said public utility or municipal authority at its initial cost, and in such a manner as will not interfere with the alteration of the crossings.

*May 2024 Secretarial Letter* at 4, Ordering Paragraph Nos. 6-10.

As noted, by the *May 2024 Secretarial Letter* dated May 28, 2024, the Commission approved the Application, assigning specific requirements to various Parties including PennDOT and Norfolk Southern, as indicated above.

On June 17, 2024, Norfolk Southern filed the instant Petition seeking reconsideration of the *May 2024 Secretarial Letter*. The basis of Norfolk Southern's Petition was its request to amend the Ordering Paragraph on furnishing flagging for the subject project to place the obligation upon PennDOT to arrange for flagging services

from a list of Norfolk Southern approved and qualified vendors.<sup>1</sup> I&E filed an Answer in Opposition to Norfolk Southern's Petition on June 27, 2024, and PennDOT filed an Answer Objecting to Norfolk Southern's Petition on July 5, 2024. Both Answers questioned the safety of the new process as well as whether it would serve to increase the availability of qualified flaggers for non-railroad projects.

On July 23, 2024, Norfolk Southern filed a Motion to Assign Proceeding to OALJ for Disposition. No Answers to Norfolk Southern's Motion were filed.

## II. Discussion

We advise the Parties that any argument or contention that we do not specifically discuss 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. Cmwlt. 1993); *see also, generally, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlt. 1984).

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<sup>1</sup> We note that the question of Norfolk Southern's duty and the manner of furnishing flagging was at issue in a recent proceeding before the Commission. See, *Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to replace the public above-grade crossing by the construction of new bridge where State Route 0011 (West King Street) crosses over the single track of Norfolk Southern Railroad (DOT No. 592 122 M) in Shippensburg Borough, Franklin County, and the allocation of cost incident thereto*, Docket No. A-2022-3031613 (Opinion and Order issued October 4, 2024). In that proceeding, the Commission granted Norfolk Southern's request to refer the matter to OALJ for hearing and disposition. In referring the present matter to OALJ, we note that it may be prudent, if it is determined by OALJ the same facts and legal issues are involved, to consolidate these matters, pursuant to 52 Pa. Code § 5.81 (a).

## **A. Petition for Reconsideration from Staff Action**

### **1. Legal Standards**

Before us is a Petition for Reconsideration from Staff Action, pursuant to 52 Pa. Code § 5.44(a). Petitions for Reconsideration from Staff Action are governed by Section 5.44(a) of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.44(a), which provides the following:

Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20 days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

52 Pa. Code § 5.44(a).

In considering the appeal from Staff Action, the Application and compliance with Commission Regulations, Section 332(a) of the Code, 66 Pa.C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In the matter before us, Norfolk Southern, as Petitioner, is the party seeking affirmative relief from the Commission and, therefore, is the party with the burden of proof.

In *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (1950) (*Se-Ling Hosiery*), the Pennsylvania Supreme Court held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence that is more convincing, by even the slightest degree, than the evidence presented by the opposing party. Additionally, the Commission must ensure that the decision is supported by substantial evidence in the

record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, supra*, citing *Norfolk & Western Railway Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

## **2. Norfolk Southern’s Petition and Answers Thereto**

In its Petition, Norfolk Southern objects to the provisions of Ordering Paragraph No. 8 of the *May 2024 Secretarial Letter*, which stated that Norfolk Southern is responsible for providing flagging and watchmen during the bridge rehabilitation project, with the bridge rehabilitation project to be conducted at the sole cost and expense of PennDOT. Norfolk Southern’s argument is regarding the specific language, “furnish any watchmen, flagmen, inspectors and/or engineering services that may be deemed necessary to protect the railroad’s operations or facilities during the time the facilities are being altered.” Norfolk Southern contends that, contrary to the language set forth in Ordering Paragraph No. 8 of the *May 2024 Secretarial Letter*, it has “a system-wide procedure requiring that the sponsors of non-Norfolk Southern projects arrange for their own flagging.” Petition at 1.

Additionally, according to Norfolk Southern, its internal procedure requires a project sponsor to choose from a list of three qualified vendors.<sup>2</sup> Petition at 1-2; Exh. A. Therefore, Norfolk Southern proposes language to delete and replace Ordering

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<sup>2</sup> Attached to its Petition as Exhibit B, Norfolk Southern provided an appendix from its Public Project Manual, which, according to the Petitioner, demonstrates the stringent qualifications necessary for third party flaggers.

Paragraph No. 8 of the *May 2024 Secretarial Letter* and add a new Ordering Paragraph No. 9 with the following proposed language:

8. CSX Transportation, Inc., at Pennsylvania Department of Transportation's sole cost and expense, furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work and furnish any watchmen, flagmen, inspectors and/or engineering services that may be deemed necessary to protect the railroad's operations or facilities during the time the facilities are being altered.

9. Norfolk Southern Railway Company, at Pennsylvania Department of Transportation's sole cost and expense, furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work and furnish all inspectors and/or engineering services that may be deemed necessary to protect the railroad's operations or facilities during the time the facilities are being altered. Pennsylvania Department of Transportation, at its sole cost and expense, furnish any watchmen and flagmen as required for work around the operations of Norfolk Southern Railway Company, as applicable, to protect Pennsylvania Department of Transportation or its contractor during the time work is being performed across, above and adjacent to the railroad's tracks, which at the sole option of Norfolk Southern Railway Company, as applicable, may be through railroad forces or qualified contractors.

Petition at 2-3.

Lastly, Norfolk Southern submits that "either the subject of flagging was not specifically raised at the field meeting or Norfolk Southern's representative at the field meeting for this matter was unaware of the new process." Petition at 3.

As indicated previously, both I&E's and PennDOT's Answers in opposition question the safety of the new process as well as whether it would serve to increase the

availability of qualified flaggers for non-railroad projects. I&E Answer at 5-6; PennDOT Answer at 2. As such, neither I&E nor PennDOT are in agreement with Norfolk Southern's proposed amendments to the *May 2024 Secretarial Letter*.

Specifically, I&E and PennDOT contend that modifying the language as the Petitioner proposes would remove a layer of public safety oversight from the Commission by allowing Norfolk Southern, at its "sole option," to control a process that the Commission has exclusive jurisdiction under, particularly when it relates to safety. I&E Answer at 5; PennDOT Answer at 2. According to PennDOT, the requested amendments eliminate Norfolk Southern's oversight over the flagging vendor, diminishing public safety by holding PennDOT legally responsible for activities that Norfolk Southern would have exclusive control over via its internal procedures, which can be revised at any time without PennDOT's or the Commission's input. PennDOT Answer at 2.

According to PennDOT, although Norfolk Southern's proposed amendments attempt to shift the burden to PennDOT and its contractors, any flagging vendors chosen are still required to be approved by Norfolk Southern. Therefore, Norfolk Southern's current approved list of vendors, which contains a mere three options, will not ensure an increase of the amount of approved flagging vendors if the *May 2024 Secretarial Letter* is modified. PennDOT Answer at 2.

I&E contends that, from a safety standpoint, Norfolk Southern is in the best position to provide oversight of flagging and watchmen for their own facilities/utilities via railroad forces or their qualified contractors. I&E Answer at 6. Consistent with its contention, I&E submits that the original language contained in Ordering Paragraph

No. 8 reflects the historical position of the Commission in requiring the railroad to provide flagging and watchmen with reimbursement from the project applicant.<sup>3</sup> *Id.* at 5.

Lastly, contrary to Norfolk Southern's belief that the subject of flagging was not specifically raised on May 26, 2024, during the field investigation and conference, I&E and PennDOT submit that the Parties' representatives discussed and agreed to the terms for flagging and watchmen, which was ultimately reflected in Ordering Paragraph No. 8 of the *May 2024 Secretarial Letter*. I&E Answer at 6; PennDOT Answer at 2.

### **3. Disposition**

Upon our review of the instant Petition and Answers thereto, we are of the opinion that the amendments requested by Norfolk Southern raise factual issues that must be resolved prior to determining the appropriate action to be ordered regarding the rehabilitation project and the manner in which PennDOT and Norfolk Southern must

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<sup>3</sup> See Ordering Paragraph No. 9 of the Secretarial Letter pertaining to *Application of the Pennsylvania Department of Transportation for approval to alter the public crossing (DOT 501 500 G) by replacement of the existing bridges where State Route 0083 (Interstate 83) crosses, above grade, the tracks of Norfolk Southern Railway Company and State Route 3029 (Loucks Mill Road) located in Spring Garden Township, York County, and the allocation of costs incident thereto.* Docket No. A-2021-3027407; Ordering Paragraph No. 5 of the Secretarial letter pertaining to *Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to alter the public above-grade crossing by replacing the existing bridge where State Route 3022 (Maclay Street) crosses above grade the tracks of Norfolk Southern Railway Company (DOT 518 088 K) in the City of Harrisburg, Dauphin County, and the allocation of costs incident thereto.* Docket Number A-2023-3037711; and Ordering Paragraph No. 8 of the Secretarial Letter pertaining to *Application of the Pennsylvania Department of Transportation for approval to alter the public crossing (DOT 592 197 L) by the removal and replacement of the existing bridge where SR 2035 (South Third Street) crosses, above grade, the tracks of Norfolk Southern Railway Company located in Lemoyne Borough, Cumberland County, and the allocation of costs incident thereto.* Docket No. A-2021-3023845. I&E Answer at 5.

proceed. Specifically, Norfolk Southern’s proposed amendment to the language of the *May 2024 Secretarial Letter* would alter the Parties’ responsibilities and oversight over a critical safety aspect of the project.

Accordingly, we shall grant Norfolk Southern’s Petition in part. Consequently, we believe that it is appropriate to refer this Application proceeding to the OALJ for assignment to a presiding officer who shall conduct such proceedings as deemed necessary and appropriate consistent with this Opinion and Order. The scope of this referral shall expressly include the conducting of hearings as may be deemed necessary to resolve the issue surrounding the assignment of responsibility in providing flagging and watchmen, as required, to protect the railroad tracks during the time the work is being performed across, above, and adjacent to the tracks.

**B. Motion to Assign Proceeding to OALJ for Disposition**

**1. Legal Standards**

Norfolk Southern, as the movant, is the proponent of a rule or order from the Commission. Norfolk Southern, therefore, has the burden of proof. 66 Pa.C.S. § 332(a). The burden of proof is established by the presentation of substantial evidence in support of its position. *See Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992); *Se-Ling Hosiery*.

**2. Norfolk Southern’s Motion**

As previously indicated, Norfolk Southern filed a Motion requesting that this matter be assigned to the OALJ for hearing and disposition. Motion at 3. In support of its Motion, Norfolk Southern asserts that, since there was “no explicit meeting of the minds regarding flagging made at the field meeting,” initiating the hearing process would

permit all sides to thoroughly address the issue and obtain a disposition in the public interest. Motion at 2-3. The Motion contends that an evidentiary hearing is necessary for Norfolk Southern to submit evidence in support of its new internal procedure regarding the assignment of responsibility in providing flagging and watchmen, and likewise provide I&E and PennDOT the opportunity to challenge Norfolk Southern's evidence in regard to the proposed changes through cross examination. Motion at 2.

### **3. Disposition**

Consistent with our finding that reconsideration of our *May 2024 Secretarial Letter* is warranted here, as well as our direction that this matter be referred to the OALJ to address the assignment of responsibility for flagging and watchmen, we shall grant Norfolk Southern's Motion.

### **III. Conclusion**

On consideration of Norfolk Southern's Petition, Motion, and related pleadings, we shall: (1) grant reconsideration of our *May 2024 Secretarial Letter*, and (2) grant Norfolk Southern's Motion, consistent with this Opinion and Order;

**THEREFORE,**

#### **IT IS ORDERED:**

1. That the Petition for Reconsideration from Staff Action, filed by Norfolk Southern Railway Company, on June 17, 2024, at Docket No. A-2024-3045709, is granted, in part, consistent with this Opinion and Order.

2. That the Motion to Assign Proceeding to Office of Administrative Law Judge for Disposition filed by Norfolk Southern Railway Company on July 23, 2024 is granted, consistent with this Opinion and Order.

3. That the Application Docket No. A-2024-3045709, is, hereby, referred to the Office of Administrative Law Judge for assignment to a presiding officer which shall conduct such proceedings as necessary. The scope of this referral shall expressly include whatever is deemed necessary to resolve the issue surrounding the assignment of responsibility in providing flagging and watchmen as required to protect the railroad tracks during the time the work is being performed across, above, and adjacent to the tracks.

**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: November 7, 2024

ORDER ENTERED: November 7, 2024