



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

November 10, 2025

Matthew L. Homsher, Esquire, 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

Dear Secretary Homsher,

Enclosed for electronic filing please find the Department of Transportation's *Nunc Pro Tunc Reply to Norfolk Southern's Exception to Recommended Decision* 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.

Sincerely,

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

Leah Jo Bobula
Assistant Counsel

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. :

NUNC PRO TUNC REPLY OF THE COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION TO NORFOLK SOUTHERN’S EXCEPTION

The Commonwealth of Pennsylvania, Department of Transportation (PennDOT or the Department), by its counsel, Leah Jo Bobula, offers the following in its *Nunc Pro Tunc* Reply to the Exception filed by Norfolk Southern Railway Company (Norfolk Southern) on October 31, 2025 to the Recommended Decision issued by Administrative Law Judge F. Joseph Brady (ALJ Brady) on October 21, 2025.

The Commission may accept the Department’s Reply *Nunc Pro Tunc* on its merits for good cause shown. In order to show “good cause,” the party seeking *nunc pro tunc* filing must show: 1) that extraordinary circumstances, involving fraud or breakdown in the administrative process or non-negligent circumstances related to the party, its counsel or a third party, caused the untimeliness; 2) that it filed the document within a short time period after the deadline or date that it learned of the untimeliness; and 3) that the respondent will not suffer prejudice due to the delay. See e.g. Bureau Veritas N. Am., Inc. v. DOT, 127 A.3d 871, 879 (Pa. Cmwlth. 2015); Bass v. Cmwlth., 401 A.2d 1133 (Pa. 1979).

In this case, there was a breakdown in the administrative process where undersigned counsel calculated the due date pursuant to 52 Pa. Code § 5.535(a), which states a reply shall be filed within 10 days of the date that an exception is due. As the exception was due October 31, 2025, the calculation led to a due date of Monday November 10, 2025. However, ALJ Brady in his Recommended Decision noted any replies are due Friday November 7, 2025. As soon as undersigned counsel realized the error on Monday November 10, 2025, undersigned counsel immediately sought to file the Reply *nunc pro tunc*. Norfolk Southern will not suffer prejudice due to the brief delay in the filing as there are no additional filings due from Norfolk Southern at this time.

Norfolk Southern's lone exception is to the Conclusion of Law 16, on page 22 of ALJ Brady's Recommended Decision, 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), which resulted in the denial of Norfolk Southern's Petitions for Reconsideration in ordering paragraph 1. Norfolk Southern failed to meet their burden of proof by a preponderance of the evidence that the Department, rather than Norfolk Southern, should bear the responsibility to furnish and maintain flaggers. RD, p. 14. For the reasons below, the ALJ's decision is supported by substantial and logical evidence and should be made final.

Norfolk Southern argues that PennDOT is in the best position to secure cost-effective solutions and to ensure flagging vendor availability simply because PennDOT controls the funding. NS Exceptions, p. 2. However, Norfolk Southern offers no cognizant reason to support

this assertion. Which party provides payment is of no consequence when one party, in this instance, Norfolk Southern, has exclusive control over what flagging vendors are permitted to work on its property. NS Statement 1, pp. 5-6, NS Exhibit 1. For this reason, Norfolk Southern is in the best position to furnish and maintain flaggers.

In addition, as shown by the testimony, Norfolk Southern has the expertise and understanding of how the flaggers operate in the field. While in the field, flaggers utilize specialty software from Norfolk Southern's custom mobile applications as well as communicate directly with Norfolk Southern workers and managers on-site. NS Statement 1, p. 3, lines 13-24. Norfolk Southern requires the flaggers to attend a pre-work briefing with Norfolk Southern supervisors to ensure the supervisor understands what the flagger will be doing. NS Statement 1, p. 7, lines 1-8. Norfolk Southern controls the required qualifications to become a third-party flagger on its tracks, establishes their own operating procedures, and is the only party with knowledge of the characteristics of their rail lines. NS Statement 1, p.4, lines 4-9; N.T. at 63, lines 21-25. Even Norfolk Southern notes that the Department lacks the expertise needed to determine when and how flaggers are required for projects on or near Norfolk Southern tracks. NS Statement 5, p. 8, lines 9-14.

Norfolk Southern attempts to compare flagging vendors to all contractors necessary for the completion of a project and argues that “[w]hen 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.” NS Exception, p. 5; *See* N.T. at 184-87, 225 lines 6-10. Norfolk Southern's argument is unavailing because PennDOT is not attempting to withdraw or

shift its responsibility over its contractors when Norfolk Southern needs them for a project, but in this case, Norfolk Southern is attempting to shift its responsibilities over their qualified third-party flagging vendors when PennDOT projects require flaggers. If the Commission finds there is a concern with a PennDOT contractor, it contacts PennDOT, not the contractor. N.T. at 229, lines 1-8. Based on their own logic, Norfolk Southern should remain responsible to furnish and maintain flaggers. Further, the argument wholly ignores the process necessary to become a flagging vendor, the uniqueness of the railroad's assets, and the fact that there are an extremely limited number of Norfolk Southern qualified flagging vendors available for use of PennDOT projects. NS Exhibit 1; N.T. at 67 lines 23-25, 68 lines 1-6.

Norfolk Southern also states that it "fulfills its obligation to furnish flaggers under the current language. NS Exception, p. 3. One must ask then, why did Norfolk Southern file petitions for reconsideration if it believes that it is fulfilling the terms of the existing Secretarial Letters? Nonetheless, Norfolk Southern is seeking to shift all responsibility for furnishing and maintaining flaggers on Norfolk Southern's property to PennDOT. NS Exception, pp. 1-2. ALJ Brady correctly states that "...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." RD, p. 16. Just because the Commission also has jurisdiction over PennDOT does not mean that PennDOT should bear the responsibility to control the flaggers in these situations. RD, p. 17. Making direct calls to schedule flagging and writing a check for the costs of flagging does not provide sufficient control over flaggers. Those are merely administrative tasks that require no expert knowledge of a specific railroad's requirements and procedures. Moreover, all Commission orders for railroad crossing work require the railroad to furnish and maintain 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. The critical concern over the flagging responsibility is “whether there is an enforceable mechanism to ensure flaggers are present at the rail crossings.” RD, p. 17. ALJ Brady properly concluded that the responsibility must stay with Norfolk Southern because the Commission and PennDOT lack any recourse if a safety issue would arise with a third-party flagging vendor under Norfolk Southern’s proposed flagging language. RD, p. 18. This lack of recourse would not support the Commission’s mandate that a “public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.” 66 Pa.C.S. § 1501; RD Conclusion of Law 11, p. 21.

For the above reasons, the Department respectfully requests that the Commission dismiss Norfolk Southern’s Exception from the Recommended Decision of Administrative Law Judge Brady’s Recommended Decision dated October 21, 2025, and enter an Order adopting the Recommended Decision as final.

Respectfully Submitted,



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Dated: November 10, 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,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Leah J. Bobula
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Supreme Court I.D. 332184

Dated: November 10, 2025