

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

Public Meeting held April 24, 2025

Commissioners Present:

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

Application of the Pennsylvania Department of Transportation for approval to alter the public crossing (DOT# 592 188 M) by the removal and replacement of the existing bridge where Seventeenth Street crosses, above grade, the tracks of Norfolk Southern Railway Company in the City of Harrisburg, Dauphin County, and the allocation of costs incident thereto

A-2024-3051983

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 March 25, 2025, requesting reconsideration of the Commission Secretarial Letter issued on March 7, 2025 (*March 2025 Secretarial Letter*). Specifically, Norfolk Southern requested that the Commission amend the *March 2025 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.¹ An Answer to the Petition was filed by the Pennsylvania Department of Transportation (PennDOT) on April 4, 2025 (Answer).

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 further proceedings as necessary and appropriate, consistent with this Opinion and Order, and the issuance of an Initial Decision, if necessary.

I. Background and History of Proceeding

The proceeding before the Commission is an application filed by PennDOT pursuant to, *inter alia*, Section 2702 of the Public Utility Code (Code), 66 Pa.C.S. § 2702, requesting approval to replace the existing bridge where Seventeenth Street crosses, above grade, the tracks owned by Norfolk Southern, in the City of Harrisburg, Dauphin County.

¹ Norfolk Southern requests that this matter be stayed by the OALJ, pending a decision in the consolidated proceedings at *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 entered October 4, 2024) (*Norfolk Southern October 2024*) and *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*, Docket No. A-2024-3045709 (Order entered November 7, 2024)(*Norfolk Southern November 2024*).

Specifically, on November 5, 2024, PennDOT filed an application (Application) seeking Commission approval for alteration of the public above-grade crossing where Seventeenth Street crosses above the two (2) tracks of Norfolk Southern Railway Corporation, at DOT Number 592 188 M, at RR Milepost HP-11.13 in the City of Harrisburg, Dauphin County. Application at 1. 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 November 5, 2024, 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 February 26, 2025. Representatives of PennDOT, Norfolk Southern, the City of Harrisburg and various utility companies were in attendance. Although notified by letter dated January 21, 2024, there were no representatives from Dauphin County, Brightspeed Company, Lumen Technologies Inc, Next Mile Technologies, Frontier, or Sprint Communications. *March 2025 Secretarial Letter at 2.*

Based in substantial part on the field conference, the Commission thereafter issued the *March 2025 Secretarial Letter*. As noted, by the *March 2025 Secretarial Letter*, the Commission approved the Application, assigning specific requirements to various parties, including PennDOT and Norfolk Southern. In pertinent part, our *March 2025 Secretarial Letter* directed, *inter alia*, that 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 alteration work is being performed. *See March 2025 Secretarial Letter at 5, ¶11.*

Specifically, with respect to Norfolk Southern, the *March 2025 Secretarial Letter* directed that:

14. Norfolk Southern Railway Company, at the sole cost and expense of Pennsylvania Department of Transportation, furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work; furnish construction engineering and inspection service, if required, as a result of the proposed work; and furnish and maintain flagmen and watchmen, as required, to protect its operations during the time the work is being performed across, above and adjacent to its tracks.

March 2025 Secretarial Letter at 5, ¶14.

On March 25, 2025, Norfolk Southern filed the instant Petition seeking reconsideration of the *March 2025 Secretarial Letter*. The basis of Norfolk Southern's Petition was its request to amend existing Ordering Paragraph 14 into three 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.² PennDOT filed an Answer to Norfolk Southern's Petition on April 4, 2025. Therein,

² As previously noted, the question of Norfolk Southern's duty and the manner of furnishing flagging is at issue in several proceedings currently pending before the Commission. See, *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*, Docket No. A-2023-2043493 (Opinion and Order entered February 6, 2025)(*Norfolk Southern February 2025*); *Norfolk Southern November 2024*; *Norfolk Southern October 2024*. In those proceedings, 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 that the same facts and legal issues are involved, to consolidate the present matter with the similar matters, pursuant to 52 Pa. Code § 5.81 (a).

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 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 Hosier v. Margulies*, 70 A.2d 854 (1950) (*Se-Ling Hosier*), 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. 14 of the *March 2025 Secretarial Letter*, which stated that Norfolk Southern is responsible for providing flagging and watchmen during the alteration project, with the 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 Manual;³ (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 at 1-3; Exhs. A-B. Therefore, Norfolk Southern proposes language to delete and replace Ordering Paragraph No. 14 of the *March 2025 Secretarial Letter* with three new Ordering Paragraphs: Nos. 14 and 14(a) and 14(b), with the following proposed language:

14. 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 the rail system of Norfolk Southern Railway Company, to protect the Pennsylvania Department of Transportation or its contractors when activities required to alter the subject public crossing has the potential to foul the railroad's tracks or operations on or adjacent to any affected railroad property. 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.

³ Attached to its Petition as Exhibit B, Norfolk Southern provided an appendix from its Public Improvements Project Manual, which, according to the Petitioner, demonstrates the stringent qualifications necessary for third party flaggers.

14a. Norfolk Southern Railway Company, at its sole cost and expense, shall be responsible for all railroad operations and dispatching communications with the flagging vendors to and through the subject captioned public crossing during the time alterations and/or construction activities are being performed across, above and adjacent to its tracks, all in accordance with the provisions of this Secretarial Letter.

14b. Norfolk Southern Railway Company, at the sole cost and expense of Pennsylvania Department of Transportation, 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, including furnishing construction engineering and inspection services if required as a result of the proposed work.

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 1-2. As such, PennDOT is not in agreement with Norfolk Southern's proposed amendments to the *March 2025 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 *March 2025 Secretarial Letter* is modified. Answer at 1.

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 *March 2025 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 February 2025*, *Norfolk Southern November 2024*, and *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, including consideration of the Parties' request for a stay, 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 prior cases involving Norfolk Southern that were referred to the OALJ on this issue, at *Norfolk Southern February 2025*, *Norfolk Southern November 2024*, and *Norfolk Southern October 2024*, should be consolidated, and/or stayed, if deemed appropriate.

III. Conclusion

On consideration of Norfolk Southern's Petition, and related pleadings, we shall: (1) grant reconsideration of our *March 2025 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 March 25, 2025, at Docket No. A-2024-3051983, is granted, in part, consistent with this Opinion and Order.

2. That the Application at Docket No. A-2024-3051983, 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 or stayed pending disposition of the open proceedings at Docket Nos. A-2022-3031613, A-2024-3045709, and A-2023-2043493, 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,



Matthew L. Homsher
Secretary

(SEAL)

ORDER ADOPTED: April 24, 2025

ORDER ENTERED: April 24, 2025