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July 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 Reply 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.	:	

**REPLY BRIEF OF NORFOLK SOUTHERN RAILWAY COMPANY**

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July 25, 2025

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## **I. INTRODUCTION**

Norfolk Southern Railway Company (“NS”) respectfully submits its Reply Brief in response to the Main Briefs filed by the Pennsylvania Department of Transportation (“PennDOT”) and the Commission’s Bureau of Investigation and Enforcement (“I&E”). The issue before the Pennsylvania Public Utility Commission (“Commission”) remains whether NS must manage flagging services and/or provide backup flaggers for PennDOT’s highway bridge projects located on NS property, even though NS has already implemented a comprehensive third-party flagging process.

NS has satisfied its burden under 66 Pa.C.S. § 1501 to demonstrate, by a preponderance of the evidence, that its third-party flagging process is adequate, safe, efficient and reasonable. This process represents a market-driven solution that enhances safety, reduces costs for taxpayers, minimizes operational delays, effectively utilizes labor, and equitably addresses the needs of both PennDOT and NS, benefits that far outweigh the prior inefficient in-house flagging system, which no longer works for either party.

PennDOT’s and I&E’s arguments rest largely on outdated assumptions, misrepresentations of NS’s third-party flagging process, largely unsubstantiated concerns about delays and completely inapplicable arguments on jurisdiction. Critically, the briefs filed by PennDOT and I&E implicitly concede several key points.

First, neither party disputes that NS’s process meets safety standards, the primary concern of the Commission in any crossing matter. Nevertheless, PennDOT insists that NS coordinate all flagging services for its projects and provide backup flaggers when third-party flaggers are not available within its desired timeframes. I&E takes an even more regressive position, suggesting NS should return to supplying all flaggers through its own workforce. Neither party explains *how* reverting back to an archaic model (that no longer worked), would be more efficient, cost-effective

or beneficial to the parties compared to NS's current process. The Commission must balance the needs of both PennDOT and NS under current circumstances, not just fall back on how flagging was handled in the past. If history alone justified policy, then innovative solutions to address current needs and circumstances would never be adopted.

Second, the evidence cited by PennDOT and I&E in support of their claim of "delays" is both isolated and anecdotal. These assertions of widespread delays that negatively affect PennDOT projects are inaccurate and unsupported by the record, with some directly contradicted by the evidence presented. The limited and insufficient evidence offered by PennDOT cannot justify dismantling an entire flagging system that was specifically designed to address the very concerns PennDOT and I&E now raise. The Commission should reject these isolated examples and instead rely on the full and comprehensive record, which supports by a preponderance of the evidence, the reasonableness and effectiveness of NS's third-party flagging process.

Third, I&E's jurisdictional concerns are wholly inaccurate. I&E disregards the fact that NS, as the regulated utility, remains accountable for the safety of flagging operations on its property. NS ensures safety compliance through limiting the third party flaggers to only those that meet stringent requirements, as well as through regular audits, requiring pre-work briefings, and maintaining the authority to remove non-compliant vendors or flaggers. NS dispatching and other personnel must and do work with the third-party flaggers to carry out their important safety function. If I&E sees a safety issue with a flagger, or anyone else working on a jurisdictional crossing project, it can address that issue with NS as the property owner and public utility under its jurisdiction. These mechanisms preserve the Commission's oversight function and reinforce NS's ongoing regulatory obligations.

The Commission should adopt NS's proposed ordering language, which strikes the proper balance between regulatory oversight, safety and efficiency. NS's third-party flagging process maximizes the availability of flaggers, frees up skilled NS employees for core railroad functions and aligns with its practice in all of the 22 states through which it traverses.

**II. NS HAS MET THE BURDEN OF PROOF THAT ITS THIRD-PARTY FLAGGING PROCESS IS SAFE, EFFECTIVE AND SERVES ALL INTERESTED PARTIES**

I&E explains that a “public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” 66 Pa.C.S. § 1501 (“Section 1501”). Section 1501 also grants public utilities the authority to set their own operational guidelines, meaning NS may create “reasonable rules and regulations governing the conditions under which it shall be required to render service.” *Id.*

I&E asserts that NS bears the burden of proving that its third-party flagging system is “adequate, efficient, safe, and reasonable.” I&E Brief at Appendix B, ¶ 5 (*quoting* 66 Pa.C.S. 315). I&E further argues that NS must prove its burden by “a preponderance of the evidence,” which it defines in this context as “only that one party has presented evidence that is more convincing, *by even the smallest amount*, than the evidence presented by the other party.” *Id.*, ¶¶ 4-5 (*quoting Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010) (emphasis added)).

NS does not dispute this standard. As described in its Main Brief and further demonstrated herein, NS has met its burden. The record evidence establishes that pursuant to its authority granted under Section 1501, NS's third-party flagging process is adequate, safe and efficient and better serves both PennDOT and NS compared to outdated in-house flagging.

**A. The Third-Party Flagging Process Is Reasonable and Serves the Interests of All Parties**

NS's third-party flagging process provides real benefits to all parties. It permits PennDOT to obtain trained flaggers at lower costs through qualified third-party vendors, thereby reducing the overall burden on taxpayers (NS Main Brief at 12–13). While PennDOT states it will “assume the costs” of flagging (PennDOT Brief at 12), PennDOT overlooks the differential cost of pulling more highly skilled railroad employees from their regular work to provide backup flagging services.

Furthermore, PennDOT's statement on its assumption of costs ignores the real-world operational inefficiencies and administrative burdens PennDOT's preferred model would impose. The control of when and where flaggers are needed, and enabling the switching of flaggers between PennDOT projects as circumstances warrant is much more efficiently handled by PennDOT and its primary contractors, rather than using NS as a middleman. Furthermore, PennDOT proposes to reimburse only the on-site time of NS flaggers, without addressing the substantial ancillary costs to NS associated with scheduling, mobilizing, supervising and reallocating labor among PennDOT – or other priority – projects. Neither PennDOT nor I&E acknowledge these collateral costs to NS operations, which would likely require the hiring of additional personnel to manage. Lange Rebuttal, 13:22-14:2.

Even assuming, *arguendo*, that the Commission deems PennDOT's and I&E's position as reasonable (which they are not), that should not invalidate NS's reasonable third-party flagging process. I&E's reliance on *Energy Conservation* only bolsters NS's third-party process as being just and reasonable. There, the challengers contested a utility's application for route siting of HV power lines, arguing that an alternative route (the route the challengers wanted) should be used instead. The court determined that the “mere existence of an alternative route [did] not invalidate

the utility's judgment [and] the information [the utility provided] goes toward establishing the reasonableness of the utility's route selection." *See Energy Conservation*, 995 A.2d at 478-479.

So too here. NS has presented substantial evidence that its third-party flagging program is safe, efficient and reasonable (and in fact superior to the status quo in 2018). It has satisfied its burden by a preponderance of the evidence. The mere fact that other approaches (*i.e.*, what I&E and PennDOT propose) may be plausible does not negate the reasonableness of NS's third-party flagging process.

In the same vein, I&E and PennDOT overlook a fundamental fact on this issue. Section 1501 requires NS to provide safe and reasonable service and facilities. In fact, I&E cites Section 1501 several times throughout its Main Brief, but conspicuously focuses only on that first sentence of the section, while ignoring the rest of the section that explains how NS is allowed to fulfill that requirement. Section 1501 expressly allows utilities to adopt reasonable rules and regulations governing how its service is provided. *See* Section 1501 (“[E]very public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.”).

Section 1501 does not preclude NS from implementing efficient, modern systems that achieve those goals through the use of qualified third-party vendors. NS's third-party flagging process is a reasonable process for PennDOT to secure flagging for its bridge projects on NS property and is within its Section 1501 authority. Indeed, I&E simply cannot have it both ways, it cannot demand that NS provide adequate, efficient, safe and reasonable services under Section 1501, while refusing to accept that NS has authority granted by that very same Section to implement its own reasonable procedures to realize those goals.

In addition, all parties agree on the applicability of the equitable standard that the Commission's Order must be "just and reasonable." See PennDOT Main Brief at 12 and I&E Main Brief at 7, citing, *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 642 A.2d 541,543 (Pa. Cmwlth. 1994) and *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655, 656-657 (Pa. Cmwlth. 1991), respectively. Equity requires a balancing of competing interests. See *e.g.*, *North Lebanon Twp. v. Pa. Public Utility Comm'n*, 962 A.2d 1237 (Pa. Cmwlth. 2008), where public safety and convenience interests asserted by the parties were balanced by the Commission in reaching its decision whether to abolish a crossing.

Both PennDOT and I&E cite the public safety implications of PennDOT highway projects in support of their arguments that NS provide flaggers, whether as a backup when third party flaggers are not available or otherwise. However, both PennDOT and I&E studiously ignore that NS does not have employees who perform only flagging work, and so more highly skilled workers such as railroad foremen, tamper operators and welders who perform flagging only as an ancillary part of their other work would need to be pulled for PennDOT projects, at the expense of the essential railroad infrastructure maintenance obligations for which they were hired. While PennDOT and I&E characterize NS's objections as primarily commercial concerns (see PennDOT Main Brief at 15, I&E Main Brief at 9), these railroad workers perform safety critical tasks such as track maintenance to prevent derailments. HT, at 104:6-105:21. Pulling skilled workers from NS's own safety related projects is not equitable and is contrary to public safety.

To address these competing interests, NS has come up with a process to help entities like PennDOT maintain access to qualified flaggers through third-party vendors. This process is equitable in that it makes flaggers available for PennDOT projects and does not pull NS employees

from their own safety-related projects. Thus, this use of third-party flagging vendors is the most “just and reasonable” resolution.

**B. The Secretarial Letter Language at Issue Does Not Reflect Modern Practice.**

Both I&E and PennDOT argue that NS should continue to be responsible for coordinating flagging for PennDOT crossing projects because that is how it was done in the past. PennDOT argues that the Commission “historically has assigned responsibility for furnishing flaggers to the railroads and should continue to do so to ensure public safety.” PennDOT Brief at 13. Yet PennDOT concedes that NS’s process complies with applicable safety standards and has not resulted in any safety incidents. HT, at 203:8-18. Third party flaggers have been used on NS tracks since 2018, and the requirement for PennDOT to arrange its own flagging was initiated in 2022. Lange Direct, 4:18-22, Lange Rebuttal, 5:4-9.

I&E witness William Sinick likewise testified that Rail Safety “has no issue with trained third-party vendors/contractors performing railroad flagging.” I&E Statement 1, at 2:14-17. Neither PennDOT nor I&E offer any explanation for *why* public safety would be better protected by NS furnishing its own flaggers rather than by third-party vendors qualified and approved by NS. It simply cannot when the safety standards apply to all workers on NS lines performing a similar task regardless of employer.

Similarly, PennDOT further mischaracterizes NS’s third-party process as a “unilateral” shift, ignoring NS’s needs and authority under Section 1501 to adapt to new realities within the rail industry. PennDOT Brief at 14. Under PennDOT’s view, innovation in the rail industry would be impossible.

While speaking in regard to challenged innovations in telephone service, Pennsylvania’s appellate courts long ago determined that “[g]ood faith is to be presumed on the part of [a regulated company’s] officers and the Commission may not substitute its judgment for theirs when the

choice is between two systems which provide reasonable and adequate service without discrimination,” adding that “the State’s powers [to regulate] are not without limitation.” *Pa. Telephone Corp. v. Pa. P.U.C.*, 33 A.2d 316, 325 (Pa. Super. 1943), *citing*, *State of Missouri v. Public Service Comm’n of Missouri*, 262 U.S. 276, 43 S.Ct. 544 (1922).

A rule or a method is not unreasonable merely because it results in some inconvenience to a class entitled to service. And there can be no question as to the right of a telephone company doing a general public business to adopt new methods of furnishing service to its patrons if they are reasonable.

*Id.*

Prior to 2018, neither PennDOT nor NS benefitted from the status quo as NS’s internal model was inefficient for both parties. As explained in NS’s Main Brief, both NS and PennDOT had constant delays when NS directly supplied flaggers, leaving the status quo inadequate. *See* NS Main Brief at 7-8; Lange Direct, at 4:13-22; HT, at 104:6–105:21. In response, NS developed and rolled out a comprehensive third-party flagging process precisely to fix these issues.

Even worse, I&E suggests that NS abandon its current third-party flagging program and revert back to the *very* system that NS has spent years improving and modernizing. I&E Brief at 12-14. While the Commission certainly has the authority to make and enforce orders to ensure the safety of work at public rail-highway crossings, respectfully it does not have the authority to micromanage who performs the work, as I&E suggests at pages 6 and 10 of its Main Brief. Both NS and PennDOT are responsible to ensure that Commission orders are carried out in a competent, safe and timely manner, whether the work is performed by its own forces or by third-party contractors. PennDOT never sought or received specific authorization to utilize third-party contractors and subcontractors for its crossing construction projects, nor did it need to do so. The same should apply to the use of third-party contractors for flagging services.

Any reversion to old practices ignores the progress made over the past several years to develop and refine a better solution to accommodate flagging needs under current circumstances. While in hindsight the transition to a new process might have been handled better and more smoothly, NS made the change in the best interest of both itself and PennDOT, as well as the multiple other state DOTs and utilities that need to do work along NS right of way. I&E's position is simply archaic and out of touch with the reality of the rail industry today.

**C. PennDOT's Position on NS's Expertise Misses the Point.**

Ironically, PennDOT insists NS has "expertise" in flagging operations while simultaneously asserting that NS's own comprehensive process should be overridden for its preferred process. PennDOT Brief at 16. Such a position is contradictory.

PennDOT argues that it lacks the "railroad experience" to arrange for flaggers. Yet at the same time, it requires NS to arrange for roadway flaggers to control vehicular traffic when NS has a project on a state highway, subject to PennDOT approval. HT, at 186:2-21. NS similarly lacks "highway experience."

Nevertheless, PennDOT's position misses the point. NS's third-party program retains NS expertise by requiring third-party flaggers to meet NS's training and qualification standards while NS exercises oversight and quality control through audits and reviews. Lange Direct, at 7:1-12. The flaggers must work with NS dispatching and other personnel, and NS retains the ability to address any safety issue by anyone operating on its property, whether contracted by PennDOT or itself. Lange Direct, 3:13-24, 7:13-8:10.

In making this "expertise" argument, PennDOT is confusing the oversight of safety on NS property with the coordination of flagging services. Arranging for flagging is simply an administrative function. It is a function that PennDOT's contractors are well equipped to handle, as they do with any other subcontractor needed for a construction project.

Put simply, expertise in setting and enforcing standards does not mean NS must provide administrative services for scheduling purposes or physically furnish flaggers. By enabling private vendors to meet its strict criteria, NS ensures public safety while leveraging the free market. PennDOT already permits its contractors to hire subcontractors for construction and engineering work. It offers no compelling reason why flagging should be treated differently.

**D. Availability Concerns Are Unfounded and Contradicted by the Record.**

PennDOT and I&E argue that PennDOT’s “options for obtaining qualified flagging vendors for its grade crossing projects are very limited and that, as a result, [it] has incurred more delay damages than (*sic*) it did when [NS] was directly providing flagging services.” PennDOT Brief at 14-15. I&E relies on the same one line plucked from the record where PennDOT simply set forth a self-serving general statement that “there were less delays when [NS] directly provid[ed] flagging services.” (*citing* Mertz Direct at 3:21-23.). PennDOT, however, presented no comparative evidence to support that statement. Simply relying on this one sentence repeatedly does not justify overhauling an *entire* system created to solve this very problem.

Indeed, to the contrary, PennDOT’s own records refute that statement. PennDOT Exhibit B, addressing purported flagging delays, does not cover any pre-2018 timeframe, covering only work during the period of 2021-2025. Furthermore, of the 21 projects listed on PennDOT Exhibit B, 5 had no delays listed, on 2 projects flaggers were not available “timely on short notice” and the contractor “[w]orked on other items in contract until flaggers were available”; on another project the paving limits were shortened to avoid the need for flaggers; another involved the inability to obtain track time, not flaggers; another delay involved a “stream restriction,” not flaggers; and 2 delays were due to the bankruptcy of Railroad Consultants.

As testified by NS witness Dustin Lange, pre-2018 delays were more frequent and more severe, affecting both PennDOT’s and NS’s own projects. The current program has improved

efficiency and reduced delays across the board. Lange Direct, at 3:13-23; HT, at 104:6 - 105:21. Notably, the delay damages of \$49,710.20 caused by flagger unavailability during the 2023-2024 time period cited by PennDOT on its Exhibit C were minimal compared to the \$3.35 million in delay damages incurred by PennDOT on just three projects with another railroad that still relies on in-house flaggers. See NS Brief at 17. Both PennDOT and I&E ignore this telling measure of comparing the efficiency of third-party flagging versus in-house flagging.

PennDOT's criticisms are further undercut by its own incomplete and superficial efforts to engage with available vendors. A prime example is the use of flaggers for bridge inspections. PennDOT is aware of the requirement to inspect bridges on a regular basis, usually every two years. Yet recently a PennDOT contractor called a flagging vendor to schedule the inspections of 15 different bridge locations in central and western Pennsylvania about a month before the first group of inspections was scheduled. Even I&E's witness William Sinick pointed out that PennDOT contracts with engineering companies to ensure their availability for these regular bridge inspections, and he thought PennDOT could do the same for flaggers needed for the inspections. See NS Main Brief at 10. NS should not be responsible to scramble and shift labor to fill PennDOT's flagging needs based on such dilatory conduct.

Another example is that PennDOT could coordinate projects with short flagging needs in the same area to both ensure availability and save costs. R&R Consulting, for instance, allows states, municipalities and utilities to contract for flagging services on as little as a week's basis. NS Main Brief at 15. NS should not be forced into the role of a *de facto* project manager, performing these coordination services for PennDOT.

The record shows that the vendors are continuing to train new employees and scale in size. HT, at 124:5-125:1; 143:12-144:4; Craft Rebuttal, at 8:12-16. North Carolina Railroad Services

recently entered the Pennsylvania market, and NS is working with a fourth vendor to become qualified. NS Main Brief at 9-10. The use of these third-party vendors will cause them to continue to expand and increase their availability, while on the other hand NS has no employees who perform only flagging services.

Nothing presented justifies imposing a sweeping obligation on NS to resume an outdated flagging model. The Commission should reject the isolated, anecdotal examples presented by PennDOT and I&E and instead rely on the comprehensive record, which supports the reasonableness of NS's third-party flagging program.

**E. I&E's Focus on Jurisdictional Concerns are Unsupported.**

Both I&E and PennDOT argue that transferring the responsibility to secure flagging services to PennDOT undermines the Commission's jurisdiction over rail-highway crossings because vendors are not directly regulated. I&E Brief at 16; PennDOT Brief at 19-20. This purported concern is a complete red herring.

In so stating, I&E and PennDOT once again confuse safety oversight with the coordination of flagging services. NS, as the regulated utility, retains responsibility for flagging safety on its property, and the Commission continues to exercise jurisdiction over NS in regard to flagging for these rail-highway crossing projects. See NS Main Brief at 17-18. NS has implemented stringent safety requirements for third party flaggers, conducts audits, mandates pre-work briefings, and retains the right to address safety issues from any non-compliant flagger, just like it retains the right to address safety issues of any third party or employee working on its right of way. These controls ensure that the Commission's regulatory authority remains intact, regardless of whether flagging is performed by NS employees or third-party contractors (Lange Direct, at 7:13-8:10).

PennDOT laments what recourse it would have if flaggers are not available for a particular project at a particular time if NS is not required to provide backup flaggers. See PennDOT Main

Brief at 19-23. Tellingly, PennDOT would put the onus on NS to provide these flaggers, without reference to any reasonable obligation of PennDOT to exercise appropriate due diligence in lining up flaggers for the project or concern whether this would pull workers from NS's own safety-related projects, such as track maintenance or NS's own bridge construction. The Commission does not insert itself in any other PennDOT or NS relationship with their employees or contractors, and it is respectfully asserted that it should not do so here.

Furthermore, I&E asserts that if third-party contractors are utilized, "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." I&E Main Brief at 15. Besides the fact that the flagging contractor would be PennDOT's contractor or subcontractor, and thus subject to PennDOT's control and financial limitations, the PUC has no authority to determine contractual disputes. As such, the PUC already has no authority to determine contractual disputes involving a regulated utility, which are properly determined in a court of law. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 8-9, 383 A.2d 791, 794-795 (1977) ("[T]he statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility, . . . [with the Legislature] leaving traditional judicial remedies, such as damages in the hands of the courts.") Thus, this jurisdictional argument is inapplicable.

### **III. CONCLUSION**

Based upon the foregoing, NS has met its burden of demonstrating that its third-party flagging process is “adequate, efficient, safe, and reasonable,” per the requirements of 66 Pa.C.S. § 1501. Thus, the Commission should adopt NS’s Proposed Ordering Paragraphs in its Main Brief regarding flagging responsibilities.

Respectfully submitted,

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*Counsel for Norfolk Southern Railway Company*

Date: July 25, 2025

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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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: July 25, 2025