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October 31, 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 Norfolk Southern Railway Company's Exception to Recommended Decision 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.	:	

**EXCEPTION OF NORFOLK SOUTHERN RAILWAY COMPANY TO  
RECOMMENDED DECISION**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its undersigned counsel, files this Exception to the Recommended Decision of Administrative Law Judge F. Joseph Brady, issued on October 21, 2025, pursuant to 52 Pa. Code § 5.533.

Norfolk Southern excepts to Conclusion of Law 16 on page 22 of the Recommended Decision (“RD”), which states that “[t]he 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,” citing 66 Pa.C.S. §§ 502, 2702 and 2704(a). This Conclusion of Law resulted in ALJ Brady’s recommendation in proposed ordering paragraph 1 on page 22 that Norfolk Southern’s Petitions for Reconsideration from Staff Action in the above-referenced five consolidated proceedings be denied, to which Norfolk Southern also excepts.

For the reasons set forth herein, the RD’s conclusions are flawed. As the RD acknowledges, while the Commission has jurisdiction over both the Pennsylvania Department of Transportation (“PennDOT”) and Norfolk Southern, its direct jurisdiction does not extend to their respective employees or contractors. RD, p. 17. However, the Commission may direct

either of these regulated entities to retain the necessary personnel, including contractors, to ensure the safe execution of PennDOT's crossing projects.

Moreover, consistent with other public improvement projects involving the railroad's right-of-way, the entity controlling the funding – here PennDOT – is best positioned not only to secure cost-effective solutions by directly engaging qualified vendors, but also to ensure that those vendors are available as warranted to meet the demands of the project. This principle applies not only to flagging services, but to all contractors essential to the completion of PennDOT's projects.

The language of the ordering paragraphs at issue in all five of the Secretarial Letters in the consolidated cases are substantively the same. Each requires Norfolk Southern, at the sole cost and expense of PennDOT, to provide construction engineering and inspection services as required due to its proposed work, with which Norfolk Southern takes no issue. However, those ordering paragraphs also require Norfolk Southern, at the sole cost and expense of PennDOT, to “furnish and maintain flagmen” as may be required during the time work is being performed across, above and adjacent to its tracks. While Norfolk Southern does both “furnish and maintain” flaggers under its current program pursuant to the RD, it is the further implications of the quoted language that is at issue.

By way of background, ALJ Brady explains that flagging is the process of protecting workers and equipment near a railroad track from injury or property damage resulting from passing trains. In doing so, flaggers ensure that persons and equipment stay off the tracks when trains will be passing through the work area or obtain permission from the railroad dispatcher for workers and equipment to enter the track area during a specified period of time. “[A]ll 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,” ALJ Brady notes at page 17 of the RD.

Norfolk Southern fulfills its obligation to “furnish” flaggers under the present Secretarial Letter language by providing a pool (currently three) of approved vendors who are qualified to perform flagging services for PennDOT and for sponsors of other non-railroad construction projects on Norfolk Southern property. Indeed, ALJ Brady finds “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.” RD, p. 18.

All of these vendors had to meet the stringent qualification standards detailed on NS Exhibit 1. See NS Main Brief, pp. 4-6. These standards closely mirror those for Norfolk Southern’s own employees, ensuring consistent execution of protective services on its property. NS Statement 1, p. 5, line 19 – p. 6, line 7. No party questions the safety of these vendors’ flaggers. William Sinick, Manager of the Commission’s Rail Safety Division, explicitly testified, “We have no issue with trained third-party vendors/contractors performing railroad flagging.” I&E Statement 1, p 2, lines 14-17.

Norfolk Southern fulfills its obligation to “maintain” flaggers on its property under the present language by ensuring accountability through audits, spot checks and corrective actions. The project sponsor’s chosen flagging vendor coordinates with Norfolk Southern each day it conducts flagging operations and Norfolk Southern conducts unannounced inspections to ensure strict compliance with its safety protocols.<sup>1</sup> NS Statement 1, p. 7, lines 1-8, 14.

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<sup>1</sup> ALJ Brady cited as Finding of Fact 12 a PennDOT witness’s testimony that “Genesse and Wyoming Railroads perform the coordination between PennDOT’s contractors and the third-party flagging vendors during projects” for that railroad, citing PennDOT Statement 4, p. 6. However, this witness did not describe what that “coordination” entailed, which may or may not be substantively different than the coordination Norfolk Southern provides.

The Commission retains jurisdiction to address any flagging safety concerns through Norfolk Southern no matter who contracts with the flagging vendors to obtain their services.<sup>2</sup> Norfolk Southern can address safety concerns involving anyone performing construction operations on its property and can eject anyone from its property if they are not following safety protocols. ALJ Brady acknowledges Norfolk Southern's position on this jurisdictional issue. RD, p. 16.

“However, the qualification and operation of the flaggers at the rail crossing is not the issue,” he states. “*The issue is whether there is an enforceable mechanism to ensure flaggers are present at the rail crossings.*” RD, p. 17 (emphasis added).

Thus, ALJ Brady's primary concern is the availability of flaggers. “[I]n 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,” he writes. RD, p. 17.

Norfolk Southern agrees that contractors and employees are not “concerned parties” within the meaning of Pa.C.S. § 2704(a), and therefore the Commission's direct jurisdiction does not extend to railroad flaggers, railroad employees, PennDOT employees or PennDOT construction contractors. RD, p. 17. ALJ Brady correctly states that the Commission “cannot enforce its orders on railroad flagging companies [who employ the flaggers] because the Commission only has authority and jurisdiction over the railroads, highway entities, and utilities.” From this statement, he concludes that if the Commission were to grant Norfolk Southern's Petitions to require PennDOT to be solely responsible for obtaining flaggers, “it

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<sup>2</sup> PennDOT pays the actual costs for flaggers on its projects no matter who provides those services.

would effectively leave no one responsible for the completion of rail crossing projects should PennDOT be unable to retain qualified flaggers.” RD, p. 18

The Commission, however, likewise has no authority to require PennDOT construction contractors to have sufficient employees if enough are not available for a specific project or to return to work if they should go on strike. Nor can it compel asphalt suppliers or steel fabricators to provide sufficient product on a timely basis for PennDOT projects. Nor can it require any construction contractor to work for PennDOT if it does not want to do so.

The Commission does have authority over PennDOT and can require that PennDOT retain the flagging vendors it needs to undertake its crossing project – as it does with other contractors. It is Norfolk Southern’s position that the entity in charge of the project should be responsible for obtaining all of the contractors needed for its project, as Norfolk Southern does for its own construction projects. When Norfolk Southern is constructing a railroad bridge over a highway or doing work at an at-grade crossing, it is responsible to contract PennDOT-approved third-party roadway flaggers for the protection and maintenance of vehicular traffic during lane closures. PennDOT’s witness admitted that Norfolk Southern asking PennDOT to provide roadway flaggers for its projects if Norfolk Southern has difficulty scheduling those flaggers is analogous to PennDOT’s position that Norfolk Southern should act as a backstop to provide railroad flaggers for PennDOT projects. HT, p. 186.

Norfolk Southern does not have employees who exclusively do railroad flagging work. Instead, more highly skilled workers such as railroad foreman, tamper operators and welders perform flagging as an ancillary part of their duties when doing track maintenance and construction work for the railroad. If Norfolk Southern is required to supply these highly skilled workers any time PennDOT cannot obtain flaggers when desired, it would come at the expense

of the essential railroad infrastructure work for which these employees were hired. An example of this safety-critical work is track maintenance to prevent derailments. NS Reply Brief, p. 6; HT, pp. 104-105. This is contrary to public safety, which is the Commission’s primary responsibility in rail-highway crossing cases. 66 Pa.C.S. § 2702(b); *Pittsburgh Railways Co. v. Pa. Public Utility Comm’n*, 182 A.2d 80, 84 (Pa. Super. 1962) (“the standard to be applied is ‘the prevention of accidents and the promotion of the safety of the public,’” citing the statutory language).

If these highly skilled Norfolk Southern employees should be pulled from their regular duties to provide flagging for PennDOT projects, the reimbursement costs will almost certainly be higher than for third-party flaggers – and availability likely would not be any better.<sup>3</sup> Furthermore, should Norfolk Southern hire flagging employees it does not need, only to provide flagging for PennDOT projects, reimbursement costs would necessarily encompass all costs for keeping these employees on the payroll, including times they are not utilized.

To fill this gap for non-railroad projects, Norfolk Southern began allowing project sponsors and prime contractors to arrange for flagging from qualified third-party vendors in 2018. NS Statement 1, p. 4, lines 19-20. Norfolk Southern implemented its comprehensive Third-Party Flagging Program in 2022, which required project sponsors like PennDOT to hire flaggers from Norfolk Southern approved companies. NS Statement 1, p. 5, lines 8-22; HT p. 68, lines 7-12. Importantly, ALJ Brady acknowledges that the utilization of third-party flagging vendors by PennDOT for its projects is acceptable. RD, p. 18.

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<sup>3</sup> Notably, the \$49,710.20 in delay damages caused by third-party flagger unavailability during the 2023-2024 time period cited by PennDOT on its Exhibit C was 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. NS Main Brief, p. 17. The RD does not address this telling measure of comparing the efficiency of third-party flagging versus in-house flagging.

There are currently three approved flagging vendors, who at the time of the hearing employed more than 130 flaggers qualified to work on Norfolk Southern property. All three companies are working to expand the number of qualified flaggers they employ.<sup>4</sup> In addition, Norfolk Southern is continuing its review of applications for additional flagging vendors, which would further expand the pool of available flaggers. *See NS Main Brief*, pp. 9-11. PennDOT could also contract directly with the vendors for flaggers to be available for the regular work of bridge inspections, as PennDOT already does for the engineers who conduct these inspections. Contracting directly with the vendors would also permit PennDOT to move flaggers around within a territory as needed. *NS Main Brief*, pp. 9-11, 13-16.

ALJ Brady found the current language of the Secretarial Letters at issue contain “no prohibition against Norfolk Southern and PennDOT coordinating the hiring of third-party flaggers.” *RD*, p. 18. Instead, “[t]he Secretarial Letters only require that Norfolk Southern not abdicate its ultimate responsibility to furnish and maintain flaggers.” *RD*, p. 18.

Thus, Norfolk Southern will continue to require PennDOT’s contractors to work directly with the flagging vendors to arrange for their needs, as they have done for the past several years.<sup>5</sup> It would be illogical for Norfolk Southern to become the middleman between PennDOT’s contractors and the vendors in making flagging arrangements, becoming a *de facto* project manager. Having Norfolk Southern make these flagging arrangements on behalf of PennDOT’s contractors would not only be unduly burdensome for Norfolk Southern, but also less efficient

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<sup>4</sup> Mr. Sinick of the PUC agreed that it is in the vendors’ best interests to have a sufficient pool of flaggers to meet PennDOT’s and other entities’ needs, as that is how they make money. *HT*, p. 239, lines 18-24. Thus, free market forces to meet the demand for flaggers should resolve any temporary shortages.

<sup>5</sup> Indeed, PennDOT agreed to continue this practice, as well as accept ultimate responsibility for obtaining flaggers, in its Motion for Approval of Temporary Settlement filed on September 22, 2025.

for all parties, with the changing needs and timing priorities inherent in PennDOT's numerous and complex project construction schedules.

Furthermore, PennDOT has an obligation to communicate with these vendors to arrange for its flagging needs on a timely basis, well in advance of when needed. The Secretarial Letters in these proceedings require such cooperation. See *e.g.*, the Secretarial Letter issued May 28, 2024, in A-2022-3031613, ordering paragraph 14, stating that “the Pennsylvania Department of Transportation cooperate with Norfolk Southern Railway Company so that during construction of the project, the operations and facilities of the railroad company will not be endangered or unnecessarily impeded.” If Norfolk Southern is required to pull essential workers from its own maintenance and construction projects to provide flagging for PennDOT, especially if PennDOT has not made all reasonable efforts to secure flaggers on its own, that would certainly “unnecessarily impede” railroad operations and could “endanger” those operations and facilities.

Norfolk Southern disagrees that it being assigned ultimate responsibility to supply flaggers is necessary for the Commission to exercise proper jurisdiction over rail-highway crossing projects. The Commission also has jurisdiction over PennDOT and can require that PennDOT obtain a qualified contractor.

However, the Commission should not, and indeed may not, micromanage how those flaggers are furnished if the current flagging language in the subject Secretarial Letters is affirmed. Norfolk Southern is allowed to fulfill its requirement to provide safe and reasonable services under Section 1501 of the Code by adopting reasonable rules and regulations governing how those services are provided. See 66 Pa.C.S. § 1501 (“[E]very public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.”). Norfolk Southern’s third-party flagging process is a reasonable means for

PennDOT to secure flagging for its bridge projects on railroad property and thus is within Norfolk Southern's Section 1501 authority.

Although the RD does not expressly require the use of Norfolk Southern employees for flagging, Norfolk Southern should not be compelled to make its own employees available to serve as flaggers for PennDOT projects – as a back-up or otherwise. This is particularly true where PennDOT either fails to schedule or does not make reasonable efforts to schedule third-party flaggers, despite the availability of such vendors. See NS Main Brief, pp. 13-16.

The Commission possesses authority to direct PennDOT to retain and use appropriately qualified personnel for the execution of its crossing projects involving railroad property. This obligation extends to all necessary contractors, including construction firms, excavation companies as well as flagging vendors. The responsibility for securing such contractors – including the flagging vendors – properly lies with the project sponsor, in this case, PennDOT. Accordingly, Norfolk Southern's respectfully requests that its Petitions for Reconsideration be granted, and that the Commission adopt the Proposed Ordering Paragraphs set forth on page 25 of Norfolk Southern's Main Brief.

Respectfully submitted,

**COHEN SEGLIAS PALLAS  
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By: 

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Date: October 31, 2025

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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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/s/ Karen L. Gagne  
Karen L. Gagne, Secretary to  
Benjamin C. Dunlap, Jr., Esquire

Date: October 31, 2025