



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 25, 2025

Matthew L. Homsher, Secretary
Pennsylvania Public Utility Commission
400 North Street 2nd FL
Harrisburg, PA 17120

**RE: A-2022-3031613, A-2024-3045709, A-2023-3043493, A-2024-3051983, and A-2024-3052077
(Consolidated)**

Dear Secretary Homsher,

Enclosed, please find the Department's *Reply Brief* for filing in the above-captioned matters.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in black ink, appearing to read "LJB", with a long horizontal flourish extending to the right.

Leah Jo Bobula
Assistant Counsel

Cc: Parties of Record
Mark Chappell, PennDOT, Chief, Right-of-Way, Utilities, Grade Crossing Division
Sarah Fenton, PennDOT, Grade Crossing Engineer
Ahmed Lasloudji, District 8-0, Senior Civil Engineer
Heidi Mertz, P.E., District 8-0, Senior Civil Engineer Manager
Richard Reisinger, District 8-0, Assistant District Executive
Michele Acitelli, District 11-0, District Utility manager
Michael Grace, District 11-0, Senior Civil Engineer Supervisor
Douglas Seeley, District 11-0, Assistant District Executive Design
Jason Zang, P.E., District 11-0 District Executive

Application of Westmoreland County for approval : A-2024-3052077
to replace an above grade crossing by the :
Installation of a single-span girder bridge where :
West Broadway Avenue/Fourth Street crosses :
Norfolk Sothern 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. :

**REPLY BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT
OF TRANSPORTATION**

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Dated: July 25, 2025

History of the Proceeding

The Pennsylvania Department of Transportation (the Department or PennDOT) incorporates the procedural history as set forth in its Main Brief submitted on June 25, 2025, on pages 1-11. Main Briefs were also submitted by the Bureau of Investigation and Enforcement (I&E) and Norfolk Southern Railway Company (Norfolk Southern) on June 25, 2025. The Department now submits this Reply Brief.

Statement and Summary of the Case

The Department references and incorporates the Statement and Summary of the Case as set forth in its Main Brief submitted on June 25, 2025, on pages 10-11. The Department's Main Brief includes a substantial and credible discussion of the facts stemming from the record. Generally, the Department is in concurrence with I&E's arguments in their Main Brief.

Argument

A. Burden of Proof

Norfolk Southern filed Petitions for Reconsideration from Staff Action in each of the consolidated dockets in this case. As the proponent seeking relief from the Public Utility Commission (Commission), the Department agrees with I&E that Norfolk Southern bears the burden of proof in this case. I&E Main Brief, pg. 4; 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). This burden means Norfolk Southern must show, by a preponderance of the evidence, that "...the service and facilities involved are adequate, efficient, safe, and reasonable." I&E Main Brief, pg. 4; 66 Pa.C.S. § 315. "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." I&E

Main Brief, pg. 5; *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

The Department's Main Brief previously discussed how Norfolk Southern's request to change the language in the Secretarial Letter is not safe or reasonable. *See* 66 Pa.C.S. § 315. As discussed below, Norfolk Southern has also not shown that its requested relief is appropriate by a preponderance of the evidence because their request to change the language is not efficient and does not adequately provide for safe operations during highway grade crossing improvement projects. *Id.*

B. Norfolk Southern's requested shift in responsibility over the third-party flagging system is not efficient or adequate.

The language in the Secretarial Letters requires Norfolk Southern to furnish flaggers for projects across, above, and adjacent to Norfolk Southern tracks. Although the language in the Secretarial Letters did not change, Norfolk Southern stopped providing flaggers from their own pool of employees and began utilizing third-party flagging vendors. N.T. at 179-180; NS Statement 1, pg. 4, lines 18-20; NS Main Brief, pg. 3. Without Commission approval, Norfolk Southern ignored its responsibilities under the Secretarial Letters and instead forced the Department and the Department's contractors to furnish flaggers by requiring the Department and its contractors to communicate and schedule directly with the third-party flagging vendors. NS Statement 1, pg. 4, lines 13-22. Norfolk Southern also added requirements for hiring third-party flaggers in their manual that it expects the Department's contractors to follow, yet Norfolk Southern does not follow its own manual in instances it deems are a reasonable accommodation. NS Exhibit 1; N.T. at 63-65. These instances show Norfolk Southern continues to disregard the Secretarial Language by making unilateral decisions.

Norfolk Southern's new process for flagging on projects it does not initiate has not been effective and Norfolk Southern has demonstrated a lack of interest in assisting with highway grade crossing improvement projects as required by the Commission pursuant to law. Even after the Department has attempted to acquire flaggers unsuccessfully and reached out to Norfolk Southern for assistance, Norfolk Southern has purposefully failed to assist in at least one instance. Department Exhibit B. This failure of Norfolk Southern to meet its requirements under the Secretarial Letters shows that Norfolk Southern does not effectively furnish flaggers as required. Changing the language of the Secretarial Letter to Norfolk Southern's proposed language will only allow Norfolk Southern to further disclaim responsibility for flagging services that are necessary for safe operations during projects which will result in even less oversight and efficiency of the third-party flagging vendor scheduling and operations.

In addition to the long lead times discussed in the Department's Main Brief, the number of third-party flaggers is not adequate as Norfolk Southern suggests. Norfolk Southern testified that a benefit of utilizing third-party flagging is availability, yet the numbers show there is not adequate availability of third-party flaggers. N.T. at 107, lines 15-21. Norfolk Southern requires that any third-party flagger be qualified to perform the flagging on their lines. N.T. at 128, 137. As of April 30, 2025, there are only three qualified third-party flagging vendors able to provide flagging for Norfolk South lines. N.T. at 207, NS Exhibit 2. From those third-party flagging vendors, there are approximately 120-135 flaggers in total. N.T. at 68, line 6. Those flaggers are not solely utilized in Pennsylvania, but for Norfolk Southern's lines in 22 states. N.T. at 68, lines 10-12. This means the Department is in competition with 22 other states' departments of transportation, utilities, municipalities, and whomever else may need to utilize flagging when on or near Norfolk Southern's tracks. NS Statement 1, pg. 4, lines 23-25. This does not alleviate

the resource conflict as Norfolk Southern suggests, but rather, it creates additional competition within those 22 states Norfolk Southern operates in. NS Main Brief, pg. 8. Even Norfolk Southern's third-party flagging vendors, Railpros and R&R Consulting, agree that their training programs are in place because there is a demand for flagging. N.T. at 124-125; 143-144. The number of qualified flaggers and lack of availability show Norfolk Southern has not met its burden to show their proposed changes to the Secretarial Letters are efficient and adequate.

C. Norfolk Southern's argument regarding delay damages is not fully based on the record and should not be considered.

Norfolk Southern's comparison of delay damages is distorted and not supported by the record. NS Main Brief, pg. 18; pg. 24, Proposed Findings of Fact 26. Norfolk Southern argues that PennDOT's delay claims were overstated because delay claims incurred with another railroad, CSX, were higher when compared to the delay claims for Norfolk Southern projects. NS Main Brief, pg. 18; pg. 24, Proposed Findings of Fact 26. However, the amount of delay damages Norfolk Southern cites, are not part of the record nor listed on PennDOT Exhibit C, but were merely part of discovery. As this court's Proposed Report must be based on material issues of fact, law, or discretion presented on the record, this portion of Norfolk Southern's argument must not be considered. *See* 1 Pa. Code § 35.205.

Conclusion

For the above reasons and based on the general equities given the nature of the parties and the public benefit generally resulting from the grade crossing projects, the Commission should require Norfolk Southern to continue to have primary and ultimate responsibility for furnishing flaggers for public highway grade crossing projects. The Department respectfully requests that the Commission determine that Norfolk Southern has not met their burden and it is just and reasonable to continue to use the language already present in each Secretarial Letter that

is the subject of these proceedings and deny Norfolk Southern's respective petitions for reconsideration of staff action.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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Dated: July 25, 2025

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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 the allocation of costs incident thereto. : **A-2022-3031613**
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Application of Pennsylvania Department of Transportation for approval to alter two (2) Public crossings by the rehabilitation of the existing bridge where State Route 0018 (Seventh Avenue) crosses, above grade, one (1) track of Norfolk Southern Railway Company (DOT 503 768 L) located in New Brighton Borough and two (2) tracks of CSX Transportation, Inc. (DOT 584 878 T) located in the City of Beaver Falls, all in Beaver County, and the allocation of costs incident thereto. : **A-2024-3045709**
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Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to replace the existing bridge where West Lackawanna Avenue crosses above the track(s) of Norfolk Southern Railway corporation, DOT Number 265 971 V in the City of Scranton, Lackawanna County and the allocation of costs incident thereto. : **A-2023-3043493**
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Application of the Pennsylvania Department of Transportation for approval to alter the public crossing (DOT# 592 188 M) by the removal and replacement of the existing bridge where Seventeenth Street crosses, above grade, the tracks of Norfolk Southern Railway Company in the City of Harrisburg, Dauphin County, and the allocation of costs incident thereto. : **A-2024-3051983**
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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. :

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code §1.54, by electronic mail and first-class mail to the addresses stated below:

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Respectfully submitted,

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