

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

Public Meeting held May 22, 2025

Commissioners Present:

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

Application of Westmoreland County for  
Approval to Replace an Above Grade Crossing  
By the Installation of a Single-Span Girder Bridge  
Where West Broadway Avenue/Fourth Street Crosses  
Norfolk Southern Railroad (NSRC) BR0028787- PT-331.87;  
U.S. Department Federal Highway Administration (FHWA)  
Will Fund the Bridge Replacement, But Westmoreland County  
Will own and Maintain the Bridge Located in the Borough  
of North Irwin, Westmoreland County, Pennsylvania

A-2024-3052077

**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 April 14, 2025, requesting reconsideration of the Commission Secretarial Letter issued on March 24, 2025 (*March 2025 Secretarial Letter*). Specifically, Norfolk Southern requests 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.<sup>1</sup> An Answer to the Petition was filed by Westmoreland County (Westmoreland) on April 24, 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 Westmoreland 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 West Broadway Avenue/Fourth Street crosses, above grade, the tracks owned by Norfolk Southern, in North Irwin, Westmoreland County.

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<sup>1</sup> 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 13, 2024, Westmoreland filed an application (Application) seeking Commission approval for alteration of the public above-grade crossing where West Broadway Avenue/Fourth Street Crosses Norfolk Southern's at BR0028787-PT-331.87. Application at 1. Westmoreland proposed replacing the crossing, arguing that the project is necessary and proper for the safety and convenience of the public. *Id.* at 1-2. By Secretarial Letter dated November 13, 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 December 2, 2024. Representatives of Westmoreland, Norfolk Southern, and others were in attendance.

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 indicated its intent to approve the Application, assigning specific requirements to various parties, including Westmoreland and Norfolk Southern. In pertinent part, our *March 2025 Secretarial Letter* indicated our intent to direct, *inter alia*, that Westmoreland, 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 ¶1.

Specifically, with respect to Norfolk Southern, in the *March 2025 Secretarial Letter*, Commission Staff proposed to direct that:

1. Norfolk Southern Railway Company, at the sole cost and expense of Westmoreland County, 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 any watchman, 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 installed.

*March 2025 Secretarial Letter* at ¶1.

On April 14, 2025, Norfolk Southern filed the instant Petition seeking reconsideration of the *March 2025 Secretarial Letter*. The basis of Norfolk Southern's Petition is its request to amend the proposed Paragraph No. 1, as set forth in the Petition, *inter alia*, in which the obligation for the furnishing of flagging for the subject project be placed upon Westmoreland to arrange for flagging services from a list of Norfolk Southern approved and qualified vendors.<sup>2</sup> Westmoreland filed an Answer to Norfolk Southern's Petition on April 24, 2025. Therein, Westmoreland questions the safety of the

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<sup>2</sup> 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 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*. Docket No. A-2024-3051983 (Opinion and Order entered April 24, 2025)(*Norfolk Southern April 2025*); *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).

proposed new process, as well as whether it would serve to increase the availability of qualified flaggers for non-railroad projects. Answer at ¶ 9.

## **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 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 Westmoreland’s Answer Thereto**

In its Petition, Norfolk Southern objects to the provisions of proposed Paragraph No. 1 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 Westmoreland. 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;<sup>3</sup> and (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. Petition at 1-3; Exhs. A-B. Therefore, Norfolk Southern proposes language to delete and replace proposed Paragraph No. 1 of the *March 2025 Secretarial Letter* with a new proposed Paragraph No. 1, with the following proposed language:

1. Westmoreland County, 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 Westmoreland County 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 Westmoreland County 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 Westmoreland County 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.

1a. Norfolk Southern Railway Company, at Westmoreland County'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

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

railroad's operations or facilities during the time the facilities are being altered.

Petition at 2-3.

In its Answer, Westmoreland 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 ¶ 9. As such, Westmoreland is not in agreement with Norfolk Southern's proposed amendments to the *March 2025 Secretarial Letter*.

Specifically, Westmoreland contends, *inter alia*, that: (1) the proposed amendments will not help to ensure an adequate supply of flaggers or serve the public interest; and (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 Westmoreland submits that such amendments will diminish public safety by holding Westmoreland legally responsible for activities that Norfolk Southern would have exclusive control over via its internal procedures. Answer at ¶ 9.

According to Westmoreland, although Norfolk Southern, through its proposed amendments, attempts to shift the burden to Westmoreland and its contractors, any flagging vendors chosen are still required to be approved by Norfolk Southern. Therefore, Westmoreland 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 ¶ 9.

**a. Disposition**

Upon our review of the instant Petition and Westmoreland'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 project and the manner in which Westmoreland 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 April 2025*, *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 April 14, 2025, at Docket No. A-2024-3052077, is granted, in part, consistent with this Opinion and Order.

2. That the Application, at Docket No. A-2024-3052077, is, hereby, referred to the Office of Administrative Law Judge for assignment to a presiding officer, who 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 Office of Administrative Law Judge shall examine whether this proceeding shall be consolidated with or stayed pending disposition of the open proceedings at Docket Nos. A-2024-3051983, 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: May 22, 2025

ORDER ENTERED: May 22, 2025