

**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 :  
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. :

Application of Pennsylvania Department of : A-2024-3045709  
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. :

Application of the Department of : A-2023-3043493  
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. :

Application of the Pennsylvania Department : A-2024-3051983  
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. :

Application of Westmoreland County for : A-2024-3052077  
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. :

**RECOMMENDED DECISION**

Before  
F. Joseph Brady  
Administrative Law Judge

## INTRODUCTION

This Decision recommends that Norfolk Southern Railway Company (Norfolk Southern or Petitioner) remain responsible for furnishing and maintaining flagmen and watchmen as required to protect its operations during the time work is being performed across, above and adjacent to its tracks as originally ordered by the Pennsylvania Public Utility Commission (Commission) in the above-captioned proceedings.

## HISTORY OF THE PROCEEDING

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 No. 592 122 M) in Shippensburg Borough, Franklin County, and the allocation of cost incident thereto, which was docketed at A-2022-3031613.

On January 24, 2024, PennDOT filed an Application 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, which was docketed at A-2024-3045709.

On May 28, 2024, Secretarial Letters (*May 2024 Secretarial Letters*) were issued by the Commission approving both Applications.

On June 17, 2024, Norfolk Southern filed Petitions for Reconsideration from Staff Action (Petitions) to both dockets/applications.

On June 28, 2024, the Commission's Bureau of Investigation and Enforcement (I&E) filed an Answer in Opposition to the Petitions in both dockets/applications.

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

On July 10, 2024, PennDOT filed its Amended Answer to the Petition for Reconsideration from Staff Action for 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.

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 was granted in part, 2) that Norfolk Southern's Motion to Assign Proceeding to the Office of Administrative Law Judge (OALJ) for Disposition was granted, and 3) that this matter be assigned 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 me.

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 was granted in part, 2) that Norfolk Southern's Motion to Assign Proceeding to the OALJ for Disposition was granted, and 3) that the matter be assigned 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 issued for both dockets, confirming the December 13, 2024, Prehearing Conference and requiring a Prehearing Memorandum on or before December 11, 2024.

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

On December 11, 2024, Prehearing Memoranda were filed by PennDOT, Norfolk Southern, and I&E.

The prehearing conference was held as scheduled on December 13, 2024. Counsel for PennDOT, Norfolk Southern, and I&E participated.

On January 9, 2025, Prehearing Order No. 2 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 April 8, 2025, Norfolk Southern served the written direct testimony of Dustin K. Lange, PE (Norfolk Southern Statement 1); PennDOT served the written direct testimonies of Mark Chappell (PennDOT Statement 1), Heidi Mertz (PennDOT Statement 2), Michele Acitelli (PennDOT Statement 3), and Sarah Fenton (PennDOT Statement 4); and I&E served the written direct testimony of William Sinick (I&E Statement 1).

On April 29, 2025, Norfolk Southern served the written rebuttal testimonies of David Arant (Norfolk Southern Statement 2), David Craft (Norfolk Southern Statement 3), Dennis Julian Ezell, II (Norfolk Southern Statement 4), and Dustin K. Lange (Norfolk Southern Statement 5).

On May 7, 2025, an evidentiary hearing was held as scheduled. Benjamin Dunlap, Esquire, appeared on behalf of Norfolk Southern and presented the testimony of Dustin Lange, David Craft, and Dennis Ezell, II. Norfolk Southern offered one exhibit and moved to have the written testimonies of Dustin K. Lange, David Arant, David Craft, and Dennis Ezell, II admitted into the record. Leah Bobula, Esquire and Karen Cummings, Esquire, appeared on behalf of PennDOT and presented the testimony of Mark Chappell, Heidi Mertz, Michele Acitelli, and Sarah Fentonard. PennDOT offered three exhibits and moved to have all of their witnesses' written testimonies admitted into the record. Grant Rosul, Esquire, appeared on behalf of I&E and presented the testimony of William Sinick. I&E offered one exhibit and moved to have the written testimony of William Sinick admitted into the record. As there were no objections, all Parties' written testimony and exhibits were admitted into the record during the hearing.

The question of Norfolk Southern's duty and the manner of furnishing flagging is at issue in several proceedings currently pending before the Commission:

1. *Application of the Department of Transportation of the Commonwealth of Pennsylvania for approval to replace the public above-grade crossing by the construction of new bridge where State Route 0011 (West King Street) crosses over the single track of Norfolk Southern Railroad (DOT No. 592 122 M) in Shippensburg Borough, Franklin County, and the allocation of cost incident thereto, Docket No. A-2022-3031613 (Opinion and Order entered Oct. 4, 2024) (Norfolk Southern October 2024);*
2. *Application of Pennsylvania Department of Transportation for approval to alter two (2) public crossings by the rehabilitation of the existing bridge where State Route 0018 (Seventh avenue) crosses, above grade, one (1) track of Norfolk Southern Railway Company (DOT 503 768 L) located in New Brighton Borough and two(2) tracks of CSX Transportation, Inc. (DOT 584 878 T) located in the City of Beaver Falls, all in Beaver County, and the allocation of costs incident thereto, Docket No. A-2024-3045709 (Order entered Nov. 7, 2024) (Norfolk Southern November 2024);*
3. *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 (Opinion and Order entered Feb. 6, 2025) (Norfolk Southern February 2025); and*
4. *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 (Opinion and Order entered Apr. 24, 2025) (Norfolk Southern April 2025).*

In referring these matters to the OALJ, the Commission advised that it may be prudent, if it is determined that the same facts and legal issues are involved, to consolidate the matters pursuant to 52 Pa. Code § 5.81 (a). Accordingly, at the outset of the May 7, 2025, hearing, I proposed the consolidation of these matters. The parties did not object.

After the hearing was adjourned, the parties agreed to deadlines for the filing of Main Briefs and Reply Briefs.

On May 15, 2025, an Interim Order was issued: (1) consolidating the proceedings at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983; (2) establishing a deadline of June 20, 2025, for Main Briefs; and (3) establishing a deadline of June 30, 2025, for Reply Briefs.

On May 28, 2025, the Commission received a copy of the transcript from the evidentiary hearing held on May 7, 2025.

On June 16, 2025, Counsel for Norfolk Southern advised that the transcript for the hearing on May 7, 2025, was delayed. Accordingly, the Parties proposed a revised briefing schedule that was acceptable.

On June 17, 2025, Counsel for Westmoreland County requested that the Application of Westmoreland County, Docket No. A-2024-3052077, be consolidated with the previously consolidated proceedings at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983. Norfolk Southern, PennDOT, and I&E did not object to the consolidation request.

On June 23, 2025, a Second Interim Order was issued: (1) consolidating the proceeding at 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; (2) establishing a new deadline of June 25, 2025 for Main Briefs; and (3) establishing a new deadline of July 25, 2025 for Reply Briefs.

On June 25, 2025, Main Briefs were filed by Norfolk Southern, PennDOT, and I&E.

On July 25, 2025, Reply Briefs were filed by Norfolk Southern, PennDOT, and I&E, and the record closed.

#### FINDINGS OF FACT

1. The Petitioner is Norfolk Southern, a jurisdictional railroad company operating in the Commonwealth of Pennsylvania.

2. Norfolk Southern is the owner and operator of the line of railroad at the crossings at issue in this proceeding. NS Statement 1, p. 2.

3. The Applicant is the Pennsylvania Department of Transportation.

4. 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. NS Statement 1, p. 3.

5. 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. NS Statement 1, p. 3.

6. Norfolk Southern began allowing project sponsors and prime contractors to arrange for flagging from qualified third-party vendors for non-railroad projects in 2018. NS Statement 1, p. 4.

7. Norfolk Southern implemented its comprehensive third-party flagging program in 2022, requiring project sponsors like PennDOT to hire flaggers from Norfolk Southern-approved companies. NS Statement 1, p. 5.

8. In regard to flagging, the Secretarial Letters include the following pertinent language:

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.

*See* Secretarial Letters at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983.

9. Norfolk Southern proposes the pertinent language of the Secretarial Letters be changed to:

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.

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.

*See* Petitions at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983.

10. Every other railroad company operating in Pennsylvania is subject to the requirement to furnish and maintain flaggers to protect its operations during the time work is being performed across, above and adjacent to its tracks. *See* Secretarial Letters for Docket Nos. A-2020-3022688, A-2024-3049938, A-2024-3051881, A-2024-3050077, A-2024-3049330, A-2024-3047937, A-2023-3045019, A-2023-3041189, A-2023-3040722, A-2023-3037699, A-2022-3031928, A-2022-3031878, A-2022-3031362, and A-2022-3030281; PennDOT Statement 4, p. 6.

11. Since 2018, PennDOT projects involving the Genesee and Wyoming Railroads have utilized third-party flagging vendor services similar to how Norfolk Southern uses them. PennDOT Statement 4, p. 6.

12. Genesee and Wyoming Railroads perform the coordination between PennDOT's contractors and the third-party flagging vendors during projects. PennDOT Statement 4, p. 6.

## DISCUSSION

This case arises from four applications<sup>1</sup> filed by PennDOT to alter public rail crossings involving Norfolk Southern railroad tracks. In each Application, the Commission issued Secretarial Letters approving the proposed alterations and directing Norfolk Southern to furnish and maintain flagging and watchmen services on its railway. Specifically, the Secretarial Letters directed, *inter alia*, that:

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.

*See* Secretarial Letters at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983.

In response, Norfolk Southern filed a Petition for Reconsideration from Staff Action for each Application, requesting that these ordering paragraphs be amended to require PennDOT to be responsible for arranging the flagging. Specifically, Norfolk Southern proposed the language of the Secretarial Letters be changed to:

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.

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<sup>1</sup> On June 23, 2025, a Second Interim Order was issued consolidating the Application of Westmoreland County, Docket No. A-2024-3052077, with PennDOT's four applications at the request of Westmoreland County's counsel who asserted that the issues are identical, and Westmoreland County's position is the same as PennDOT's position.

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.

*See* Petitions at Docket Nos. A-2022-3031613, A-2024-3045709, A-2023-3043493, and A-2024-3051983.

In support of its Petitions, Norfolk Southern makes three main arguments. First, Norfolk Southern argues that its third-party flagging system is safe and consistent with industry practice. NS Main Brief, p. 7. Second, Norfolk Southern argues that PennDOT is best positioned to coordinate flagging services and Norfolk Southern backup is unwarranted. *Id.*, pp. 7-17. Third, Norfolk Southern argues that the Commission's jurisdiction remains intact with third-party flagging. *Id.*, p. 18.

The position of PennDOT is that this proposed change does nothing to increase the number of flaggers available yet shifts the responsibility of obtaining flaggers to PennDOT even though Norfolk Southern still maintains oversight and control of the flaggers and flagging vendors qualified to work on or around its tracks. PennDOT Main Brief, pp. 10-11. PennDOT also argues that this does not serve the public interest because it does not place Norfolk Southern as the primary party responsible for the oversight of flagging. *Id.* Additionally, PennDOT argues that it does not provide any options when no flaggers are available from the qualified flagging vendor list or from Norfolk Southern railroad forces. *Id.* I&E supports PennDOT's position and further asserts that Norfolk Southern should remain responsible for providing flaggers so that the Commission maintains its jurisdiction to enforce rail safety regulations. I&E Main Brief,

pp. 5-6, 8. Thus, PennDOT and I&E assert that the language regarding flagging in the Secretarial Letters granting the Applications should remain unchanged.

### **Burden of Proof**

As the party seeking affirmative relief from the Commission, Norfolk Southern bears the burden of proving by substantial evidence that it is entitled to the requested relief. 66 Pa.C.S. § 332(a). This must be shown by a preponderance of the evidence, that is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Rev.*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dep't. of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

### **Legal Standard**

The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition, or alteration of railroad facilities that cross any other public utility or a public highway either at grade or above or below grade as well as 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. 66 Pa.C.S. §§ 502, 2702, 2704(a). This includes the authority to order necessary improvements or maintenance to

ensure the safety of the traveling public. *SEPTA v. Pa. Pub. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991).

While not limited to any fixed rule, the Commission has consistently relied upon a variety of relevant factors for the allocation of costs, repair and replacement, and maintenance responsibilities, including: 1) the party that originally built the crossing; 2) prior ownership and maintenance responsibilities; 3) the relative benefit conferred on each party with the construction of the crossing; 4) whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; and 5) the relative benefit that each party will receive from the repair, replacement, or removal of the crossing. *N. Lebanon Twp. v. Pa. Pub. Util. Comm'n*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

Despite often using these factors, the Commission is not required to set forth an analysis of these five factors as courts have held such a practice would ultimately infringe upon the discretionary aspect of the Commission's decisions. *Millcreek Twp. v. Pa. Pub. Util. Comm'n*, 753 A.2d 324 (Pa. Cmwlth. 2000) (quoting *AT&T v. Pa. Pub. Util. Comm'n*, 737 A.2d 201 (Pa. 1999)). These five factors are "neither mandatory nor exclusive of other considerations." *Norfolk & S. Ry. v. Pub. Util. Comm'n*, 971 A.2d 545, 551 (Pa. Cmwlth. 2009) (citing *AT&T*, 737 A.2d at 209). In addition to these above-listed factors, the Commission can also consider ownership of the tracks and the general equities of a case in reaching its decision. *SEPTA v. Pa. Pub. Util. Comm'n*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, \*5-\*6 (Opinion and Order entered Apr. 9, 1981). Though many of the factors are not at issue in the instant cases, the fundamental requirement is that the Commission's order be just and reasonable. *Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 642 A.2d 541, 543 (Pa. Cmwlth. 1994).

In addition, a “public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” 66 Pa.C.S. § 1501. 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...” 66 Pa.C.S. § 1505. 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. *Union Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm’n*, Docket No. C-80112248 (Order 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 Twp. v. Pa. Pub. Util. Comm’n*, 119 A.2d 674, 678 (Pa. Super. 1956))).

## **Disposition**

In this case, there was considerable time, testimony, and argument regarding the most efficient and cost-effective way of hiring flaggers. Both sides presented testimony regarding the current practice of hiring third-party flaggers and the accompanying issues that they have encountered as a result. However, I find that ultimately these issues are not essential to deciding this case. Rather, the key issue is whether alleviating Norfolk Southern from the responsibility of furnishing flaggers would be critically detrimental to the Commission’s jurisdictional authority over alterations to public rail crossings. I find that it would.

In response to this issue, Norfolk Southern contends that concerns about Commission jurisdiction over third-party flaggers are unfounded because Norfolk Southern remains fully accountable for all railroad safety on its property. NS Main Brief,

p. 18. However, the qualification and operation of the flaggers at the rail crossing is not the issue. The issue is whether there is an enforceable mechanism to ensure flaggers are present at the rail crossings.

Here, all Parties are in agreement that in “order to prevent accidents and promote the safety of the public,” flaggers are necessary when work is being performed on rail 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 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. 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.

Thus, in order to exercise its duty to prevent accidents and promote the safety of the public while work is being performed on rail crossings, the Commission must be able to ensure there are flaggers present. The current language in the Secretarial Letters achieves this result. Under Norfolk Southern’s proposal, third-party vendors will control access to flaggers and essentially remove this crucial ability from the Commission.

The Commission’s jurisdiction to regulate the alteration of railroad facilities that cross a public highway in order to prevent accidents and promote the safety of the public necessarily gives the Commission jurisdiction over railroads and over PennDOT as the owner of the highway. *See* 66 Pa.C.S. §§ 502, 2702, 2704(a). Contractors and employees are not “concerned parties” within the meaning of the Public Utility Code; therefore, the Commission’s direct jurisdiction does not extend to railroad flaggers, railroad employees, PennDOT employees, or PennDOT construction contractors. *See* 66 Pa.C.S. § 2704(a).

If the Commission were to grant Norfolk Southern's petitions, it would effectively leave no one responsible for the completion of rail crossing projects should PennDOT be unable to retain qualified flaggers or the flagging companies refuse to do business with PennDOT. The Commission cannot enforce its orders on railroad flagging companies because the Commission only has authority and jurisdiction over the railroads, highway entities, and utilities. If there is a public safety issue caused by lack of flaggers for a project, neither the Commission nor PennDOT would have any recourse to immediately address the issue with the third-party flagging vendor under the Public Utility Code. In fact, even if PennDOT decided to pursue an action against Norfolk Southern with the Commission, Norfolk Southern would be able to point to their proposed language that now alleviates them of all responsibility for furnishing and maintaining flaggers. This is an untenable result. Consequently, Norfolk Southern must ultimately remain responsible for the furnishing and maintaining of flaggers as they are subject to the Commission's authority and jurisdiction. *See* 66 Pa.C.S. §§ 502, 2702, 2704(a). The current language in the Secretarial Letters maintains this result.

Finally, it should be noted that there is nothing in the current language of the Secretarial Letters that prohibits Norfolk Southern from utilizing third-party flaggers to satisfy its obligations. Likewise, there is no prohibition against Norfolk Southern and PennDOT coordinating the hiring of third-party flaggers. The Secretarial Letters only require that Norfolk Southern not abdicate its ultimate responsibility to furnish and maintain flaggers. In fact, currently, every other railroad is subject to the requirement to furnish flaggers. *See* Secretarial Letters for Docket Nos. A-2020-3022688, A-2024-3049938, A-2024-3051881, A-2024-3050077, A-2024-3049330, A-2024-3047937, A-2023-3045019, A-2023-3041189, A-2023-3040722, A-2023-3037699, A-2022-3031928, A-2022-3031878, A-2022-3031362, and A-2022-3030281; PennDOT Statement 4, p. 6.

In regard to coordination, PennDOT points out that since 2018, PennDOT projects involving the Genesee and Wyoming Railroads have utilized third-party flagging vendor services similar to how Norfolk Southern uses them. PennDOT Statement 4, p. 6. However, PennDOT states the Genesee and Wyoming Railroads still perform the coordination between PennDOT's contractors and the third-party flagging vendors. *Id.*

Based on the forgoing, it is recommended that Norfolk Southern remain responsible for furnishing and maintaining flagmen and watchmen as required to protect its operations during the time work is being performed across, above and adjacent to its tracks as originally ordered by the Commission in the above-captioned proceedings.

#### CONCLUSION OF LAW

1. Norfolk Southern, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa.C.S. § 332(a).

2. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

3. The Commission's decision must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

4. The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition, or alteration of railroad facilities that cross any other public utility or a public highway either at grade or above or below grade as well as 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. 66 Pa.C.S. §§ 502, 2702, 2704(a).

5. The Commission is authorized to order necessary improvements or maintenance to ensure the safety of the traveling public. *SEPTA v. Pa. Pub. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991).

6. While not limited to any fixed rule, the Commission has consistently relied upon a variety of relevant factors for the allocation of costs, repair and replacement, and maintenance responsibilities, including: 1) the party that originally built the crossing; 2) prior ownership and maintenance responsibilities; 3) the relative benefit conferred on each party with the construction of the crossing; 4) whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; and 5) the relative benefit that each party will receive from the repair, replacement, or removal of the crossing. *N. Lebanon Twp. v. Pa. Pub. Util. Comm'n*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm'n*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

7. Despite often using these factors, the Commission is not required to set forth an analysis of these five factors as courts have held such a practice would ultimately infringe upon the discretionary aspect of the Commission's decisions. *Millcreek Twp. v. Pa. Pub. Util. Comm'n*, 753 A.2d 324 (Pa. Cmwlth. 2000) (quoting *AT&T v. Pa. Pub. Util. Comm'n*, 737 A.2d 201 (Pa. 1999)).

8. These five factors are “neither mandatory nor exclusive of other considerations.” *Norfolk & S. Ry. v. Pub. Util. Comm’n*, 971 A.2d 545, 551 (Pa. Cmwlth. 2009) (citing *AT&T, v. Pa. Pub. Util. Comm’n*, 737 A.2d 201, 209 (Pa. 1999)).

9. In addition to these above-listed factors, the Commission can also consider ownership of the tracks and the general equities of a case in reaching its decision. *SEPTA v. Pa. Pub. Util. Comm’n*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, \*5-\*6 (Opinion and Order entered Apr. 9, 1981).

10. The fundamental requirement is that the Commission’s order be just and reasonable. *Greene Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm’n*, 642 A.2d 541, 543 (Pa. Cmwlth. 1994).

11. A “public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” 66 Pa.C.S. § 1501.

12. 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...” 66 Pa.C.S. § 1505.

13. 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. *Union Twp. Bd. of Supervisors v. Pa. Pub. Util. Comm’n*, Docket No. C-80112248 (Order 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 Twp. v. Pa. Pub. Util. Comm’n*, 119 A.2d 674, 678 (Pa. Super. 1956)).

14. The Commission’s jurisdiction to regulate the alteration of railroad facilities that cross a public highway in order to prevent accidents and promote the safety of the public necessarily gives the Commission jurisdiction over railroads and over PennDOT as the owner of the highway. 66 Pa.C.S. §§ 502, 2702, 2704(a).

15. Contractors and employees are not “concerned parties” within the meaning of the Public Utility Code, therefore, the Commission’s direct jurisdiction does not extend to railroad flaggers, railroad employees, PennDOT employees, or PennDOT construction contractors. 66 Pa.C.S. § 2704(a).

16. The current language in the Secretarial Letters making Norfolk Southern responsible for the furnishing and maintaining of flaggers is necessary to maintain the Commission’s authority and jurisdiction over rail crossings. 66 Pa.C.S. §§ 502, 2702, 2704(a).

### ORDER

THEREFORE,

IT IS RECOMMENDED:

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, be denied.

2. That for Docket No. A-2022-3031613, paragraph 10 of the Secretarial Letter dated May 28, 2024, shall remain as follows:

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.

3. That for Docket No. A-2024-3045709, paragraph 8 of the Secretarial Letter dated May 28, 2024, shall remain as follows:

8. Norfolk Southern Railway Company and CSX Transportation, Inc., at Pennsylvania Department of Transportation's sole cost and expense, furnish all material and perform all work relating to its facilities which may be required as incidental to the performance of the proposed work and furnish any watchmen, flagmen, inspectors and/or engineering services that may be deemed necessary to protect the railroad's operations or facilities during the time the facilities are being altered.

4. That for Docket No. A-2023-3043493, paragraph 13 of the Secretarial Letter November 22, 2024, shall remain as follows:

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

