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June 25, 2025

VIA ELECTRONIC FILING

Matthew L. Homsher, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Re: Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to alter the public above grade crossing by the replacement of the existing bridge carrying State Route 0011 (West King Street) over track of Norfolk Southern Railway Company (DOT 592 122 M) in Shippensburg Borough and Southampton Township, Franklin County, and all the allocation of costs incident thereto.

Docket No. A-2022-3031613

Consolidated with: A-2024-3045709

A-2023-3043493

A-2024-3051983

A-2024-3052077

Dear Secretary Homsher:

Enclosed please find the Main Brief of Norfolk Southern Railway Company for filing in the above-referenced consolidated matters. A copy has been served upon all interested parties of record. Thank you.

Sincerely yours,

Benjamin C. Dunlap, Jr.

BCDjr:klg

Enclosures

cc: All Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the Department of	:	A-2022-3031613
Transportation of the Commonwealth of	:	
Pennsylvania for approval to alter the public	:	Consolidated with:
above grade crossing by the replacement of the	:	A-2024-3045709
existing bridge carrying State Route 0011 (West	:	A-2023-3043493
King Street) over track of Norfolk Southern	:	A-2024-3051983
Railway Company (DOT 592 122 M) in	:	A-2024-3052077
Shippensburg Borough and Southampton	:	
Township, Franklin County, and the allocation	:	
of costs incident thereto.	:	

MAIN BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY

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Date: June 25, 2025

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I. STATEMENT OF THE CASE

This matter involves four applications filed by the Pennsylvania Department of Transportation (“PennDOT”) concerning bridge replacement projects involving Norfolk Southern Railway Company (“NS”) tracks in various Pennsylvania counties. Specifically, the applications requested to alter public crossings by replacing bridges on State Route 0011 in Shippensburg Borough (Docket No. A-2022-3031613), rehabilitating bridges on State Route 0018 in New Brighton Borough and Beaver Falls (Docket No. A-2024-3045709), restoring a bridge in Lackawanna County (Docket No. A-2023-3043493), and replacing a bridge in Dauphin County (Docket No. A-2024-3051983) (collectively, these are referred to as the “Applications”).

On May 7, 2025, Administrative Law Judge (“ALJ”) Joseph F. Brady formally consolidated the Applications under Docket No. A-2022-3031613.¹ *See* Hearing Transcript (“HT”) dated May 7, 2025, at 46:3-12; 47:24–49:5. A fifth case involving an application by Westmoreland County to replace a bridge on West Broadway Avenue/Fourth Street over NS tracks in North Irwin (Docket No. A-2024-3052077) was consolidated with the other four in Judge Brady’s Second Interim Order dated June 23, 2025.

In each Application, the Public Utility Commission (“PUC”) issued Secretarial Letters approving the proposed alterations and directing NS, at PennDOT’s expense, to furnish flagging and watchmen services. For example, in Docket No. A-2023-3043493, the November 22, 2024, Secretarial Letter ordered,

13. [NS], at the sole cost and expense of [PennDOT], furnish construction, engineering and inspection services 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.

¹ Initially, only Docket Nos. A-2024-3045709 and A-2022-3031613 were consolidated in a Prehearing Conference Order on November 15, 2024.

In response, NS filed a Petition for Reconsideration from Staff Action (“Petition for Reconsideration”) for each Application, requesting that these identical ordering paragraphs be amended to maintain the actual status quo and require PennDOT to arrange flagging through NS-approved vendors on its property to protect PennDOT’s contractors during its work or, alternatively, that the matter be assigned to the Office of Administrative Law Judge (“OALJ”) for a hearing. PennDOT filed an answer in opposition to each Petition for Reconsideration.² In each Application, the PUC issued an Opinion and Order granting NS’s request in part, referring the matter to the OALJ to determine responsibility for flagging services.

On December 13, 2024, ALJ Brady held a Prehearing Conference and issued a scheduling order. NS, PennDOT and I&E submitted written Direct Testimony, followed by written Rebuttal Testimony from NS and PennDOT. A telephonic hearing occurred on May 7, 2025, wherein the written testimony was entered into the record, and each party conducted cross examination.

II. SUMMARY OF THE ARGUMENT

The issue in this proceeding is whether NS must manage flagging services and/or furnish backup flaggers for PennDOT’s work to complete highway bridge projects located on NS property, even though NS has implemented a comprehensive third-party flagging program that all parties agree is safe and effective and consistent with modern railroad industry practice.

Historically, railroads used employees whose job was to warn its own employees and third parties’ employees working on or near railroad tracks of the approach of oncoming trains to safely clear the area for their passage. Times have changed, and railroads such as Norfolk Southern do

² The PUC’s Bureau of Investigation and Enforcement (“I&E”) filed Answers in opposition to NS’s Petition for Reconsideration in Docket Nos. A-2024-3045709 and A-2022-3031613. During that time period, I&E participated in discovery, submitted Direct Testimony from William M. Sinick, and participated in the May 7, 2025 hearing.

not have employees that can serve as dedicated flaggers. Instead, foremen, welders and other skilled workers now perform flagging as an incidental part of their railroad jobs when working on track maintenance and other railroad projects.

To accommodate these changes, NS put in place a process whereby project sponsors such as PennDOT desiring to conduct work affecting NS rights of way would directly retain a third-party vendor to provide the flagging services to protect that project sponsor's employees and contractors during their project. NS published requirements under which third party vendors could become qualified to provide flagging services for project sponsors on NS property when needed. While any change requires some adjustment, instead of PennDOT communicating with these vendors to plan and coordinate its flagging needs to ensure sufficient coverage, as it does with any other construction contractor, PennDOT wants NS to provide scheduling oversight and backup flaggers for PennDOT's various projects. PennDOT has admitted it wants NS to take on these duties, simply because that is how it was done historically.

Shifting these project management responsibilities to NS would only serve to disincentivize PennDOT from performing the same work of coordination with flagging vendors it does with any of its other contractors. It would make NS a *de facto* construction manager for PennDOT, without compensation for the additional work. PennDOT's own contractors are in the best position to coordinate PennDOT construction projects, and inserting NS as a middleman in the process would be highly inefficient.

Furthermore, assigning NS employees as backup flaggers not only would be more costly but could remove NS employees from other critical railroad work. When railroad employees are assigned to non-railroad flagging projects, they are taken away from their primary jobs on core railroad work, cannot do any other work while flagging for PennDOT or other third parties, and

may need to be reimbursed at higher rates reflecting their higher skill levels. This inefficient use of resources would be more costly to the taxpayers funding PennDOT's projects.

The PUC's jurisdiction remains intact under NS's third-party flagger program, as NS remains fully accountable for railroad safety on its property. NS's vendor qualification process requires adherence to its safety rules and when issues arise, NS removes from its property non-compliant flaggers or vendors, which could also include PennDOT's own construction contractors. NS is subject to the PUC's jurisdiction and thus can and will respond to any flagging safety issues – or safety issues relating to any other PennDOT contractor – on its property that may be raised by the Commission's Rail Safety Division, thereby maintaining regulatory oversight.

The record in this matter supports one conclusion: NS's third-party flagging program complies with applicable safety standards, ensures effective coordination, and has not been credibly challenged by any party on grounds of safety or reliability. PennDOT's request to impose additional flagging responsibilities on NS, either through direct provision of backup flaggers or management of third-party contractors, would represent an unnecessary and inefficient imposition of responsibility. Moreover, such a shift would burden NS with uncompensated costs, interfere with its core railroad operations and undermine the very efficiency PennDOT seeks.

III. LEGAL ARGUMENT

The PUC's authority under 66 Pa.C.S. § 2702(b) requires it to regulate rail-highway crossings "to effectuate the prevention of accidents and the promotion of the safety of the public." In allocating responsibilities for flagging services, the PUC must then consider both the operational realities of the railroads and the needs of public infrastructure projects to ensure an order that is equitable, practical and aligned with modern industry practices. The PUC's exercise of this

discretion must be grounded in a practical understanding of how railroads function today, not based on outdated assumptions about staffing models that no longer exist.

A. NS's Third-Party Flagging Program is Safe and Consistent With Industry Practice.

The record in this proceeding unequivocally demonstrates that NS's third-party flagger authorization requirements, as outlined in Appendix E-1 of its Public Projects Manual (NS Exhibit 1), is safe and has a reliable industry-standard approach. No party in this proceeding has contested the safety of NS's program. William Sinick, Manager of the Commission's Rail Safety Division, explicitly testified, "We have no issue with trained third-party vendors/contractors performing railroad flagging." (I&E Statement 1, at 2:14-17).

NS's third-party flagging requirements adhere to stringent safety standards that closely mirror those required for NS's own employees, ensuring consistent execution of protective services on its property (NS Exhibit 1; Written Direct Testimony of Dustin K. Lange, PE, NS Statement 1 ("Lange Direct"), at 5:19-6:7). These standards include rigorous training, qualification requirements and compliance with federal regulations, which no party has contested as insufficient to protect PennDOT and its contractors' workers and equipment from train-related incidents (NS Exhibit 1).

The program meets or exceeds applicable FRA regulations and NS's stringent safety standards, requiring flaggers to complete instructor-led training and supervised field training, with the amount of such training dependent upon the person's past experience (NS Exhibit 1, pp. 13-17; HT, at 63:13-25; Lange Direct, at 15:19-6:7). Under this purview, NS has rejected third-party flagging companies who fail to meet these standards, ensuring only qualified providers operate on NS property (Lange Direct, at 6:18-23). The absence of any testimony or evidence from PennDOT

or I&E challenging the safety protocols of the third-party flagging companies underscores the consensus that the program is designed to prioritize safety.

Further, NS's current monitoring efforts ensure that third-party flaggers operate safely on its property. NS requires qualified third-party flaggers to engage in pre-work briefings with NS supervisors, and they are subject to compliance checks during normal operations, with the expectation for the vendor to develop and implement corrective actions for any safety violations. (Lange Direct, at 7:1-12; NS Exhibit 1, p. 16).

NS promptly removes non-compliant flaggers and enforces vendor stand-downs for any systemic issue, as seen in the 2024 District 6 incident involving RailPros (one of the currently qualified third-party vendors) and a track time violation. NS and RailPros effectively cooperated and remedied the issue swiftly within a single day, providing plain evidence that NS and the approved third-party flagging companies prioritize safety (Lange Direct, at 7:13–8:14; Direct Testimony of Sarah Fenton, PennDOT Statement 4 (“Fenton Direct”), at 11:9-14). Fenton acknowledged that NS's response to this incident was appropriate, further validating the program's effectiveness in ensuring safe flagging operations (HT, at 202:16-20).

Fenton further admitted that no ancillary safety issues have occurred with NS's third-party flaggers, and she could provide no examples of any safety failures (HT, at 203:8-18). Overall, Fenton did not contest the safety of the third-party flagging operations, further affirming that safety is not at issue in this proceeding (*Id.*). The testimony of Sinick for I&E further supports this conclusion, as he confirmed that communication between flaggers and NS dispatchers, a critical safety component, occurs effectively (HT, at 226:1-19).

NS's transition to third-party flagging is not revolutionary. It is the same process used in each of the 22 states in which NS operates (HT, at 68:7-12), for projects sponsored by

government/municipal entities and other utilities alike. This wide acceptance of the practice, coupled with the absence of any safety-related complaints from PennDOT or I&E in the record, solidifies that NS's program is safe and effective.

B. PennDOT is Best Positioned to Coordinate Flagging Services and NS Backup is Unwarranted.

PennDOT's request for an order requiring NS to oversee third-party flagging or to provide backup flaggers is unjust, inefficient and unsupported by law. Under 66 Pa.C.S. § 2704(a), cost responsibilities must be allocated equitably. Yet PennDOT offers no plan to compensate NS for staff, training or overhead if forced to manage or provide flaggers it does not currently employ. (Rebuttal Testimony of Dustin K. Lange, PE, NS Statement 5 ("Lange Rebuttal"), at 4:9–5:3).

NS does not employ dedicated flaggers, as its skilled workers are reserved for critical internal operations and projects (Lange Direct, at 10:3–10). Mandating NS to divert these workers would impair essential railroad maintenance. It would also increase costs to taxpayers by having overqualified employees at higher hourly rates perform this work (HT 105:1–24).

NS's current model frees up these highly skilled railroad workers and enables PennDOT to control project scheduling via a broader vendor pool (Lange Direct, at 5:18–22). PennDOT's primary contractors routinely manage subcontractors for various construction services, such as paving and painting, through competitive bidding, demonstrating its procurement expertise to handle flagging contracts without NS oversight (Lange Rebuttal, at 6:6–7:2; HT, at 129:16–130:7).

Furthermore, three qualified vendors, RailPros, R&R Consulting Team, LLC ("R&R"), and North Carolina Railway Services ("NCRS"), serve Pennsylvania, currently offering over 130 trained flaggers qualified to work on NS property (Rebuttal Testimony of DJ Ezell, NS Statement 4 ("Ezell Rebuttal"), at 2:7–3:10; Rebuttal Testimony of David Craft, NS Statement 3 ("Craft

Rebuttal”), at 2:7–5:5; Rebuttal Testimony of Donald H. Arant, PE, NS Statement 2 (“Arant Rebuttal”), at 3:12–21). These resources make NS scheduling oversight and backup unnecessary.

1. The Current Third-Party Flagging Program is Effective and Adequate.

Historically, NS provided flaggers for PennDOT’s work on its projects on NS property and would use in-house flaggers for these projects. However, evolving rail industry practices reduced the need for NS to retain employees who solely served as flaggers, reserving these skilled railroad employees for railroad work, with flagging as an ancillary part of their primary duties (Lange Direct, at 10:3-10).

This industry shift prompted NS to adopt a scalable third-party program for non-railroad projects, ensuring skilled workers focus on core railroad tasks (Lange Direct at 10:3–10; HT, at 104:6–105:21). Since NS does not hire dedicated flaggers, skilled workers such as foreman, tamper operators and welders, who performed flagging as an incidental aspect of their jobs, were often pulled from their critical railroad tasks to service these PennDOT projects (Lange Direct, at 3:13-23; HT, at 104:6–105:21). By 2018, NS would either halt internal projects in order to divert workers to PennDOT projects on its property or would not provide flaggers at all for PennDOT projects when it could not divert skilled workers from critical railroad projects. (*Id.*) The reality of the industry shift caused widespread delays for both PennDOT and NS projects.

The current use of third-party flaggers for non-railroad projects across the 22 states where NS operates alleviates the resource conflict for both NS and for various state entities and utilities (HT, at 68:7-12). Since adopting the third-party program, NS has enabled PennDOT and other project sponsors, including other states, to control scheduling by accessing a broader pool of flaggers than those available in-house at NS, while freeing NS’s skilled workers for critical railroad tasks (Lange Direct, at 5:18-22). This system eliminates PennDOT’s reliance on NS as a sole

source for flaggers, replaced by specialized vendors, that with proper planning can better adjust to PennDOT's project timelines. (HT, at 51:1-53:25; Lange Rebuttal, at 4:9-5:3; Lang Direct, at 8:15-17).

2. PennDOT's Claims of Limited Flaggers Under NS's Program is Overstated.

PennDOT's claims of limited third-party flagger availability are overstated and primarily result from its own planning and coordination shortcomings, not NS's third-party vendor program (*see e.g.* HT, at 125:2-127:13; NS Exhibit 3). NS's witnesses demonstrated that its three currently approved vendors, RailPros, R&R and NCRS, generally have sufficient capacity to meet demand with proper planning and coordination.

PennDOT's assertion of limited vendor options is inaccurate and fails to consider the recent uptick in market demand from federal infrastructure funding. Indeed, even Sinick conceded that the increase in the number of PennDOT projects is a result of recent federal funding (HT, at 225:12-18).

Currently, PennDOT has access to three qualified third-party flagger companies (RailPros, R&R, and NCRS), with over 130 available flaggers for NS projects in Pennsylvania. Dennis Ezell, RailPro's Vice President of Flagging Operations, explained that RailPros has been operational since 2001, employs 72 flaggers qualified to work on NS property and over 700 company-wide, with plans for further expansion to meet demand (HT, at 137:1-10; Ezell Rebuttal, at 2:7-3:10).

David Craft, the President of R&R, confirmed that R&R has been active on NS tracks since 2023, has completed 18 PennDOT projects, and has 47 flaggers (HT, at 119:13-18; Craft Rebuttal, at 2:6-5:5). Indeed, R&R currently has an additional six individuals in its training program, which boasts a successful 92-95% passing rate (HT, at 124:5-125:1; 143:12-144:4). Craft explained that R&R generally requires six weeks' notice for large projects (Craft Rebuttal, at 7:9-11).

Donald Arant, the Vice President of NCRS, explained that the company recently launched in 2024 and already has 15 flaggers qualified to provide services on NS territory (Arant Rebuttal, at 3:12-21). NCRS completed its business registration to operate in Pennsylvania on April 30, 2025, and is expanding to enhance capacity in the state (NS Cross Examination Ex. 1; HT, 66:8-20; 207:11-19).

Sinick agreed that it is in the vendor's best interest to have a sufficient pool of flaggers to meet PennDOT's and other entities' needs, as that is how they make money (HT, at 239:18-24). In that regard, not only are the three current qualified vendors working to increase their number of flagging employees, but NS has been working toward approval of a fourth flagging vendor, "as their latest submission on April 17th addressed one of the primary obstacles which had previously hindered approval" (Lange Rebuttal, at 9:13-18). PennDOT was helpful in connecting NS to this vendor, which "is a great example of PennDOT working to address their own concerns about availability." (*Id.*)

While the "busy season" can require additional notice of 90-180 days, both Ezell and Craft explained that RailPros and R&R, respectively, have ample capacity when given proper notice of projects, while NCRS's recent expansion into Pennsylvania adds further options for PennDOT (HT, at 116:1-136:25; Ezell Rebuttal, at 4:7-5:10; Craft Rebuttal, at 5:1-5). PennDOT cannot feign ignorance by burying its head in the sand and claim that it does not know that longer notice to obtain flaggers is necessary for the busy warm-weather construction season. The same is true for most other construction contractors during these busy months.

PennDOT's and I&E's position that thirty days' notice for flagging jobs should be enough just does not square with industry standards, especially for long projects of 2-3 years and regular bridge inspection work. For instance, a PennDOT contractor recently sent R&R a request for

flaggers for 15 different bridge locations in central and western PA about a month before the first group of inspections was to be scheduled (Craft Rebuttal, at 7:15-18).

PennDOT knows that these bridges need to be inspected at least every two years, and its contractors could schedule flaggers far in advance. Better still, PennDOT could contract with any of these flagging vendors for dedicated flaggers for these regular inspections, which would not only ensure availability, but likely would be less expensive for PennDOT (see e.g., Craft Rebuttal, at 7:17-20). Sinick testified that PennDOT routinely contracts with the bridge inspectors themselves, ensuring their availability even on short notice, and so thought PennDOT could do the same with flagging vendors (HT, at 240:2-18).

Similarly, large PennDOT bridge projects may require flagging for two or three construction seasons (HT, at 195:12—196:1). On these large construction projects, PennDOT would generally know whether it had a need for flagging about three years before construction was scheduled to start, even if it would not then know the exact points in the project they may be needed (HT, at 194:14—195:10). If PennDOT were to communicate and coordinate with vendors far in advance about its known future needs, that would enable vendors to hire and train sufficient numbers of employees to meet PennDOT's needs. Again, better still, if PennDOT would contract ahead of time for these multi-year projects, it would ensure having the flaggers it needs when the time comes. Thirty days' notice is simply not reasonable in these situations, especially where PennDOT expects NS to pull one of its own employees from other railroad work for long periods of time on short notice due to PennDOT's own lack of proper planning.

3. PennDOT's Position that NS Must Coordinate Third Party Flaggers or Alternatively Provide Its Own Flaggers as Backup Would Increase Costs on Taxpayers and Unfairly Burden NS Without Compensation.

Requiring NS to manage the scheduling of third-party flaggers would effectively shift PennDOT's contractor oversight responsibility to NS without any legal or financial justification. Such a mandate would necessitate NS hiring new personnel to coordinate vendors with PennDOT project schedules, diverting resources from NS's *own* safety-critical railroad operations (Lange Rebuttal, at 4:9–5:9;7:1–9:23). This responsibility would make NS a *de facto* project manager for PennDOT's highway transportation projects, without full compensation. PennDOT's contractors are in the best position to coordinate flaggers with their project schedule, just as they do for any other subcontractor on a project.

Mandating NS to provide backup flaggers is equally impractical. NS does not employ dedicated flaggers, as its skilled workers perform flagging only as an incidental part of their regular duties when necessary for NS's own projects (Lang Direct, at 10:3-4). Providing backup flaggers would require reallocating personnel and risking delays to safety-critical tasks like track maintenance (HT, at 105:1-24). Maintaining a standby flagger pool also would cause NS to incur substantial costs for additional salaries, training and management, without any assurance that the employees in that pool would be fully employed or any indication of the number that may be needed in such a pool. PennDOT provides no solutions to compensate for these activities that lead up to actual coverage by an NS employee; instead, like the administrative costs to coordinate flaggers, PennDOT expects NS to just bear them (Lange Direct, at 10:19-26; Lange Rebuttal, at 11:10-20).

PennDOT witness Michele Acitelli is looking for NS to provide a “broad oversight” of the independent flagging vendors and make decisions about where their services are most needed (HT,

at 181:16—182:25). This would include “oversight of priorities (with input from PennDOT) for the NS Flagging Vendors when facing completing [sic] requests for projects and areas” (Direct Testimony of Michele Acitelli, PennDOT Statement 3 (“Acitelli Direct”), at 5:11-16). When asked why NS should bear this coordination burden, Acitelli testified “because that’s the burden they were facing before this all came up,” when NS used its own employees for flagging on PennDOT projects (HT, at 178:4-20).

Such a system is fraught with logistic, contractual and financial problems. It would force NS to prioritize PennDOT’s projects over those of other states, municipalities and utilities. Acitelli “is advocating that NS inject itself, on behalf of PennDOT, in the business dealings of utilities and state and local governments in 22 states, because she expects NS to somehow enforce PennDOT’s self-proclaimed priority over the projects of those other entities whenever PennDOT’s contractor fails to properly subcontract for services it knows without a doubt it will require” (Lange Rebuttal, at 6:6-15). Further, the contract for the flagging services is between PennDOT and the flagging vendors, and NS has no ability to control any of the work flows relating to that work. That is – and should remain – a contractual matter between PennDOT and the flagging vendor.

Overall, PennDOT’s proposal would impose significant operational and financial burdens on NS without compensation, effectively forcing NS to subsidize PennDOT’s bridge projects. (Lange Direct, at 10:19-26). Under 66 Pa.C.S. § 2704(a), a primary consideration in allocating work and cost responsibilities is the party benefiting most from the project. *See PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155, 1163 (Pa. 2002); *Millcreek Twp. v. Pa. Public Utility Comm’n*, 753 A.2d 324, 327 (Pa. Cmwlth. 2000). Sinick, on behalf of I&E, acknowledged that flagging costs are traditionally allocated to PennDOT at its “sole cost and expense,” ensuring NS bears no financial burden, yet PennDOT’s proposal would impose operational and financial burdens

without compensation (HT, at 231:1-232:25). While admittedly NS does receive some benefit from these grade-separation projects, they are primarily highway projects, for which PennDOT should bear the primary burden, just as railroad bridges over highways are primarily NS projects for which it bears the primary burden.

In regard to NS construction work for its own bridges over state highways, NS is required to provide highway flaggers for the maintenance and protection of vehicular traffic during lane closures (HT, at 185:15-186:9). PennDOT witness Acitelli “[did] not disagree” that if NS came to PennDOT and said such third-party highway flaggers were not available and expected PennDOT to provide them, that would be analogous to what PennDOT is asking of NS regarding railroad flaggers. (HT, at 186:8-21). It is also analogous that while arranged by NS, these third-party highway flagging services are subject to PennDOT approval, just as NS approves what flaggers are qualified to work on its railroad property (HT, at 186:2-9).

4. PennDOT’s Approach Encourages Inefficiency and Poor Planning.

PennDOT’s proposal to shift ultimate flagging responsibility to NS establishes a perverse disincentive structure by allowing it to bypass procurement due diligence and transfer that burden to NS (Lange Rebuttal, at 2:4–3:5). If PennDOT fails to secure flaggers – or simply fails to timely coordinate with flagging vendors – it would then rely on NS as a fallback, which undermines efficient project planning and contradicts the PUC’s mandate to ensure just and reasonable allocations. *PECO*, 791 A.2d at 1163. The evidence shows that PennDOT’s delays stem primarily from its own lack of diligence and poor coordination, not deficiencies in NS’s third-party flagging program. Should the Commission accept PennDOT’s proposal for NS to oversee flagging vendors for its projects and provide its own personnel as backup, PennDOT will have no incentive to improve its own efforts.

PennDOT knows of its complex projects and schedules *years* in advance. (HT, at 195:2–197:2). However, despite admitting that it would be wise to arrange flaggers further than thirty days in advance of a project, PennDOT often waits just thirty days before arranging flaggers and has taken the position that thirty days’ notice is sufficient (HT, at 76:8–78:13; 237:2–238:15). What is worse, PennDOT has admitted contacting only a single vendor in some cases, hardly a diligent effort, when it knows that other vendors are potentially available (HT, at 80:12–81:2; 125:2–127:13; NS Exhibit 3).

The April 2025 SR 183 project illustrates this failure. There, PennDOT’s contractor, Kinsley, contacted *only* R&R for flagging services related to a sediment breach issue and failed to convey the project’s urgency (HT, at 125:2 – 127:13; NS Exhibit 3). PennDOT admitted it did not contact RailPros or NCRS and only secured flaggers after NS’s intervention clarified the urgency, enabling R&R to provide weekend availability (*Id.*; Lange Rebuttal, at 3:13–4:8). NS staff had to make calls to vendors to clarify availability, a task PennDOT should have performed, demonstrating that delays were avoidable with better coordination. The fact that the issues were resolved promptly, and R&R immediately offered multiple weekends of availability, shows that simple coordination, not railroad employees as backup flaggers, is the solution here. PennDOT’s position that there is a lack of available flaggers rings hollow when its efforts have failed to meet reasonable standards of communication and coordination.

Other than better coordination, there are market driven solutions that PennDOT can adopt, but has so far not done so, as have other agencies managing similar challenges. For example, utilities and the Commonwealth of Virginia mitigate the potential for availability issues by contracting *directly* with vendors for dedicated flaggers, a model PennDOT could adopt (Rebuttal Testimony of David Craft (“Craft Rebuttal”), at 4:16 –6:2; Lange Direct, at 9:24–10:2; HT, at

129:16–130:7). Indeed, R&R has even offered dedicated flaggers to PennDOT to streamline coordination across multiple projects, which would reduce overall costs, but PennDOT has not concluded negotiations on this reasonable solution (Craft Rebuttal, at 5:6-10). Such a solution would allow PennDOT to contract for particular weeks or months when flaggers are needed, as well as coordinate flaggers within a week-minimum pay period when only needed for a day or two on each of several jobs in an area (Craft Rebuttal, at 5:11--6:2).

R&R's success in implementing this strategy in other states and its willingness to adapt and coordinate with PennDOT underscores PennDOT's inflexibility and inability to achieve a reasonable solution to self-inflicted problems. Further rewarding this behavior by requiring NS to procure and coordinate flaggers would just exacerbate PennDOT's dilatory conduct. Furthermore, this refusal to adopt readily available solutions speaks to a planning failure, not a vendor capacity problem.

Even Sinick acknowledged that contracting with third party flaggers, as performed successfully in other states, is analogous to PennDOT's consultant agreements that it routinely enters into with engineers for bridge inspections (HT, at 240:2-18). There, PennDOT enters into contracts with these consultants in advance of bridge inspections, which enables PennDOT to provide little notice for an inspection, especially in emergency situations. Sinick agreed that PennDOT could similarly enter into an agreement to provide flagging for bridge inspections with one of the flagging vendors to increase availability (*Id.*). Yet, PennDOT has not done so and instead is attempting to treat this aspect of regular bridge inspections differently, which makes no logical sense. PennDOT should be encouraged to adopt these market-driven solutions, *i.e.*, contracting directly with the flagging vendors, rather than imposing an unjust burden on NS without adequate compensation.

Furthermore, PennDOT's contractors already secure other subcontracted services, such as asphalt and painting, and flagging should be treated no differently. (Lange Rebuttal, at 6:6–7:2). Further highlighting PennDOT's inconsistency, Acitelli concurred that PennDOT expects NS to obtain highway flaggers for the maintenance and protection of vehicular traffic when NS is working on or over state roadways, yet objects to the admittedly analogous situation of PennDOT being required to obtain railroad flaggers when working at or over NS railroad property. (HT, at 185:15—186:21). PennDOT's double standard makes little sense in light of the success of NS's third-party flagging program with other highway entities and utilities (HT, at 178:12-20). The successful operation of NS's third-party flagging program elsewhere suggests that PennDOT's challenges are unique to its own insufficient planning practices (Craft Rebuttal, at 4:16–6:2). Even Sinick admitted that PennDOT should have responsibility “to arrange [for] flagging” (HT, at 228:14:24).

5. PennDOT's Claims of Delay Damages are Overstated and Only Affirm NS's Program is Efficient When Compared to Other Railroads Providing Their Own Flaggers.

PennDOT's claim of delay damages associated with flagging scheduling is overstated and lacks context, as delays often stem from unrelated factors. For example, PennDOT has acknowledged that delays and delay damages can occur because of other reasons that are unrelated to securing third-party flaggers, such as delays with other utilities relocating or protecting their facilities (HT, at 197:7–198:7). For instance, in one project cited by PennDOT, delays were due to an inability to obtain available track time, *i.e.*, when trains would not be using the tracks to enable PennDOT's construction work, which has nothing to do with securing flaggers (HT, at 112:2-114:10; PennDOT Ex. C).

During discovery, PennDOT provided data showing NS's third-party flagging program has caused minimal delay damages, compared to another railroad providing its own flaggers for PennDOT, where delay damage costs of \$947,000, \$3,350,000 and \$4,053,000 piled up on three different projects. Compared to the two minimal claims under NS's program for \$6,210 and \$43,500 over the same time frame, the numbers speak for themselves. This further demonstrates that NS's third-party flagging program is a more efficient, cost-effective alternative than NS providing its own flaggers as backup (HT, at 198:14–202:4; PennDOT Ex. C).

C. The PUC's Jurisdiction Remains Intact with Third-Party Flagging.

Pursuant to 66 Pa.C.S. § 2702, the PUC has exclusive jurisdiction over highway-rail crossings, including bridges where PennDOT roads pass over NS tracks. This power extends to prescribing the manner and conditions under which crossings shall be maintained, operated, and protected to prevent accidents and promote public safety. *Id.*, see also, *Millcreek Twp.*, 753 A.2d at 327.

I&E contends that third-party flagging undermines the PUC's oversight by placing non-utility contractors outside its jurisdiction. This concern, however, is unfounded. NS remains fully accountable for railroad safety on its property. While these are PennDOT contractors, NS remains able as the property owner to handle any safety violations that may occur on its property, whether by a flagging vendor employee, one of NS's own employees, or by one of PennDOT's other contractors or subcontractors (Lange Direct, at 7:13–8:10). Because the PUC has regulatory authority over NS, it can cause NS – or PennDOT – to address any problems with the flagging vendors, thereby maintaining PUC authority and oversight.

Any suggestion that the PUC's oversight is compromised ignores the structure of NS's program, which explicitly builds in accountability through an ability to conduct audits and spot checks and to require that the vendor determine and implement corrective actions. As the record makes clear, NS coordinates daily with flaggers on its system and conducts unannounced inspections to ensure strict compliance with safety protocols (Lange Direct, at 7:1–8:14). NS's vendor qualification process requires adherence to its safety rules and when issues arise, NS has removed non-compliant flaggers or vendors (*Id.*).

NS is not attempting to evade PUC jurisdiction but is instead implementing a more efficient system that prioritizes safety. Mandating that NS provide flaggers would not strengthen oversight; rather, it could strain NS's resources and risk compromising safety in its own core operations (Lange Rebuttal, 4:22-5-3; HT, at 105:2-21). Third-party flagging, therefore, supports safety and regulatory oversight.

While Acitelli noted the absence of a specific PUC order authorizing third-party flagging, this does not preclude its use. She admitted that no PUC order specifically allows PennDOT to utilize third-party construction contractors rather than its own employees (HT, at 183:12—185:6). Why should the rules be any different for NS?

NS's flagging program remains in compliance with existing railroad safety standards, as third-party flaggers are trained to the same level as NS's own employees who perform flagging as part of their jobs (Lange Direct, at 5:23-6:7). NS has the authority to remove any non-compliant third-party flagger, other PennDOT contractor or subcontractor, or NS employee from its property (Lange Direct, at 7:13–8:10), and the PUC has regulatory authority over NS. In addition, PennDOT has the right to stop any of its own contractors that create safety concerns or other non-

compliance, and the PUC also has regulatory authority over PennDOT. Therefore, I&E's concerns over the PUC's ability to deal with any flagging issues that may arise are unfounded.

IV. CONCLUSION

In conclusion, the Commission should require PennDOT to utilize NS's safe and effective third-party flagging program, which is consistent with industry practice for highway bridge projects on NS property. NS's program, successfully implemented across its 22-state network, complies with rigorous safety standards, ensures efficient coordination, and provides PennDOT with access to a scalable pool of qualified flaggers without imposing uncompensated costs or disrupting NS's core operations. PennDOT's proposal to shift flagging coordination and backup responsibilities to NS is unnecessary, inequitable and misaligned with standard industry practices. NS remains fully accountable for the safety of railroad operations on its property, and the Commission's Rail Safety Division has jurisdiction over NS, thus preserving the PUC's regulatory authority over flagging.

V. PROPOSED FINDINGS OF FACT

1. NS began allowing project sponsors and prime contractors to arrange for flagging from qualified third-party vendors for non-railroad projects in 2018, allowing them to have better control and planning for their flagging resources. (Lange Direct, at 4:19-22).

2. NS implemented its comprehensive third-party flagging program in 2022, requiring project sponsors like PennDOT to hire flaggers from NS-approved companies. (Lange Direct 5:18-22; HT 68:7-12).

3. NS has implemented this same third-party flagging program across each of the 22 states in which it operates, with no documented negative impact on safety, demonstrating its reliability and compliance with industry safety standards. (Lange Direct, at 5:18-22; HT, at 68:7-12; NS Exhibit 1, pp. 13-17).

4. NS does not have dedicated flagging employees, with flagging for NS activities performed by skilled workers trained in flagging as an ancillary aspect of their primary jobs for NS's own maintenance and construction activities. (Lange Direct 10:3-10).

5. If required as backup flaggers for PennDOT projects, NS skilled workers would need to be diverted from critical railroad maintenance tasks, at a higher cost to PennDOT than third-party flaggers. (Lange Direct, at 10:3-10; HT, at 104:6-105:21).

6. Appendix E-1 of NS's Public Improvement Projects Manual outlines stringent qualifications for third-party flagging vendors, including compliance with NS safety standards and protocols. (NS Exhibit 1; Lange Direct 5:19-6:7).

7. Approved vendors must have management with at least 15 years of Class I freight railroad experience and flaggers with up to 160 hours of instructor-led training and 80 hours of supervised field training, depending upon their prior experience. (NS Exhibit 1, pp. 13-17; HT, at 63:13-25; Lange Direct, at 15:19-6:7).

8. NS engages in pre-work briefings with third-party flaggers for every day they are working on a project and performs unannounced inspections to ensure compliance with its safety protocols. (Lange Direct, at 7:1-8:14).

9. In 2023, NS resolved a track time violation by RailPros in Montgomery County within a single day, demonstrating effective coordination and enforcement of safety standards with

third-party vendors, as acknowledged by PennDOT's witness Sarah Fenton. (Fenton Direct, at 11:9-15; HT, at 202:16-20).

10. NS currently has approved three vendors as qualified to provide flagging services on its property for other parties' projects: R&R Consulting, RailPros and NCRS. (Lange Direct, at 6:8-13; NS Exhibit 2).

11. RailPros, operating since 2001, employs 72 flaggers qualified to provide third-party flagging services on NS property and over 700 companywide, serving all 48 continental U.S. states. (HT, at 132:1-136:25; Ezell Rebuttal, at 2:7-3:10).

12. RailPros requires 90-180 days' lead time for projects during the busy season and has not failed to provide flaggers with adequate notice. (HT 132:1-136:25; 137:1-10; Ezell Rebuttal 2:7-3:10).

13. R&R, qualified to provide third-party flagging services on NS tracks since 2023, currently has 47 NS-qualified flaggers. (Craft Rebuttal, at 3:14-17; HT, at 117:18-118:6).

14. R&R has completed 18 PennDOT projects to date and typically requires a six-week lead time for large projects. (Craft Rebuttal, at 5:3-5 and 7:9-12).

15. R&R's training program, with a 92-95% success rate, is actively expanding its flagger pool, with at least six additional trainees as of May 2025, further increasing available flaggers. (HT, at 124:5-125:1; 143:12-144:4; Craft Rebuttal, at 8:12-16).

16. NCRS, launched in 2024, has grown from 5 to 15 flaggers. NCRS recently registered to do business in Pennsylvania, and requires a few weeks' notice for flagging jobs. (HT, at 66:8-20; 205:23-206:4; Arant Rebuttal, at 3:12-21; NS Cross Examination Exhibit 1).

17. RailPros, R&R, and NCRS collectively employ over 130 flaggers qualified to provide third-party flagging services on NS properties. (Ezell Rebuttal, at 2:7–3:10; Craft Rebuttal, at 2:7–5:5; Arant Rebuttal, at 3:12–21; HT, at 132:1-136:25).

18. NS is working toward approval of a fourth flagging vendor, “as their latest submission on April 17th addressed one of the primary obstacles which had previously hindered approval” (Lange Rebuttal, at 9:13-18).

19. PennDOT contractors’ responsibility for hiring and coordinating the work of third-party flagging companies is the same as their responsibility for hiring and coordinating the work of any other contractor or subcontractor necessary for a bridge or highway crossing project. (HT, at 231:1-232:25).

20. PennDOT’s coordination failures, such as providing insufficient notice and failing to contact all vendors, are the source of many delays concerning flagging for its projects. (HT, at 76:8–78:13; 80:12–81:2; 125:2–127:13; NS Exhibit 3).

21. In spite of knowing that bridges must be inspected on a regular schedule, at least every two years, a PennDOT contractor recently sent R&R a request for flaggers for 15 different bridge locations in central and western PA about a month before the first group of inspections was to be scheduled (Craft Rebuttal, at 7:15-18).

22. In the April 2025 SR 183 project, PennDOT’s contractor, Kinsley, contacted only one vendor, R&R, for flagging services related to a sediment breach issue and failed to convey the project’s urgency. PennDOT admitted it secured flaggers after NS’s intervention clarified the urgency, enabling R&R to provide weekend availability. (HT, at 125:2 – 127:13; NS Exhibit 3; Lange Rebuttal, at 3:13–4:8).

23. PennDOT's failure to contact all available vendors before involving NS demonstrates a lack of diligence in coordination, not a deficiency in NS's third-party flagging program. (HT, at 125:2–127:13; Lange Rebuttal, at 3:13–4:8).

24. While PennDOT cited scheduling delays, vendors like RailPros and R&R maintain sufficient capacity with adequate notice, as evidenced by national coverage and past project completion. (HT, at 132:1-136:25; 137:1-10; Ezell Rebuttal, at 2:7–3:10; Craft Rebuttal, at 2:7–5:5).

25. PennDOT's claim of delay damages related to flagging is undermined by its admission that delays can result from unrelated factors, such as with delays in other utilities relocating or protecting their facilities or being unable to schedule work time when trains will not be using the tracks. (HT, at 197:4-20; PennDOT Exhibit C).

26. NS's third-party vendor program has incurred minimal delay costs compared to other railroads providing their own flaggers, which reported delay damages of \$947,000, \$3,350,00 and \$4,053,000 on three projects. (HT, at 198:8–201:20; PennDOT Exhibit 3).

27. PennDOT's inconsistent double-standard is evidenced by the fact that NS hires and coordinates highway vehicular traffic maintenance flaggers for NS railroad bridge projects over PennDOT highways, while objecting to having the analogous responsibility to hire and coordinate railroad flaggers for PennDOT projects on NS property. (HT, at 186:2-22; 178:4-20).

28. PennDOT witness Sarah Fenton admitted that NS's third-party flagging program has not resulted in any secondary safety outcomes, such as accidents or injuries, on PennDOT projects. (HT, at 203:8-18).

29. Enhanced coordination by PennDOT, such as contracting dedicated flaggers and regular meetings or communication with vendors, could directly address any scheduling issues

without NS involvement. (Craft Rebuttal, at 4:16–6:2; Lange Direct at 9:24–10:2; HT, at 129:16–130:7).

30. R&R offered dedicated flaggers to PennDOT beginning in August 2024, but PennDOT has not advanced these discussions or acted on the offer. (Craft Rebuttal, at 4:6-10).

31. Other states and utilities successfully contract directly with NS-approved vendors, minimizing the possibility of delays. (Craft Rebuttal, at 4:6–10; Lange Direct, at 9:24–10:2; HT, at 129:16–130:7).

32. I&E’s witness, William Sinick, confirmed that PennDOT’s practice of contracting with consultants for bridge inspections is analogous to contracting with third-party flaggers, a solution PennDOT has not pursued to date. (HT, at 240:2-18).

33. Mandating NS to furnish flaggers as back up to the third-party flagging vendors would disincentivize PennDOT’s planning and coordination with vendors. (Lange Rebuttal, at 2:4–3:5).

34. Requiring NS to oversee flagging or provide backup flaggers would impose upon NS uncompensated costs, divert personnel from critical railroad operations and disrupt NS’s own safety-critical projects. (Lange Rebuttal, at 4:9–5:3, 13:15-14:20; HT, at 105:1–24; Lang Direct, at 10:19-26).

35. PennDOT’s scheduling delays and vendor issues result to a substantial degree from its lack of due diligence in coordinating with NS-approved vendors. (HT, at 76:8–78:13; 80:12–83:15; 125:2–127:13; NS Exhibit 3).

VI. PROPOSED CONCLUSIONS OF LAW

1. The PUC has jurisdiction over rail-highway crossing construction and maintenance under 66 Pa.C.S. § 2702 and authority to allocate cost responsibilities under 66 Pa.C.S. § 2704(a).

2. The PUC's allocation of responsibilities must be just and reasonable, considering factors such as the party building or maintaining the crossing, relative benefits, responsibility for deterioration, and benefits from reconstruction, without being bound by a fixed formula. *PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155, 1163 (Pa. 2002).

3. Under 66 Pa.C.S. §§ 2702 and 2704(a), the party receiving the primary benefits from a crossing project is a central consideration in allocating work and cost responsibilities. *See PECO Energy Co. v. Pa. PUC*, 791 A.2d 1155, 1163 (Pa. 2002); *Millcreek Twp. v. Pa. Public Utility Comm'n*, 753 A.2d 324, 327 (Pa. Cmwlth. 2000).

4. Assigning flagging responsibility to PennDOT is just and reasonable, as PennDOT is in the best position to schedule flaggers because it controls the execution of the project, and PennDOT derives the primary benefit from highway bridge projects.

5. Requiring NS to manage third-party flagging or provide backup flaggers is unjust and unreasonable under 66 Pa.C.S. § 2704(a), as it imposes uncompensated operational and financial burdens on NS.

6. The PUC's jurisdiction over flagging at rail-highway crossings under 66 Pa.C.S. § 2702 is preserved under NS's third-party vendor program, as NS maintains authority over the safety of railroad operations on its property, and the PUC has regulatory authority over NS to address any situations that may arise.

VII. PROPOSED ORDERING PARAGRAPHS

1. Pennsylvania Department of Transportation, at its sole cost and expense, furnish any flaggers as required for work around the operations of Norfolk Southern Railway Company, as applicable and chosen from a list of vendors qualified to work on Norfolk Southern Railway Company property, to protect the Pennsylvania Department of Transportation or its contractor during the time work is being performed across, above and adjacent to the railroad's tracks.

2. 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 any inspectors and/or engineering services that may be deemed necessary to protect the railroad's operations or facilities during the time the project is being constructed.

Respectfully submitted,

**COHEN SEGLIAS PALLAS
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By: 

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Date: June 25, 2025

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of the Department of	:	A-2022-3031613
Transportation of the Commonwealth of	:	
Pennsylvania for approval to alter the public	:	Consolidated with:
above grade crossing by the replacement of the	:	A-2024-3045709
existing bridge carrying State Route 0011 (West	:	A-2023-3043493
King Street) over track of Norfolk Southern	:	A-2024-3051983
Railway Company (DOT 592 122 M) in	:	A-2024-3052077
Shippensburg Borough and Southampton	:	
Township, Franklin County, and the allocation	:	
of costs incident thereto.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code § 1.54, via electronic mail addressed to the following:

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Benjamin C. Dunlap, Jr., Esquire

Date: June 25, 2025