



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

June 25, 2025

Via Electronic Filing

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

Re: Application of Department of Transportation of the Commonwealth of Pennsylvania 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

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

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-2023-3043493

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.

Docket No. A-2024-3051983

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.

Docket No. A-2024-3052077

I&E Main Brief

Matthew L. Homsher, Secretary
June 25, 2025
Page 2

Dear Secretary Homsher:

Enclosed please find the **Main Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,



Grant Rosul
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 318204
(717) 783-5243
grosul@pa.gov

GR/ac
Enclosures

cc: As per Certificate of Service
Michael L. Swindler, Deputy Chief Prosecutor, I&E-Enf (via email – mwindler@pa.gov)
William Sinick, P.E., C.B.S.I. (via email – wmsinick@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Department of Transportation :
of the Commonwealth of Pennsylvania 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 : Docket No. A-2024-3045709
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. :

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 : Docket No. A-2022-3031613
(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. :

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 : Docket No. A-2023-3043493
Southern Railway corporation, DOT Number :
265 971 V in the City of Scranton, :
Lackawanna County and the allocation of :
costs incident thereto. :

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, : Docket No. A-2024-3051983
above grade, the tracks of Norfolk Southern :
Railway Company in the City of Harrisburg, :
Dauphin County, and the allocation of costs :
incident thereto. :

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. :

Docket No. A-2024-3052077

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Grant Rosul
Prosecutor
PA Attorney ID No. 318204

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 783-5243
grosul@pa.gov

Dated: June 25, 2025

TABLE OF CONTENTS

I. PROCEDURAL HISTORY..... 1

II. STATEMENT OF THE CASE..... 4

III. BURDEN OF PROOF 4

IV. SUMMARY OF ARGUMENT 5

V. ARGUMENT..... 6

 A. LEGAL STANDARD..... 6

 B. THE PETITIONER HAS FAILED TO MEET ITS BURDEN AND THE
SECRETARIAL LETTERS APPROVING THE APPLICATIONS SHOULD
BE RETAINED AS WRITTEN 7

VI. CONCLUSION 18

TABLE OF AUTHORITIES

Cases

<i>Arthur Larson v. PECO Energy Company</i> , Docket No. C-2017-2615206 (Opinion and Order entered Sept. 19, 2019)	5
<i>Buffalo & Pittsburgh Railroad, Inc. v. Pa. P.U.C.</i> , 316 A.3d 651 (Table), 2024 WL 880030 at *4, (Pa. Cmwlth. Mar. 1, 2024)	7
<i>Energy Conservation Council of Pennsylvania v. Pa. P.U.C.</i> , 995 A.2d 465, 478 (Pa. Cmwlth. 2010).....	5
<i>Law v. Reading Co.</i> , 312 F.2d 841, 843 (3d Cir. 1963)	5, 10
<i>Lower Chichester Township v. Pa. P.U.C.</i> , 119 A.2d 674, 678 (Pa. Super. 1956)	5, 10
<i>Municipality of Monroeville v. Pa. P.U.C.</i> , 600 A.2d 655, 656-657 (Pa. Cmwlth. 1991)	7, 10
<i>N. Lebanon Twp. v. Pa. P.U.C.</i> , 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008).....	4, 7, 10
<i>Samuel J. Lansberry, Inc. v. Pa. P.U.C.</i> , 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990).....	4, 5
<i>Southeastern Pennsylvania Transportation Authority (SEPTA) v. Pa. P.U.C.</i> , 592 A.2d. 797 n.2 (Pa. Cmwlth. 1991).....	4
<i>Union Twp. Bd. of Supervisors v. Pa. P.U.C.</i> , Docket No. C-80112248 (entered June 5, 1981), 1981 WL 178807	5, 10

Regulations

52 Pa. Code § 41.14.....	6
--------------------------	---

Statutes

66 Pa.C.S. § 1103(a).....	6
66 Pa.C.S. § 1501	5, 9

66 Pa.C.S. § 1505 5, 10

66 Pa.C.S. § 2702(a)..... 10

66 Pa.C.S. § 2702(c)..... 10, 15

66 Pa.C.S. § 315 4

66 Pa.C.S. § 332(a)..... 4

Other Authorities

Application of Commonwealth Transport LLC, Docket No. A-2025-3053301
 (Order entered May 22, 2025)..... 6

I. PROCEDURAL HISTORY

On March 24, 2022, the Commonwealth of Pennsylvania, Department of Transportation (PennDOT) filed an application 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 592 122 M) in Shippensburg Borough, Franklin County, and the allocation of cost incident thereto, docketed at A-2022-3031613.

On January 24, 2024, PennDOT filed an application for approval to alter two 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, Beaver County, and the allocation of costs incident thereto, docketed at A-2024-3045709.

On May 28, 2024, Secretarial Letters were issued by the Pennsylvania Public Utility Commission (“Commission”) approving both Applications.

On June 17, 2024, Norfolk Southern Railway Company (Norfolk Southern) filed Petitions for Reconsideration from Staff Action in both docketed applications.

On June 28, 2024, the Commission’s Bureau of Investigation and Enforcement (I&E) filed an Answer in Opposition to the Petitions for Reconsideration from Staff Action in both docketed applications.

On July 8, 2024, PennDOT filed its Answer to the Petition for Reconsideration from Staff Action at Docket No. A-2024-3045709.

On July 10, 2024, PennDOT filed its Amended Answer to the Petition for Reconsideration from Staff Action at Docket No. A-2022- 3031613.

On July 24, 2024, Norfolk Southern filed Motions to Assign Proceeding to Office of Administrative Law Judge for Disposition for both dockets.

Pursuant to Vice Chair Kimberly Barrow’s September 26, 2024, Motion, an Opinion and Order was issued for Docket No. A-2022-3031613, ordering: 1) that Norfolk Southern’s Petition for Reconsideration from Staff Action is granted in part, 2) that Norfolk Southern’s Motion to Assign Proceeding to the Office of Administrative Law Judge (“OALJ”) for Disposition is granted, and 3) assigning this matter to the OALJ to conduct such proceedings as necessary to resolve the issue surrounding the assignment of responsibility in providing flagging and watchmen as required to protect the railroad tracks during the time the work is being performed across, above, and adjacent to the tracks.

By Notice dated November 1, 2024, a Telephonic Prehearing Conference was scheduled for December 13, 2024, and the matter at Docket No. A-2022-3031613 was assigned to ALJ Brady.

On November 7, 2024, an Opinion and Order was issued for Docket No. A-2024-3045709, ordering: 1) that Norfolk Southern’s Petition for Reconsideration from Staff Action is granted in part, 2) that Norfolk Southern’s Motion to Assign Proceeding to the OALJ for Disposition is granted, and 3) assigning this matter to the OALJ to conduct such proceedings as 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.

On November 15, 2024, a consolidated Prehearing Conference Order was filed for both dockets, confirming the December 13, 2024, Prehearing Conference and requiring a Memorandum on or before December 11, 2024.

By Notice dated November 19, 2024, a Telephonic Prehearing Conference was formally scheduled for December 13, 2024, and the matter at Docket No. A-2024-3045709 was assigned ALJ Brady.

On December 11, 2025, prehearing memoranda were filed by PennDOT, Norfolk

Southern, and I&E, and the prehearing conference was held as scheduled on December 13, 2024 in which counsel for PennDOT, Norfolk Southern, and I&E participated.

On January 9, 2025, an Order was issued memorializing certain procedural matters addressed at the prehearing conference including a litigation schedule.

On February 19, 2025, Prehearing Order No. 3 was issued granting PennDOT's request to adjust the litigation schedule in order to provide additional time for discovery.

On May 7, 2025, an evidentiary hearing was held as scheduled.

On May 15, 2025, an Interim Order was issued by ALJ Brady consolidating A-2022-3031613 and A-2024-3045709 with A-2023-3043493 and A-2024-3051983, as the parties and the issue to be adjudicated — Norfolk Southern's duty and the manner of furnishing flagging — are identical.

On June 16, 2025, the Parties submitted a proposed revised briefing schedule due to a delay in receiving the hearing transcript, with the Main Briefs due on June 25, 2025, and the Reply Briefs due on July 20, 2025. ALJ Brady accepted this modified briefing schedule.

On June 23, 2025, a Second Interim Order was issued consolidating the Application of Westmoreland County, Docket No. A-2024-3052077, with the previously consolidated proceedings at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983 at the request of Westmoreland County's counsel.

I&E now submits this Main Brief in accordance with the briefing schedule that was established at the conclusion of the evidentiary hearing and documented in the May 15, 2025, Interim Order¹ and subsequently modified as recognized in the June 23, 2024, Second Interim Order. Proposed Findings of Fact, proposed Conclusions of Law, together with legal citations, and proposed Ordering Paragraphs are submitted as Appendices A, B, and C, respectively.

¹ Interim Order dated May 15, 2025.

II. STATEMENT OF THE CASE

The four consolidated Application Docket matters (collectively, “the Applications”) are before the court on Norfolk Southern’s Petitions for Reconsideration of Staff Action (collectively, “the Petitions”). The Applications were filed by PennDOT to alter the rail-highway crossings² where state roads cross Norfolk Southern railway lines. The Commission granted the Applications and issued Secretarial Letters providing specific instruction to the parties, including that Norfolk Southern furnish and maintain flaggers on its railway.

The issue raised by the Petitions concerns the responsibility of Norfolk Southern to furnish and maintain flaggers on its tracks. Norfolk Southern asserts that its system for utilizing third-party flagging contractors should be permitted by the Commission. The position of I&E is that the language regarding flagging in the Secretarial Letters granting the Applications should remain unchanged and the Petitions should be denied.

III. BURDEN OF PROOF

The “proponent of a rule or order has the burden of proof.”³ As the party seeking affirmative relief from the Commission, Norfolk Southern carries the burden of proof. Additionally, “[i]n any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.”⁴

Accordingly, Norfolk Southern, as the public utility responsible for its rail lines, bears the burden of proving, by a preponderance of evidence, that it is entitled to the relief it seeks and that

² “A rail highway crossing is the intersection of a highway with a railroad's right-of-way upon which railroad tracks lie and can be at, above or below the grade of the railroad tracks.” *Southeastern Pennsylvania Transportation Authority (SEPTA) v. Pa. P.U.C.*, 592 A.2d 797 n.2 (Pa. Cmwlth. 1991).

³ 66 Pa.C.S. § 332(a); *See also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

⁴ 66 Pa.C.S. § 315.

said relief will leave its facilities in a state that is “adequate, efficient, safe, and reasonable” for the public.⁵ “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”⁶

IV. SUMMARY OF ARGUMENT

A “public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.”⁷ The Commission is empowered to “determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed....”⁸ Such service or facilities must be “reasonable, safe, adequate and sufficient” for the accommodation and convenience of the public, which includes not only the utility’s customers but members of the general public who may come into contact with the utility’s facilities.⁹

Norfolk Southern bears the burden to show that its requested relief provides adequate, safe, and efficient service and facilities for the general public. It has not met that burden. Moving the responsibility for furnishing and maintaining flaggers onto an applicant who wishes to alter its own facilities at a public rail-highway crossing does nothing to advance the convenience, accommodation, or safety of the railroad facilities for the public.

⁵ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Arthur Larson v. PECO Energy Company*, Docket No. C-2017-2615206 (Opinion and Order entered Sept. 19, 2019).

⁶ *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

⁷ 66 Pa.C.S. § 1501.

⁸ 66 Pa.C.S. § 1505.

⁹ *Union Twp. Bd. of Supervisors v. Pa. P.U.C.*, Docket No. C-80112248 (entered June 5, 1981); *Law v. Reading Co.*, 312 F.2d 841, 843 (3d Cir. 1963) (“The public for whose convenience, accommodation, safety, and protection the Public Utility Law is concerned does not consist solely of persons served by the utility, but also includes persons generally who may come into contact with the utility's facilities.” (quoting *Lower Chichester Township v. Pa. P.U.C.*, 119 A.2d 674, 678 (Pa. Super. 1956)).

Shifting responsibility for flagging on Norfolk Southern’s rail lines to PennDOT or other non-rail parties weakens Commission authority over the alteration of the rail-highway crossing, as the third-party flaggers are not subject to the Commission’s jurisdiction. Further, outsourcing the job of flagging during alteration of rail-highway crossings reduces the responsibility of the regulated rail utility to maintain adequate facilities to accommodate the travelling public.

The third-party flagging system, set up by Norfolk Southern despite Secretarial Letters directing otherwise, has already caused delays to PennDOT projects at public rail-highway crossings. Delays increase costs to road and bridge construction, demolition, and repair work at rail-highway crossings and inconveniences the public who utilize the rail-highway crossing. Utilizing third-party flaggers has increased the complexity of the rail-highway alteration projects and has resulted in miscommunication between the parties.

Additionally, the lack of adequate third-party contractors who can perform the flagging needed to complete projects at rail-highway crossings, which includes many necessary bridge inspections and bridge repair work, indicates that the Secretarial Letters issued pursuant to the Applications providing for Norfolk Southern to “furnish and maintain” flagging should be retained.

V. ARGUMENT

A. LEGAL STANDARD

In adjudicating a Petition for Reconsideration of Staff Action, the party seeking relief from the Commission bears the burden of proof. The standard that is applied depends on the specific action that is being requested by the petitioner.¹⁰

¹⁰ See e.g. *Application of Commonwealth Transport LLC*, Docket No. A-2025-3053301 (Order entered May 22, 2025) (Applying standards found in 66 Pa.C.S. § 1103(a) and 52 Pa. Code § 41.14 to a Petition for Reconsideration from Staff Action where petitioner was denied a Certificate of Public Convenience).

Here, the Petitions concern the Applications to alter a rail-highway crossing. The Commission is vested with the exclusive power to “determine the manner in which a highway-rail crossing may be ... altered.”¹¹ In so deciding, the Commission “is not limited to any fixed rule, but may take into consideration all relevant factors, with the only requirement being that the order is just and reasonable.”¹²

Because Norfolk Southern, as a public utility, bears the burden to demonstrate that its requested relief will render its facilities “adequate, efficient, safe, and reasonable” for the public, a “just and reasonable” outcome is one that will improve the safety, adequacy, and sufficiency of the utility’s facilities for the accommodation and convenience of the public.

B. THE PETITIONER HAS FAILED TO MEET ITS BURDEN AND THE SECRETARIAL LETTERS APPROVING THE APPLICATIONS SHOULD BE RETAINED AS WRITTEN

The Secretarial Letters approving the Applications provided the following regarding flagging:

10. Norfolk Southern Railway Company, at the sole cost and expense of the Pennsylvania Department of Transportation, 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.¹³

¹¹ *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655, 656-657 (Pa. Cmwlth. 1991).

¹² *Id.*; See also *N. Lebanon Twp.*, 962 A.2d at 1247 (citing *Monroeville*); *Buffalo & Pittsburgh Railroad, Inc. v. Pa. P.U.C.*, 316 A.3d 651 (Table), 2024 WL 880030 at *4, (Pa. Cmwlth. Mar. 1, 2024) (unreported) (most recent case citing *Monroeville* for same proposition).

¹³ Secretarial Letter Approving Application, *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 (hereinafter, “PennDOT W. King St. Shippensburg Application”). This language is identical to the Secretarial Letters issued in the other cases which have been consolidated here.

In contrast, Norfolk Southern is requesting, through the Petitions, that the Secretarial Letter be changed to state:

10. Norfolk Southern Railway Company, at the sole cost and expense of the Pennsylvania Department of Transportation, furnish construction engineering and inspection service as required as a result of the proposed work above and adjacent to its tracks.

11. Pennsylvania Department of Transportation, at its sole cost and expense, furnish and maintain qualified flagmen and watchmen as required for work around the operations of Norfolk Southern Railway Company to protect Pennsylvania Department of Transportation or its contractor during the time work is being performed across, above and adjacent to the railroad's tracks, which at the sole option of Norfolk Southern Railway Company may be through railroad forces or qualified contractors.¹⁴

This proposed change in the language of the Secretarial Letters would alter the responsibility of the parties regarding flagging. Specifically, the change would require PennDOT to “furnish and maintain” flaggers, shifting the responsibility away from Norfolk Southern to protect its rail lines during construction work at the rail-highway crossing and onto a third-party flagging contractor and PennDOT.

Additionally, the Petitions provide that it will be at the sole discretion of Norfolk Southern whether Norfolk Southern employees will serve as flagmen or a “qualified contractor” — a third-party flagger — performs the flagging. This gives control to Norfolk Southern — and not the Commission — to determine how flagging is performed at rail-highway crossings.

Flagging is the process of protecting workers or equipment near a railroad track from injury or property damage resulting from passing trains by either ensuring that persons and

¹⁴ Norfolk Southern, Petition for Reconsideration from Staff Action, p. 2, PennDOT W. King St. Shippensburg Application. This requested language is identical to that requested in the Petitions under the other cases consolidated here.

equipment stay off the track during the operation of the railroad or obtaining permission from the railroad dispatcher for such persons and equipment to enter the track to perform needed work during a specified period of time. The work of a flagger can involve monitoring train movement to identify windows of time for workers to access the track and coordinating access to the track with the railroad dispatcher.¹⁵

The flagger coordinates access to the track by receiving advance notification of an impending train from the railroad dispatcher via a communication device and then notifies all personnel onsite at the public crossing to clear the tracks and impacted area of all equipment and personnel until the train passes safely through.¹⁶ Flaggers are needed whenever there is active construction work at a rail-highway crossing that will involve workers or equipment coming within the railroad right-of-way.¹⁷

Norfolk Southern's principal argument is that due to changing business conditions, it no longer has the personnel to attend to the flagging needed by PennDOT, the Commonwealth's numerous municipalities, and the various utilities whose electric lines, drainage pipes, gas lines, and other facilities cross a railroad when work on those facilities is required.

However, the primary concern for the Commission is how the use of third-party flaggers affects other utilities and the general public at the rail-highway crossing. As a regulated utility in the Commonwealth, Norfolk Southern has a duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities."¹⁸ The Commission is empowered to "determine and

¹⁵ Direct Written Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 3, lines 7-19.

¹⁶ Direct Written Testimony of William M. Sinick, P.E., C.B.S.I., on behalf of the Bureau of Investigation and Enforcement, p. 2, lines 20-22, and p. 3, lines 1-3.

¹⁷ Direct Written Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p.5, lines 1-5.

¹⁸ 66 Pa.C.S. § 1501.

prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed....”¹⁹

Prior Commission orders, as well as the Third Circuit Court of Appeals and the Superior Court, have held that these services or facilities must be “reasonable, safe, adequate and sufficient” for the accommodation and convenience of the public, which includes not only the utility’s customers but members of the general public who may encounter the utility’s facilities.²⁰

The Commission has exclusive jurisdiction to determine the manner in which a rail-highway crossing is constructed, altered, relocated, suspended, or abolished.²¹ The Commission “may order the work of construction, relocation, alteration, **protection**, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned....”²² When so ordering the manner in which a rail-highway crossing is altered, the Commission “is not limited to any fixed rule, but may take into consideration all relevant factors, with the only requirement being that the order is just and reasonable.”²³

Norfolk Southern has not demonstrated that its third-party flagging system, which it would like the Commission to adopt via its Petitions, advances the safety, adequacy, sufficiency, and reasonableness of its service and facilities for the accommodation and convenience of the

¹⁹ 66 Pa.C.S. § 1505.

²⁰ *Union Twp. Bd. of Supervisors v. Pa. P.U.C.*, 1981 WL 178807, Docket No. C-80112248 (entered June 5, 1981); *Law v. Reading Co.*, 312 F.2d 841, 843 (3d Cir. 1963) (“The public for whose convenience, accommodation, safety, and protection the Public Utility Law is concerned does not consist solely of persons served by the utility, **but also includes persons generally who may come into contact with the utility's facilities.**” (quoting *Lower Chichester Township v. Pa. P.U.C.*, 119 A.2d 674, 678 (Pa. Super. 1956)) (emphasis added).

²¹ 66 Pa.C.S. § 2702(a).

²² 66 Pa.C.S. § 2702(c).

²³ *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655, 656-657 (Pa. Cmwlth. 1991) (applying the “just and reasonable” standard to the suspension of a crossing); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (applying the “just and reasonable” standard to the Commission’s decision to abolish a crossing).

public. In fact, Norfolk Southern's third-party flagging system appears to have created new points of friction.

These points of friction also have a cascading effect. It adds a layer of complexity to projects at rail-highway crossings. This, and a lack of available third-party flaggers, creates delays, which in turn inconveniences PennDOT as well as the travelling public. Such delays can also be costly, and there has been testimony from PennDOT that it has had to pay contractual delay damages on at least two occasions.²⁴ Because PennDOT's activities are primarily federal and state taxpayer funded, these delays also inconvenience the public by requiring them to pay more for the same public service. Additionally, delays can pose a threat to the safety of the public.²⁵

In addition to these consequences, amending the Secretarial Letters in accordance with Norfolk Southern's Petitions will shift responsibility for flagging on Norfolk Southern's tracks to PennDOT and a third-party flagging company over which the Commission may have no or limited authority. This alone is reason enough to reject the changes sought by Norfolk Southern, as the Commission would be surrendering part of its authority to oversee flagging at rail-highway crossings and delegating it to Norfolk Southern.

Under Norfolk Southern's proposal, it and the third-party flaggers will control access to flaggers and be able to therefore control any project at a rail-highway crossing with limited oversight by the Commission, without reference to the Commission's rules and regulations, and without access to the Commission's Office of Administrative Law Judge to serve as a forum to resolve disputes.²⁶

²⁴ *Supra*, n. 33 and 34.

²⁵ Testimony of Sarah Fenton, P.E., 5/7/25 Hearing Tr., p. 212, lines 13-25, p. 213, lines 1-25, p. 214, lines 1-3.

²⁶ Testimony of William Sinick, P.E., C.B.S.I., 5/7/25 Hearing Tr. p. 224, lines 1-5.

Absent Commission oversight of the flagging aspect of projects involving rail-highway crossings, disputes that arise during the project between the third-party flagger and PennDOT or its contractors would have no forum for resolution. PennDOT provided testimony that Norfolk Southern's primary contact for PennDOT projects has refused to get involved in any flagging disputes or delays between PennDOT and the third-party flaggers.²⁷

It is not merely PennDOT's perception that Norfolk Southern is reluctant to mediate any issue related to securing flagging. It is Norfolk Southern's own position that flagging is now the responsibility of those who wish to alter rail-highway crossings. In fact, this appears to be engrained into Norfolk Southern's operations, and it is expected as a matter of course that non-rail project sponsors will arrange their own flagging.²⁸ Norfolk Southern's witness, Mr. Lange, testified to his frustration with a perceived lack of effort on the part of PennDOT to be more proactive in securing flagging in relation to a project when two out of the three third-party flaggers approved by Norfolk Southern to work on its rail lines declined to provide flagging services to PennDOT's prime contractor.²⁹

If issues such as the ones described above have no mechanism for resolution, projects involving the alteration of rail-highway crossings can be delayed, as flagging is an aspect to rail-highway alteration projects that cannot be avoided or side-stepped. A flagger must be on site to control the access of workers and equipment on the railway during those portions of the project that require access to the track or its right-of-way.

²⁷ Direct Written Testimony of Michelle Acitelli, P.E., on behalf of PennDOT, p. 5, lines 7-10.

²⁸ Written Rebuttal Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 6, lines 9-22 ("NS should not be forced to intervene when PennDOT's contractor fails to secure the services of a third party flagger. PennDOT should hold their contractor accountable for securing subcontracted services like every other state DOT.").

²⁹ Testimony of Dustin K. Lange, P.E., 5/7/25 Hearing Tr. p. 81, lines 3-25, p. 82, lines 1-8, and p. 83, lines 2-15.

The inability to resolve problems that arise in the field between the third-party flagger and Norfolk Southern has already occurred. For instance, when PennDOT's contractor ran into a dead end scheduling a third-party flagger for a project in Allegheny County, the issue was escalated to PennDOT's Grade Crossing Manager, who subsequently contacted the Norfolk Southern engineer who is the primary contact for PennDOT. The Norfolk Southern engineer responded to PennDOT's request for assistance with the third-party flagging availability by stating that Norfolk Southern would not get involved because it did not control staffing for the third-party flagging companies.³⁰

PennDOT provided testimony that, when working with other class 1 railroads on projects involving alterations to rail-highway crossings, PennDOT and those railroads hold monthly staffing meetings relating to ongoing and upcoming flagging needs.³¹ In contrast, PennDOT relayed that Norfolk Southern has declined to become involved with scheduling flagging.³²

The delays caused by the inability to obtain flagging for the alteration of a rail-highway crossing can be costly. In one case, a PennDOT project had to be delayed by 191 days into the next construction season because of the unavailability of flaggers, resulting in a delay claim of approximately \$6,200.³³ In another case, a PennDOT project was delayed because of flagging unavailability, resulting in \$43,500 in delay claims against PennDOT by its contractor.³⁴

The utilization of third-party flaggers complicates communications between PennDOT and Norfolk Southern. In one PennDOT district, PennDOT's contractor must contact AECOM (Norfolk Southern's representative) who then determines which third-party flagger to use. Only

³⁰ Direct Written Testimony of Michelle Acitelli, P.E., on behalf of PennDOT, p. 3, lines 18-23 and p. 4, lines 1-10 and 13-20.

³¹ Id. p. 4, lines 3-10.

³² Id. p. 5, lines 7-10.

³³ PennDOT Exhibit C, p.1.

³⁴ Id.

after working with AECOM does PennDOT's contractor then communicate directly with the third-party flagger.³⁵

In another series of incidents relayed by PennDOT, Norfolk Southern's maintenance-of-way personnel requested that a third-party flagger stop work on any aspect of the project, without providing guidance to any other party as to why work could not be conducted within the railroad right-of-way at that time or when work could resume. The testimony proffered by PennDOT indicated that the work stoppages lasted more than four hours each time and that there were "several" occurrences of Norfolk Southern-directed work-stoppage with insufficient communication to the third-party flagger, PennDOT, or PennDOT's contractor.³⁶ Although this issue was rectified between the third-party flagger and Norfolk Southern, it did result in delays to the project and increase costs (although PennDOT did not incur official contractual delay costs claims).³⁷

PennDOT also provided testimony that the use of third-party flaggers has caused issues regarding invoicing on at least one occasion.³⁸ On that occasion, the third-party flagger threatened that it would not flag projects for PennDOT on Norfolk Southern's tracks again unless PennDOT paid an invoice without questioning the invoice.³⁹

The conclusion that can be drawn from the testimony of PennDOT's engineers' relaying their experience with third-party flagging is that using third-party flaggers adds a layer of complexity to coordinating flagging which would not exist if Norfolk Southern used its own employees for flagging.

³⁵ Direct Written Testimony of Heidi Mertz, on behalf of PennDOT, p. 3, lines 3-8.

³⁶ Direct Written Testimony of Sarah Fenton, on behalf of PennDOT, p. 8, lines 17-23 and p. 9.

³⁷ Testimony of Sarah Fenton, 5/7/25 Hearing Tr., p. 214, lines p. 12-20; *Id.* p. 212, lines 9-12 (stating that delays "absolutely" could add cost to projects).

³⁸ Direct Written Testimony of Mark Chappell, P.E., on behalf of PennDOT, p. 3, lines 2-7.

³⁹ PennDOT Exhibit. A.

Further, the third-party flagging system, as it currently exists, removes a layer of accountability — Commission oversight — from Norfolk Southern. If need be, PennDOT should be able to petition the Commission to resolve any disputes preventing it from carrying out the alteration of the rail-highway crossing. If Norfolk Southern’s response — that flagging is solely an issue between the third-party flagger and PennDOT — is acceptable, then the Commission would be powerless to craft a resolution and enforce it.

Because the Commission has exclusive authority over rail-highway crossings, any delays or other disputes that arise from the alteration of a rail-highway crossing should remain with the Commission. The Commission’s Rail Safety Division should retain jurisdiction to “order the work of ... protection [meaning flagging] ... of any crossing.”⁴⁰ Likewise, the Commission’s Bureau of Investigation and Enforcement should retain jurisdiction to enforce the Public Utility Code, if need be, to ensure that applicants who wish to alter rail-highway crossings are able to do so.

Were third-party flaggers permitted, at least under the proposed changes sought by Norfolk Southern in its Petitions, the Commission may not have authority to interpret contractual provisions or hear disputes over excessive charges by one non-jurisdictional contractor against another non-jurisdictional contractor — even though public money is likely involved in the project and the project physically takes place at a rail-highway crossing.

Because the use of third-party flagging is already occurring, this concern is not simply theoretical but currently observed. What has manifested since Norfolk Southern began requiring the use of the third-party flaggers is that the negotiating table has become tilted toward Norfolk Southern and the third-party flaggers. Under the existing Secretarial Letters approving the

⁴⁰ Quoting 66 Pa.C.S. § 2702(c).

Applications, PennDOT is responsible for the costs of flagging. The third-party flagging contractors only make money from flagging, and they have limited competition, and therefore have no incentive to keep costs down. For example, in a project in 2024 in Cumberland County, PennDOT “only needed a flagger for one day but had to pay a minimum charge for an entire week.”⁴¹

Even if the Commission retains jurisdiction over the third-party flaggers in a strictly legal sense, a party seeking to alter a rail-highway crossing by work on its facilities may be reluctant to bring the third-party flagger before the Commission in any cost allocation dispute. The third-party flagger can structure their contracts to extract maximum profit, and if they do not get what they are seeking, they can refuse to work with PennDOT, as one company has already threatened to do. The third-party flaggers typically operate in other states⁴² and are not dependent upon PennDOT, Pennsylvania municipalities, or Pennsylvania utilities for work. However, PennDOT, municipalities, and utilities will always need a flagger whenever work on their roads, bridges, or facilities crosses a railroad.

Setting aside all other concerns, the availability of third-party flaggers for all the rail-highway projects in the Commonwealth is simply insufficient. Norfolk Southern has qualified three companies to provide third-party flagging on its rails. One was formed in 2024, has only recently registered to do business in Pennsylvania, and has 15 employees.⁴³ Another has 72 employees who are qualified to work on Norfolk Southern tracks.⁴⁴ This third-party flagging company is currently scheduling flaggers 160 to 180 days out.⁴⁵

⁴¹ PennDOT Exhibit C, p. 2.

⁴² See e.g. Testimony of David Craft, 5/7/25 Hearing Tr. p. 129, lines 24-25 and p. 130, lines 1-2.

⁴³ Written Rebuttal Testimony of Donald Arant, P.E., on behalf of Norfolk Southern, p. 3, lines 14-21.

⁴⁴ Testimony of D.J. Ezell II, 5/7/25 Hearing Tr., p. 137, lines 1-5 and 19-24.

⁴⁵ Testimony of D.J. Ezell II, 5/7/25 Hearing Tr., p. 141, lines 16-24.

Another third-party flagging contractor has 47 employees, only one of whom resides in Pennsylvania.⁴⁶ This contractor requires that PennDOT or other parties using its flagging services pay for five days' worth of flagging time, even if the amount of time needed for flagging is shorter.⁴⁷ Although that contractor testified that it had a six-week lead time for providing flagging to projects, it had, at the time of the submission of its testimony, a freeze on scheduling new flagging commitments due to a backlog of work.⁴⁸ There are approximately 170 to 200 projects in the Commonwealth that require applications to alter a rail-highway crossing in any given year, with roughly 190 in 2024.⁴⁹

Lastly, as has been alluded to throughout this brief, Norfolk Southern has been requiring other utilities, municipalities, and PennDOT to use third-party flaggers since 2018. In fact, it has provided testimony stating as much.⁵⁰ However, this “act first, ask later” approach to changing its flagging policy should be disfavored by the Commission, especially given that flagging was specifically addressed in the Secretarial Letters approving the Applications.

At this point, the third-party flagging system implemented by Norfolk Southern (without Commission approval) has already resulted in miscommunications and scheduling delays and caused friction between applicants for alterations of rail-highway crossings and the railroad. There have also been a few instances of PennDOT incurring contractual delay costs resulting from the unavailability of third-party flaggers. Therefore, Norfolk Southern should continue be the party responsible to “furnish and maintain” flagging at the rail-highway crossing when alterations to the crossing by non-railroad entities, such as PennDOT, are needed.

⁴⁶ Testimony of David Craft, 5/7/25 Hearing Tr. p. 119, lines 13-22.

⁴⁷ Testimony of David Craft, 5/7/25 Hearing Tr. p. 121, lines 22-25.

⁴⁸ Written Rebuttal Testimony of David Craft, on behalf of Norfolk Southern, p. 7, lines 9-21.

⁴⁹ Testimony of William Sinick, P.E., C.B.S.I., 5/7/25 Hearing Tr., p. 241, lines 20-25 and p. 242, lines 2-6.

⁵⁰ Written Direct Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 5, lines 14-18; Testimony of Michelle Acitelli, 5/7/25 Hearing Tr., p. 179, line 25 and p. 180, lines 1-2.

VI. CONCLUSION

I&E respectfully requests that presiding ALJ Brady and the Commission deny the Petition for Reconsideration from Staff Action Norfolk Southern.

Respectfully submitted,



Grant Rosul
Prosecutor
PA Attorney ID No. 318204

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 783-5243
grosul@pa.gov

Dated: June 25, 2025

PROPOSED STATEMENT OF FACTS

1. On October 4, 2024, an Opinion and Order was issued for Docket No. A-2022-3031613, ordering: 1) that Norfolk Southern's Petition for Reconsideration from Staff Action granted in part, 2) that Norfolk Southern's Motion to Assign Proceeding to the Office of Administrative Law Judge (OALJ) for Disposition granted, and 3) assigning this matter to the OALJ to conduct such proceedings as 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.

2. On November 7, 2024, an Opinion and Order was issued for Docket No. A-2024-3045709, ordering: 1) that Norfolk Southern's Petition for Reconsideration from Staff Action granted in part, 2) that Norfolk Southern's Motion to Assign Proceeding to the OALJ for Disposition granted, and 3) assigning this matter to the OALJ to conduct such proceedings as 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.

3. On May 7, 2025, an evidentiary hearing was held in this matter as scheduled.

4. On May 15, 2025, an Interim Order was issued by ALJ Brady consolidating A-2022-3031613 and A-2024-3045709 with A-2023-3043493, and A-2024-3051983, as the parties and the issue to be adjudicated — Norfolk Southern's duty and the manner of furnishing flagging — are identical.

5. Flagging is the process of protecting workers or equipment near a railroad track from injury or property damage resulting from passing trains by either ensuring that persons and equipment stay off the track during the operation of the railroad or obtaining permission from the

railroad dispatcher for such persons and equipment to enter the track to perform needed work during a specified period of time. The work of a flagger can involve monitoring train movement to identify windows of time for workers to access the track and coordinating access to the track with the railroad dispatcher.¹

6. The flagger coordinates access to the track by receiving advance notification of an impending train from the railroad dispatcher via a communication device and then notifies all personnel onsite at the public crossing to clear the tracks and impacted area of all equipment and personnel until the train passes safely through.²

7. Flaggers are needed whenever there is active construction work at a rail-highway crossing that will involve workers or equipment coming within the railroad right-of-way.³

8. The unavailability of flagging can lead to delays on projects.

9. The inability to secure flagging when needed has already caused PennDOT to incur costs on its delayed projects, including contractual delay claims on at least two occasions.⁴

10. In one case, a project was delayed by 191 days into the next construction season because of the unavailability of flaggers, resulting in a delay claim of approximately \$6,200.⁵

11. In another instance, a PennDOT project incurred \$43,500 in delay claims against PennDOT by its contractor.⁶

12. Even when contractual delay damages are not caused by delays, the delays

¹ Direct Written Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 3, lines 7-19.

² Direct Written Testimony of William M. Sinick, P.E., C.B.S.I., on behalf of the Bureau of Investigation and Enforcement, p. 2, lines 20-22, and p. 3, lines 1-3.

³ Direct Written Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p.5, lines 1-5.

⁴ PennDOT Exhibit C, p.1.

⁵ *Id.*

⁶ *Id.*

themselves are inherently costly.⁷

13. Delays to projects on account of the unavailability of flagging can also pose safety concerns at the rail-highway crossing.⁸

14. Under Norfolk Southern's proposal to have PennDOT bear responsibility for flagging, Norfolk Southern and the third-party flaggers will control access to flaggers and be able to therefore control any project at a rail-highway crossing with limited oversight by the Commission, without reference to the Commission's rules and regulations, and without access to the Commission's Office of Administrative Law Judge to serve as a forum to resolve disputes.⁹

15. Norfolk Southern has refused to mediate, broker, or otherwise become involved in any flagging disputes or delays between PennDOT and the third-party flaggers.¹⁰

16. When working with other class 1 railroads on projects involving alterations to rail-highway crossings, PennDOT and those railroads hold monthly staffing meetings relating to ongoing and upcoming flagging needs.¹¹

17. However, Norfolk Southern has declined to become involved with scheduling flagging when working with PennDOT.¹²

18. The utilization of third-party flaggers complicates communications between PennDOT and Norfolk Southern. For instance, in one PennDOT district, PennDOT's contractor must contact AECOM (Norfolk Southern's representative) who then determines which third-

⁷ Testimony of Sarah Fenton, 5/7/25 Hearing Tr., p. 214, lines p. 12-20; *Id.* p. 212, lines 9-12 (stating that delays "absolutely" could add cost to projects).

⁸ Testimony of Sarah Fenton, P.E., 5/7/25 Hearing Tr., p. 212, lines 13-25, p. 213, lines 1-25, p. 214, lines 1-3.

⁹ Testimony of William Sinick, P.E., C.B.S.I., 5/7/25 Hearing Tr. p. 224, lines 1-5.

¹⁰ Direct Written Testimony of Michelle Acitelli, P.E., on behalf of PennDOT, p. 5, lines 7-10; Written Rebuttal Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 6, lines 9-22.

¹¹ Direct Written Testimony of Michelle Acitelli, P.E., on behalf of PennDOT, p. 4, lines 3-10.

¹² *Id.* p. 5, lines 7-10.

party flagger to use. Only after working with AECOM does PennDOT's contractor then communicate directly with the third-party flagger.¹³

19. On one occasion, a third-party flagger threatened to cease providing flagging services for PennDOT on account of PennDOT questioning an invoice.¹⁴

20. The three companies currently certified by Norfolk Southern to provide third-party flagging services on its tracks are not dependent upon work from PennDOT, Pennsylvania municipalities, or Pennsylvania utilities, as they provide their service in states besides Pennsylvania,¹⁵ and therefore have greater leverage over pricing and contract terms.

21. As an example, for a project at a rail-highway crossing in Cumberland County in 2024, PennDOT was required to pay for five days' worth of flagging services even though only one day of flagging was needed.¹⁶

22. Norfolk Southern has qualified three third-party flagging companies to provide flagging services on its railroads throughout its territory, including its rail lines outside of the Commonwealth.

23. One was formed in 2024, has only recently registered to do business in Pennsylvania, and has 15 employees.¹⁷

24. Another has 72 employees who are qualified to work on Norfolk Southern tracks and is currently scheduling flaggers 160 to 180 days out.¹⁸

25. The other has 47 employees, only one of whom resides in Pennsylvania, and

¹³ Direct Written Testimony of Heidi Mertz, on behalf of PennDOT, p. 3, lines 3-8.

¹⁴ Direct Written Testimony of Mark Chappell, P.E., on behalf of PennDOT, p. 3, lines 2-7; PennDOT Exhibit A.

¹⁵ Testimony of David Craft, 5/7/25 Hearing Tr. p. 129, lines 24-25 and p. 130, lines 1-2.

¹⁶ PennDOT Exhibit C, p. 2.

¹⁷ Written Rebuttal Testimony of Donald Arant, P.E., on behalf of Norfolk Southern, p. 3, lines 14-21.

¹⁸ Testimony of D.J. Ezell II, 5/7/25 Hearing Tr., p. 137, lines 1-5 and 19-24; *Id.* p. 141, lines 16-24.

requires that PennDOT or any other entity using its services pay for a minimum of five days' worth of flagging, even if the amount of time needed for flagging is shorter.¹⁹

26. Additionally, that third-party flagging provider had, at least at the time of the submission of its testimony, a freeze on scheduling new flagging commitments due to a backlog of work.²⁰

27. There are approximately 170 to 200 projects in the Commonwealth that require applications to alter a rail-highway crossing in any given year, with roughly 190 in 2024.²¹

28. In 2018, Norfolk Southern began requiring entities that perform work on their own facilities that cross Norfolk Southern's tracks to provide their own flagging through a third-party flagging contractor approved by Norfolk Southern.²²

¹⁹ Testimony of David Craft, 5/7/25 Hearing Tr. p. 121, lines 22-25.

²⁰ Written Rebuttal Testimony of David Craft, on behalf of Norfolk Southern, p. 7, lines 9-21.

²¹ Testimony of William Sinick, P.E., C.B.S.I., 5/7/25 Hearing Tr., p. 241, lines 20-25 and p. 242, lines 2-6.

²² Written Direct Testimony of Dustin K. Lange, P.E., on behalf of Norfolk Southern, p. 5, lines 14-18; Testimony of Michelle Acitelli, 5/7/25 Hearing Tr., p. 179, line 25 and p. 180, lines 1-2.

PROPOSED CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission (“Commission”) has jurisdiction over the subject matter of and the parties to this proceeding.¹

2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public.²

3. As the proponent of a rule or order, Norfolk Southern Railway Company bears the burden of proving, by a preponderance of evidence, that it is entitled to the relief sought in its Petitions for Reconsideration from Staff Action.³

4. “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”⁴

5. Additionally, “[i]n any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.”⁵

¹ 66 Pa.C.S. §§ 2702 and 2704.

² 66 Pa.C.S. §§ 2702 and 2704.

³ 66 Pa.C.S. § 332(a); *See also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *N. Lebanon Tp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

⁴ *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

⁵ 66 Pa.C.S. § 315

6. Accordingly, Norfolk Southern, as the public utility responsible for its rail lines, bears the burden of proving, by a preponderance of evidence, that it is entitled to the relief it seeks and that said relief will leave its facilities in a state that is “adequate, efficient, safe, and reasonable” for the public.⁶

7. The public includes not only the utility’s customers but members of the general public who may come into contact with the utility’s facilities.⁷

8. The Commission is vested with the exclusive power to “determine the manner in which a highway-rail crossing may be ... altered.”⁸

9. In so deciding, the Commission “is not limited to any fixed rule, but may take into consideration all relevant factors, with the only requirement being that the order is just and reasonable.”⁹

10. Therefore, a “just and reasonable” outcome is one that will improve the safety, adequacy, and sufficiency of the utility’s facilities for the accommodation and convenience of the public.

⁶ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Arthur Larson v. PECO Energy Company*, Docket No. C-2017-2615206 (Opinion and Order entered Sept. 19, 2019).

⁷ *Union Tp. Bd. of Supervisors v. Pa. P.U.C.*, Docket No. C-80112248 (entered June 5, 1981); *Law v. Reading Co.*, 312 F.2d 841, 843 (3d Cir. 1963) (“The public for whose convenience, accommodation, safety, and protection the Public Utility Law is concerned does not consist solely of persons served by the utility, but also includes persons generally who may come into contact with the utility’s facilities.” (quoting *Lower Chichester Township v. Pa. P.U.C.*, 119 A.2d 674, 678 (Pa. Super. 1956)).

⁸ *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655, 656-657 (Pa. Cmwlth. 1991).

⁹ *Id.*; See also *N. Lebanon Tp.*, 962 A.2d at 1247 (citing *Monroeville*); *Buffalo & Pittsburgh Railroad, Inc. v. Pa. P.U.C.*, 316 A.3d 651 (Table), 2024 WL 880030 at *4, (Pa. Cmwlth. Mar. 1, 2024) (unreported) (most recent case citing *Monroeville* for same proposition).

PROPOSED ORDERING PARAGRAPH

1. That the Petitions for Reconsideration from Staff Action filed by Norfolk Southern Railway Company at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, A-2024-3051983, and A-2024-3052077, are hereby DENIED.

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- : Docket No. A-2024-3052077
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. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, June 25, 2025, served a true copy of the foregoing **Main Brief** upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail Only

Honorable F. Joseph Brady
Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market St., 4th Floor, Suite 4063
Philadelphia, PA 19107
fbrady@pa.gov

Benjamin C. Dunlap, Jr., Esq.
Cohen Seglias Greenhall & Furman PC
240 N 3rd Street, 7th Floor
Harrisburg, PA 17101
bdunlap@cogenseglias.com
Counsel for Norfolk Southern

Leah Bobula, Esq.
Karen Cummings, Esq.
Pennsylvania Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
lbobula@pa.gov
kcummings@pa.gov



Grant Rosul
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 318204
(717) 783-5243
grosul@pa.gov