

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

Public Meeting held February 6, 2025

Commissioners Present:

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

Application of the Department of Transportation
of the Commonwealth of Pennsylvania for
approval to replace the existing bridge where
West Lackawanna Avenue crosses above the track(s)
of Norfolk Southern Railway Corporation,
DOT Number 265 971 V in the City of Scranton,
Lackawanna County and the allocation of costs
incident thereto.

A-2023-3043493

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration from Staff Action (Petition), filed by Norfolk Southern Railway Company (Norfolk Southern or Petitioner) on December 11, 2024, requesting reconsideration of the Commission Secretarial Letter issued on November 22, 2024 (*November 2024 Secretarial Letter*). Specifically, Norfolk Southern requested that the Commission amend the *November 2024 Secretarial Letter* or, in the alternative, that the matter be assigned to the Office of Administrative Law Judge

(OALJ) for hearing on any factual issues. An Answer to the Petition was filed by the Pennsylvania Department of Transportation (PennDOT) on December 30, 2024.

On consideration of the foregoing pleadings, we will grant Norfolk Southern's Petition, in part, 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. Background and 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 to replace the existing bridge where Lackawanna Avenue crosses, above grade, two (2) tracks owned by Norfolk Southern, the easternmost operated and maintained by Delaware-Lackawanna Railroad Company Inc. (DOT 265 971 V), in the City of Scranton, Lackawanna County.

Specifically, on October 12, 2023, PennDOT filed an application (Application) seeking Commission approval to replace the superstructure of the existing, locally owned bridge carrying West Lackawanna Avenue crosses above the tracks of Norfolk Southern Railway Corporation, at DOT Number 265 971 V in the City of Scranton, Lackawanna County. Application at 2. PennDOT proposed to replace the crossing, as the project is necessary and proper for the safety and convenience of the public. *Id.* at 3. By Secretarial Letter dated October 12, 2023, the Commission acknowledged receipt of the Application.

Upon receipt of the Application, the Commission arranged and held a field investigation and conference (meeting) at the site of the crossing on

December 13, 2023. Representatives of PennDOT, AECOM (the consultant engineer representing Norfolk Southern), and Pennsylvania American Water were in attendance. Although notified by letter dated November 15, 2023, there were no representatives from Lackawanna County, City of Scranton, PPL Electric Utilities Corporation, Verizon Pennsylvania, Inc, Pennsylvania American Water, AT&T Corp., Frontier Communications Corporation, Comcast Cable Communications, or Sprint in attendance. At the meeting, it was discovered that both Pennsylvania Northeast Regional Railroad Authority and Delaware-Lackawanna Railroad Company Inc. were omitted from the parties of record in the October 12, 2023, Application. PennDOT filed an update to the Application on December 18, 2023, adding both parties to the record, and provided both with a copy of the Application.

At the meeting, it was noted that the existing bridge, owned by the City of Scranton, is a four lane, bi-directional, paved roadway, consisting of two travel lanes in each direction, with curbed, raised sidewalks on both sides, generally oriented east and west. The curb-to-curb width is noted as fifty feet, with an out-to-out width of sixty-two feet six inches.

Preliminary plans described the structure, constructed in 1972, as a prestressed concrete adjacent box beam bridge having a total span of 127 feet supported by concrete abutments and a single concrete pier. The skew angle for the substructures is 65-degrees to the roadway baseline. The structure also has four concrete retaining walls, supporting the approaches, flanking both abutments. Concrete barriers topped with a metal railing cap the outer edge of the sidewalk with additional chain link fence in the areas where the structure crosses directly over the track. Multiple light poles along the sidewalk areas are located on both sides of the existing structure. The Application reported the average daily traffic over the structure as 13,583 vehicles with 5% trucks.

There are two active railroad tracks beneath the structure and a remnant of a third track adjacent to abutment 2. At the field conference it was noted that the remnant track will be removed. All three tracks are located on property owned by Norfolk Southern, track No. 1, nearest to the existing pier, is operated on and maintained by Norfolk Southern, and track No. 2, nearest to abutment 2, is operated on and maintained by the Delaware-Lackawanna Railroad Company Inc. There is an additional Norfolk Southern track proposed and shown on the preliminary plans in the vicinity of the existing bridge pier, but this track is proposed in the future and will not be installed as part of the current application.

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

* * *

The Department has entered into an agreement with the City of Scranton where they will carry out the design and construction of the new structure and the City of Scranton will assume maintenance. The Department described the details of the project at the December 13, 2023, meeting, which includes the removal of the entire existing structure including the substructure, superstructure, four (4) retaining walls, and pier. Preliminary plans show the new structure as a single span, prestressed concrete adjacent box beam bridge having a span of 92 feet, as measured from the centerline of bearing of proposed abutment 1 to the centerline of bearing of proposed abutment 2, on a 75-degree skew. The bi-directional roadway will consist of four (4) 11-foot-wide travel lanes, two (2) 5-foot-wide shoulders/bike lanes, and two (2) 6 foot 8-inch- wide sidewalks with concrete curbs and 1 foot 6 inch thick concrete barriers. The total curb-to-curb width is reported as 54 feet with an out-to-out of 70 feet 4 inches. The concrete barriers will be topped with vinyl coated steel fencing on the outer edge of the sidewalks over the tracks. The structure will be supported by two

concrete abutments, both having two (2) wing walls each. The existing pier will be removed to 3-feet below the finished ground level. Four existing concrete retaining walls will be rebuilt with mechanically stabilized earth retaining walls, retaining walls 1 & 2 on the western side of the structure, retaining walls 3 & 4 on the eastern side of the structure. Additionally, multiple light poles are proposed to replace the lighting on the existing structure.

Horizontal clearances of the existing structure have been reported as 11.8 feet from the centerline of track 1 to the existing pier and 39 feet 9 inches, measured from the centerline of track 2 to abutment 2. The existing minimum vertical clearance has been reported as 20 feet 3.75 inches. Both the existing horizontal and vertical clearances will remain throughout construction of the new structure. Since both the existing side clearance of 11.8 feet and the vertical clearance of 20 feet 3.75 inches are below the Commissions minimum clearance requirements, this Secretarial Letter will serve as a temporary exemption from the Commission's minimum clearance requirements until the point in time when the existing pier is demolished, and the new structure is in place as part of the subject proceeding. Preliminary plans show the proposed minimum side clearance as approximately 29 feet 10 inches, as measured from the centerline of track no. 2 to proposed abutment 2, and the proposed minimum vertical clearance for new structure as approximately 23 feet 3 inches. Both the proposed vertical and horizontal clearances will be greater than the Commissions minimum requirements.

A full detour will be required for the construction of the new structure. The Department agreed to provide a copy of the final detour plans to all parties for review.

As previously stated, the Department will carry out the design and construction of the new structure and the City of Scranton will assume maintenance after completion. This maintenance includes but is not limited to the superstructure, substructure, abutments and retaining walls. Maintenance of the superstructure also includes snow, ice and debris removal on the sidewalks and roadway, plus the lighting and poles, and their electrification.

Maintenance of the easternmost track and any appurtenant railroad facilities related to the easternmost track will be assigned to the Delaware-Lackawanna Railroad Company Inc. Maintenance of the westernmost track and any appurtenant facilities related to the westernmost track will be assigned to Norfolk Southern Railway Company.

There are several utilities within the project area including a sewer line and Verizon facilities attached to the underside of the structure, and additional aerial power and cable facilities. Alterations required to relocate public utilities in public right-of-way will be made by the utility at its initial cost and expense.

The Department agrees to design and construct the project at its sole cost and expense. The Department agrees to reimburse the railroad for any costs incurred for providing engineering, watchman and flagman services in conjunction with the project. The bridge replacement project is estimated to cost approximately \$10,000,000 and be federally, state and locally funded.

The Commission has tentatively established jurisdiction along West Lackawanna Avenue over those portions of the project between Highway Station 144+00 and Highway 149+00 as shown on the preliminary plans.

In conjunction with the subject bridge replacement project, it may be necessary for the Commission to appropriate certain portions of railroad property to accommodate construction of the project. If required, this will be accomplished in a separate Commission Order.

The applicant has certified that a copy of the application has been served on each party in interest and none have advised that it objects to the issuance of a Secretarial Letter approving the application.

Upon full consideration of the matters involved, we determine that it is not necessary to schedule a hearing in this proceeding at this time and that the issuance of a Secretarial Letter without a hearing is proper since the Department has agreed to construct the project at its sole cost and expense,

and none of the parties has expressed any objections to the proposal.

The Commission issues this 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.

The alteration of the subject crossing as proposed by the Department of Transportation of the Commonwealth of Pennsylvania is approved as herein directed:

1. The subject caption be revised as shown herein.
2. The crossing where West Lackawanna Avenue crosses, above grade, two (2) tracks owned by Norfolk Southern Railway Company, the easternmost (track no. 2) operated thereon by Delaware-Lackawanna Railroad Company Inc., in the City of Scranton Lackawanna County, be altered in accordance with the approved plans and this Secretarial Letter.
3. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, prepare and submit final signed and sealed construction plans for the subject crossing to all parties for review and to the Commission for approval prior to construction.
4. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, prepare and submit final signed and sealed structural plans for the subject crossing to all parties for review and to the Commission for approval prior to construction.
5. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, prepare and submit final, approved detour plans for the subject crossing to all parties for review prior to construction.

6. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, and prior to the start of construction, prepare and submit final detailed right-of-way plans and property descriptions (metes and bounds) for any property for the Commission to appropriate to all parties for review and to the Commission for approval, if necessary.
7. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, furnish all material and perform all work necessary to establish and maintain all traffic controls that may be required to properly accommodate highway and pedestrian traffic during the time the crossing project is being constructed.
8. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, demolish the existing structure and construct the new structure generally in accordance with the approved plans and this Secretarial Letter.
9. The Pennsylvania Department of Transportation, at its sole cost and expense, furnish all material and perform all work necessary to establish and maintain any shielding/protection, as required, to safely protect the areas below the bridge structure during construction of the project.
10. That an exemption from the Commission's minimum horizontal clearance requirements of 52 Pa. Code §33.122(b) be and is hereby granted, in this particular instance, for a horizontal clearance of 11 feet 8 inches from the centerline of track no. 1 to the pier of the existing structure before and during construction until a point in time that the pier is removed as part of the subject proceeding.
11. That an exemption from the Commission's minimum vertical clearance requirements of 52 Pa. Code §33.121(a) be and is hereby granted, in this particular instance, for a vertical clearance of

20 feet 3.75 inches from the top of track to the bottom of the existing structure before and during construction until a point in time that the existing structure is removed as part of the subject proceeding.

12. Any operating railroads over the subject line, issue appropriate notice warning its employees of the restrictive clearances herein, all in accordance with its standard operation practice.
13. Norfolk Southern Railway Company, at the sole cost and expense of the Department of Transportation of the Commonwealth of Pennsylvania, furnish construction, engineering and inspection service as required as a result of the proposed work, and furnish and maintain flagmen and watchmen as required to protect its operations during the time work is being performed across, above and adjacent to its tracks.
14. Delaware-Lackawanna Railroad Company Inc., at the sole cost and expense of the Department of Transportation of the Commonwealth of Pennsylvania, furnish construction, engineering and inspection service as required as a result of the proposed work, and furnish and maintain flagmen and watchmen as required to protect its operations during the time work is being performed across, above and adjacent to its tracks.
15. Any relocation of, changes in or removal of any adjacent structures, equipment or other facilities of any non-carrier public utility company or municipal authority located within the limits of public right-of-way, within the limits of this Commission's jurisdiction, which may be required as incidental to the execution of the crossing project, be made by said public utility company or municipal authority at its initial cost and expense, and in such manner as will not interfere with the construction of the project.

16. Department of Transportation of the Commonwealth of Pennsylvania, at least thirty (30) days prior to the start of work, notify all parties in interest of the actual date on which work will begin.
17. Norfolk Southern Railway Company cooperate with the Department of Transportation of the Commonwealth of Pennsylvania and conduct their operations in the vicinity of the crossing, in a safe manner and under control during the time project is being constructed.
18. Delaware-Lackawanna Railroad Company Inc. cooperate with Department of Transportation of the Commonwealth of Pennsylvania and conduct their operations in the vicinity of the crossing, in a safe manner and under control during the time project is being constructed.
19. Department of Transportation of the Commonwealth of Pennsylvania cooperate with Norfolk Southern Railway Company so that during construction of the project, the operations and facilities of the railroad company will not be endangered or unnecessarily impeded.
20. Department of Transportation of the Commonwealth of Pennsylvania cooperate with Delaware-Lackawanna Railroad Company Inc. so that during construction of the project, the operations and facilities of the railroad company will not be endangered or unnecessarily impeded.
21. Construction of the bridge project be completed in a manner satisfactory to this Commission on or before December 31, 2026, and that on or before said date, Department of Transportation of the Commonwealth of Pennsylvania report to this Commission the date of actual completion of the work.
22. Department of Transportation of the Commonwealth of Pennsylvania, at its sole cost and expense, pay all compensation for damages due to owners of

property taken, injured, or destroyed by reason of the construction of the crossing in accordance with this Secretarial Letter.

23. All costs which are to be reimbursed by the Department of Transportation consistent with this Secretarial Letter shall be reimbursed pursuant to the provisions of 23 C.F.R. Part 140, 646. The aforesaid Federal reimbursement shall not supersede, delay or, in any manner, postpone the effect of any paragraph contained in this or any related Secretarial Letter or Order.
24. Upon completion of construction of the proposed project, each non-carrier public utility company and municipal authority, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain its respective facilities, existing or altered, located within the limits of the improvement.
25. Upon completion of construction of the proposed project Norfolk Southern Railway Company, at its sole cost and expense, furnish all material and perform all work necessary to maintain its tracks and railroad facilities, existing or altered, located within the limits of the project, and provide the City of Scranton at least ten (10) business days advance notice when performing any work as directed by this paragraph.
26. Upon completion of construction of the proposed project Delaware- Lackawanna Railroad Company Inc., at its sole cost and expense, furnish all material and perform all work necessary to maintain its tracks and railroad facilities, existing or altered, located within the limits of the project, and provide the City of Scranton at least ten (10) business days advance notice when performing any work as directed by this paragraph.
27. Upon completion of the construction of the proposed project, City of Scranton, at its sole cost

and expense, furnish all material and perform all work necessary to maintain and inspect the entire bridge including but not limited to the deck, superstructure, substructure, wing walls, retaining walls, protective fencing, structural integrity of the sidewalks, approach roadways and any other ancillary features of the improvement constructed in accordance with the provisions of this Secretarial Letter, and provide Norfolk Southern Railway Company and Delaware-Lackawanna Railroad Company Inc. at least ten (10) business days advance notice when performing any work as directed by this paragraph.

28. Upon completion of the construction of the proposed project, City of Scranton, at its sole cost and expense, furnish all material and perform all work necessary for the removal of snow, ice and debris from the cartway of the bridge deck, approach roadways and sidewalks.
29. Upon completion of the alteration of the subject crossing, City of Scranton, at its sole cost and expense, furnish all material and perform all work necessary thereafter to maintain the bridge lighting and system infrastructure, including the electrical costs to energize the bridge lighting, constructed as part of the alteration.
30. Upon completion of the work herein directed, and upon a written request by any party hereto, this proceeding be scheduled for a hearing at a time and a place assigned by this Commission, upon due notice to all parties, to receive evidence relative to the allocation of initial costs incurred, if any, by any of the parties, and any other matters relevant to this proceeding.

The Parties are reminded that failure to comply with this or any Order or Secretarial Letter in this proceeding

may result in an enforcement action seeking civil penalties and/or other sanctions pursuant to 66 Pa. C.S. § 3301.

November 2024 Secretarial Letter at 2-7.

As noted above in pertinent part, our *November 2024 Secretarial Letter* directed, *inter alia*, that the PennDOT, at its sole cost and expense, furnish all material and perform all work necessary to establish and maintain all traffic controls that may be required to properly accommodate highway and pedestrian traffic during the time the crossing project is being constructed. *See November 2024 Secretarial Letter* at 1-7.

As noted, by the *November 2024 Secretarial Letter* dated November 22, 2024, the Commission approved the Application, assigning specific requirements to various parties, including PennDOT and Norfolk Southern, as indicated above.

On December 11, 2024, Norfolk Southern filed the instant Petition seeking reconsideration of the *November 2024 Secretarial Letter*. The basis of Norfolk Southern's Petition was its request to amend existing Ordering Paragraph 13 into two ordering paragraphs as set forth in the Petition, *inter alia*, in which the obligation for the furnishing of flagging for the subject project be placed upon PennDOT to arrange for

flagging services from a list of Norfolk Southern approved and qualified vendors.¹ PennDOT filed an Answer to Norfolk Southern's Petition on December 30, 2024. Therein, PennDOT questioned the safety of the proposed new process, as well as whether it would serve to increase the availability of qualified flaggers for non-railroad projects.

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

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

¹ 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) (*Norfolk Southern October 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).

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 the 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 PennDOT's Answer Thereto

In its Petition, Norfolk Southern objects to the provisions of Ordering Paragraph No. 13 of the *November 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 asserts, *inter alia*, that: (1) it has a system wide procedure requiring that the sponsors of non-Norfolk Southern projects arrange for their own flagging; (2) project sponsors must choose from a list of approved vendors, currently numbering three; (3) a vendor must meet rigorous regulatory qualification and compliance, training and experience standards set forth in Norfolk Southern's Public Improvement Projects Manual²; (4) the requested change will serve the public interest by helping to ensure an adequate supply of flaggers who meet the safety qualifications for public projects; and (5) the subject of flagging was either not specifically raised at the field meeting or Norfolk Southern's representative at the meeting was unaware of the new process. Petition 1-3; Exhs. A-B. Therefore, Norfolk Southern proposes language to delete and replace Ordering Paragraph No. 13 of the *November 2024 Secretarial Letter* with two new Ordering Paragraphs: Nos. 13 and 13a, with the following proposed language:

13. Pennsylvania Department of Transportation, at its sole cost and expense, shall require its contractor to furnish and maintain flaggers, selected from a list of vendors qualified to provide protective services on Norfolk Southern Railway Company, to protect the Pennsylvania Department of

² 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.

Transportation or its contractor when construction activities are taking place on or adjacent to railroad property or have the potential to foul the railroad's tracks or operations. Norfolk Southern Railway Company shall ensure compliance with its rules for safe railroad operations by briefing, monitoring and inspecting the flagging vendor. Should the Pennsylvania Department of Transportation or its contractor be unable to schedule the flaggers when needed from the listing of qualified vendors, Norfolk Southern Railway Company shall work diligently and in good faith to assist the Pennsylvania Department of Transportation in finding qualified flagging services, including coordinating a conversation with the flagging vendors to discuss providing the flagging services, so as not to unreasonably delay the project .

13a. Norfolk Southern Railway Company, at Department of Transportation of the Commonwealth of Pennsylvania's sole cost and expense, shall furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work and furnish any 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.

Petition at 2-3.

In its Answer, PennDOT states its opposition to the Petition and questions, *inter alia*, the safety of the proposed new process, as well as whether it would serve to increase the availability of qualified flaggers for non-railroad projects. Answer at 2-3. As such, PennDOT is not in agreement with Norfolk Southern's proposed amendments to the *November 2024 Secretarial Letter*.

Specifically, PennDOT contends, *inter alia*, that: (1) the proposed amendments will not help to ensure an adequate supply of flaggers or serve the public interest; (2) the requested amendments eliminate Norfolk Southern's direct connection

and oversight over the flagging vendor, and thus the Petitioner contradicts its own assertion that the amendments will serve the public interest, rather PennDOT submits that such amendments will diminish public safety by holding PennDOT legally responsible for activities that Norfolk Southern would have exclusive control over via its internal procedures; and (3) PennDOT denies that the issue of flagging was not specifically addressed during the field investigation and conference. Answer 1-2.

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

3. Disposition

Upon our review of the instant Petition and PennDOT's Answer 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 proceed. Specifically, Norfolk Southern's proposed amendments to the language of the *November 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. Specifically, we find that reconsideration is warranted in this instance and that the matter should be referred to the OALJ, similar to our action in *Norfolk Southern October 2024*, regarding this identical issue. 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, culminating with the issuance of an Initial Decision, if necessary. 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. We further recommend that in order to ensure the most efficient use of time and resources for all, that this case and the two prior cases involving Norfolk Southern that were referred to the OALJ on this issue, at Docket No. A-2022-3031613 (*i.e. Norfolk Southern October 2024*) and A-2024-3045709, should be consolidated, if deemed appropriate.

III. Conclusion

On consideration of Norfolk Southern's Petition, and related pleadings, we shall: (1) grant reconsideration of our *November 2024 Secretarial Letter*, and (2) grant Norfolk Southern's Petition, in part, 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 December 11, 2024, at Docket No. A-2023-3043493, is granted, in part, consistent with this Opinion and Order.

2. That the Application at Docket No. A-2023-3043493, 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. Additionally, the OALJ shall examine whether this proceeding shall be consolidated with the open proceedings at Docket Nos. A-2022-3031613 and A-2024-3045709, to address 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,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 6, 2025

ORDER ENTERED: February 7, 2025