

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held April 16, 2026

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss
John F. Coleman, Jr.
Ralph V. Yanora

Application of D&J Fox Holdings, LLC for approval of the alteration of the crossing (DOT 966 038 R) where State Route 0050 (Millers Run Road) crosses, at grade, the tracks of MarkWest Liberty Midstream & Resources LLC through lease agreement/easement with property owner Montour Trail Council, operated thereon by Wheeling & Lake Erie Railway Company, located in Cecil Township, Washington County

A-2023-3043240

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Reconsideration from Staff Action (Petition), filed pursuant to 52 Pa. Code § 5.44, by D&J Fox Holdings, LLC (D&J or the Petitioner) on March 6, 2026, seeking reconsideration of the Commission's Secretarial Letter issued on February 19, 2026 issued by the Commission's Bureau of Technical Utility Services, Rail Safety Division (TUS-Rail Safety) (*February 2026 Secretarial*

Letter). D&J challenges the *February 2026 Secretarial Letter* which, *inter alia*, denied D&J's September 3, 2025 Petition to Withdraw the Application to alter the Miller Run Road Railroad Crossing (Petition to Withdraw)¹. No Answers to the Petition have been filed.

Based upon our review of the Petition, and finding there to be important public safety questions involved, we shall deny D&J's request to withdraw its Application and shall refer this matter to the Office of Administrative Law Judge (OALJ) for such further expedited proceedings as deemed necessary and the issuance of a decision on the question of the Commission's jurisdiction over D&J.

I. Background

The issues raised by the present Petition are viewed in the context of the procedural history of the establishment and alterations of the Crossing in question.

A. The Crossing Established at Docket No. A-2011-2223296

The Application which D&J now seeks to withdraw pertains to alteration of the crossing established Docket No. A-2011-2223296, by Commission Secretarial Letter issued on May 3, 2011. *In re: Application of MarkWest Liberty Midstream and Resources LLC (MarkWest) for approval of the construction of a public single track at-grade crossing with SR 0050 (Millers Run Road) within Cecil Township, Washington County, (May 2011 Secretarial Letter)* at Docket No. A-2011-2223296.

¹ Crossing (DOT 966 038 R) where State Route 0050 (Millers Run Road) crosses, at grade.

The *May 2011 Secretarial Letter* explained, *inter alia*, that: (1) “[t]his matter is before us upon application filed January 27, 2011 by MarkWest [(MarkWest Application)] . . . seeking Commission approval to construct a crossing where a track of MarkWest operated on by Wheeling and Lake Erie Railroad Company (W&LE) will cross at grade S. R. 0050 (Millers Run Road) in Cecil Township, Washington County;”² and (2)

MarkWest is involved with gathering and transporting of natural gas and by products thereof as part of the Marcellus Shale gas fields. To facilitate the transportation of these products, MarkWest proposes to construct a rail line from its processing plant to a connection with the W&LE. The rail line will cross several highways at grade of which S. R. 0050 is one.

Id. at 1.

Pursuant to the *May 2011 Secretarial Letter*: (1) MarkWest agreed to construct the project at its sole cost and expense; (2) the non-carrier public utilities agreed to alter their facilities as necessary for the project at the sole cost and expense of

² Subsequently, at a field conference held November 16, 2023, it was noted that State Route (S.R.) 0050 is a two (2) lane, two-way, bituminous paved roadway that crosses property of Montour Trail Council (MTC) that has a lease agreement/easement for the rail line with one (1) track of MarkWest (DOT 966 038 R), operated thereon by W&LE with a concrete panel crossing surface in good condition. The crossing is equipped with a cantilever mounted automatically operated flashing-lights and gate on the eastbound approach roadway and post-mounted automatically operated flashing-light signals on the westbound approach roadway. Additional sets of post-mounted flashing-lights are present in the northwest and southeast quadrants of the crossing. Additional gates are located in the northwest quadrant to deter traffic from entering the crossing and track area north of Millers Run Road. Grade Crossing (Crossbucks) (R15-1), Emergency Notification (I-13) signs, Bicycle (W11-1) signs with supplemental AHEAD plaques (W16-9P), grade crossing advance warning signs (W10-1), stop lines and pavement markings are present on both approach roadways. See *February 2024 Secretarial Letter, infra*.

MarkWest; (3) W&LE agreed to maintain the crossing and signal facilities in the future; and (4) the project was funded by private sources. *May 2011 Secretarial Letter* at 1-3.

Subsequently, MTC acquired a right-of-way to construct a pedestrian/bike trail that would run parallel to the Crossing and that MarkWest agreed to construct at its sole cost and expense.

To obtain approval for the construction of the trail, on March 8, 2013, MarkWest filed a Petition for Modification of the *May 2011 Secretarial Letter* (Petition for Modification). In that petition, MarkWest requested: (1) a project modification, to allow for construction of a pedestrian/bike trail parallel to the MarkWest single line of tracks; and, (2) an extension of time to complete the project.

By Secretarial Letter dated May 24, 2013 (*May 2013 Secretarial Letter*), the Commission granted the Petition for Modification. Based on the Commission's granting the modification to Paragraphs 5 and 9 of the *May 2011 Secretarial Letter* were modified. Paragraph 5 and Paragraph 9 of the *May 2011 Secretarial Letter* were modified as follows:

* * *

5. MarkWest Liberty Midstream and Resources, LLC, having agreed to do so, at its sole cost and expense, furnish all material and do all work necessary to repave the approaches to provide a smooth transition up to the high-type crossing surface, construct a pedestrian/bike trail crossing of S.R. 0050 adjacent to the track, and install advance warning signs (W10 Series), stop lines and pavement markings at proper locations on the approaches thereto, generally in accordance with the approved plans and Part 8 of the Manual on Uniform Traffic Control Devices.

* * *

9. Construction of the crossing project shall be completed in a manner satisfactory to this Commission, on or before December 31, 2013, and that on or before said date, Mark West Liberty Midstream and Resources, LLC report to this Commission the actual date of completion of work.

* * *

May 2013 Secretarial Letter at 1-3, (emphasis added).

By Secretarial Letter issued November 16, 2017 (*November 2017 Secretarial Letter*) the Commission marked the case “CLOSED” because a final inspection by a Commission staff engineer on May 17, 2017, revealed that construction of the project was completed, in accordance with the *May 2011 Secretarial Letter*. *November 2017 Secretarial Letter*.

Having set forth the prior history of the Crossing as set forth at Docket No. A-2011-2223296, we will turn to the application proceeding that is now pending before the Commission.

B. D&J’s Application to Alter the Crossing – A-2023-3043240

On September 22, 2023, D&J filed an Application, at this docket, in which it proposed an alteration of the Crossing “for the safety and convenience of the public.” D&J Application at 2 ¶ 9.

The Commission addressed the Application in a Secretarial Letter issued on February 15, 2024 (*February 2024 Secretarial Letter*). In that Secretarial Letter, the Commission, *inter alia*: (1) established its jurisdiction limits at the subject crossing as the area within the confines of the railroad right-of-way and the highway right-of way; (2) found that the alteration of the subject crossing is necessary and proper for the

service, accommodation, convenience, or safety of the public; (3) approved D&J's Application to alter the Crossing; and (4) provided the substantive obligations, pursuant to Section 2702 of the Code, 66 Pa.C.S. § 2702, that were reached and agreed to by the interested and concerned Parties who participated in the Commission November 16, 2023 field investigation and conferences related to this Application. The participants included representatives from D&J Fox Holdings, LLC, Pennsylvania Department of Transportation, Montour Trail Council, MPLX, Wheeling & Lake Erie Railway Company, KLH Engineers (consultant for D&J Fox Holding, LLC), Columbia Gas of Pennsylvania and Washington County. *February 2024 Secretarial Letter* at 2-3.

The participants reached agreement on matters related to the Application and are set forth in the *February 2024 Secretarial Letter*. Those relevant portions include, *inter alia*, the following language set forth below by Party after a brief introductory language:

By Application filed on September 22, 2023, D&J Fox Holdings, LLC is seeking Commission approval to alter the crossing (DOT 966 038 R) where State Route 0050 (Millers Run Road) crosses, at grade, one (1) track of MarkWest Liberty Midstream & Resources LLC / MPLX, operated thereon by Wheeling & Lake Erie Railway Company located in Cecil Township, Washington County. Montour Trail Council is the owner of the railroad property and MarkWest Liberty Midstream & Resources LLC / MPLX has a lease agreement/easement for the rail line.

In its application, D&J Fox Holdings, LLC states that it is submitting the application to comply with a Pennsylvania Department of Transportation directive and to enable further processing of its highway occupancy permit from Pennsylvania Department of Transportation (PennDOT). D&J Fox Holding, LLC avers that the highway occupancy permit application to PennDOT does not propose any change in usage of the property but rather seeks to formalize an existing usage that predated and survived a prior MarkWest

Liberty Midstream & Resources, LLC application to the Commission docketed at A-2011-2223296.

* * *

D&J . . . [a]grees to construct the project at its sole cost and expense and provide for maintenance and protection of highway and pedestrian traffic during the time the work is being performed. D&J . . . agrees to reimburse Wheeling & Lake Erie Railway Company for any costs incurred to construct or relocate the active warning devices and for providing engineering, watchman and flagman services in conjunction with the project.

D&J . . . [a]grees to, “[a]t its sole cost and expense, furnish all material and perform all work necessary to construct the alteration project to include two (2) private concrete driveways, new chain-link fencing and Type 31-S strong post guiderail generally in accordance with [the *February 2024 Secretarial Letter*], and the approved plans.”

* * *

February 2024 Secretarial Letter at 2-3.

C. D&J’s Petition to Withdraw

In its Petition to Withdraw, D&J effectively seeks rescission of the *February 2024 Secretarial Letter*, by the withdrawal of the Application upon which the field conference, subsequent safety findings and assignments of responsibility were rendered by the TUS-Rail Safety Division.

D. Commission’s *February 2026 Secretarial Letter*

The Commission’s *February 2026 Secretarial Letter*, *inter alia*, denied D&J’s Petition to Withdraw its Application on the basis that the work directed remained necessary as a matter of public safety.

II. History of the Proceeding

On September 22, 2023, D&J filed the above-captioned Application. As previously noted, in the Application, D&J stated that the Application was prompted after a consultation with PennDOT regarding a Highway Occupancy Permit, and that D&J did not concede that the crossings identified in the Highway Occupancy Permit Application were “public crossings” for the purpose of the Commission’s jurisdiction. D&J Application at ¶¶ 4-6; *see* Petition at ¶¶ 6-9, *infra*.

On February 15, 2024, the Commission issued Secretarial Letter, in which it, *inter alia*, approved D&J’s Application (*February 2024 Secretarial Letter*). The letter directed D&J to complete the alteration of the Crossing on or before June 30, 2025. *February 2024 Secretarial Letter* at 3 ¶ 2, and 5 ¶ 15; *see* Petition at ¶ 10.

On February 23, 2024, in accordance with Paragraph No. 6 of the *February 2024 Secretarial Letter*, D&J submitted an Updated Low Volume Highway Occupancy Permit Site Plan (Updated Plan) to the Commission for approval. The Commission approved the Updated Plan via Secretarial Letter issued on March 14, 2024 (*March 2024 Secretarial Letter*). *March 2024 Secretarial Letter* at 1; *see* Petition at ¶ 11.

On June 26, 2025, D&J submitted a Petition to Extend the compliance deadlines set forth in the *February 2024 Secretarial Letter*. The Commission addressed the Petition to Extend by a Secretarial Letter issued on July 25, 2025 (*July 2025*

Secretarial Letter). In that letter, the Commission: (1) granted the extension of time; and (2) directed D&J to complete the alteration of the Crossing on or before June 30, 2026. *July 2025 Secretarial Letter* at 1-2; *see* Petition at ¶ 12.

On August 5, 2025, the MTC filed an objection to the proposed alteration of the Crossing intersects with the Montour Trail in Cecil Township, Washington County (MTC Objection Letter).³ MTC objected to the D&J Application and requested that approval be rejected in its current form. MTC claimed the following: (1) that the submitted plans, as proposed, would result in the relocation of Gate #1 to a position in the middle of the Montour Trail; (2) that in no event can Gate #1, or any similar mechanism, be located within the boundaries of the trail itself; and (3) that any repositioning of the same must ensure at least two feet of clearance from the edge of the trail or, alternatively, be left in its current location. MTC asserted that if Gate #1 is relocated to the proposed position in the middle of the trail it would significantly obstruct trail traffic and would pose a potential hazard to trail users. On the other hand, if it is repositioned with at least two feet clearance from the edge of trail or left in its current location, MTC asserted that such an adjustment would preserve the uninterrupted and safe enjoyment of the trail. MTC Objection Letter.

On September 3, 2025, D&J filed its Petition to Withdraw the Application. According to D&J, it requested the withdrawal because it had decided not to pursue the alteration of the Crossing, as the costs and potential liabilities exceeded D&J's reasonable capabilities.⁴ Petition to Withdraw at ¶¶ 9-11; *see* Petition at ¶¶ 13-15. There was no opposition to the Petition to Withdraw.

³ The Montour Trail is a heavily utilized recreational asset, and any impediment to its safe and accessible use is unacceptable to MTC. *See* MTC Objection Letter.

⁴ The Petition to Withdraw also cited, with no specificity, "errors" and "omissions" from plans attributed to MarkWest as a basis for increased costs beyond its expectations. Petition to Withdraw at ¶ 9.

On February 19, 2026, the Commission issued a Secretarial Letter⁵ in which the Commission, *inter alia*: (1) denied D&J's Petition to Withdraw; and (2) directed W&LE, at the sole cost and expense of D&J, within sixty (60) days of the date of the *February 2026 Secretarial Letter*, but prior to the start of construction, to prepare a revised situation and circuitry plan⁶ for the Crossing that addressed the concerns raised by MTC in its Objection Letter. W&LE was to submit the revised plan to all of the Parties and to the Commission, for approval. *February 2026 Secretarial Letter* at 2 ¶¶ 1, 3; see Petition at ¶¶ 17, 19.

As noted, *supra*, on March 6, 2026, D&J timely filed the instant Petition. No answer or response to the Petition has been filed.

III. Discussion

A. Legal Standards

In considering the Petition for Reconsideration of Staff Action (Petition), the Petition to Withdraw, and the underlying Application, Section 332(a) of the Code, 66 Pa.C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, D&J, as the Petitioner seeking

⁵ The *February 2026 Secretarial Letter* noted, *inter alia*, that upon receipt of the Petition for Withdraw, a Commission staff engineer arranged a field investigation and conference on October 16, 2025, at the site of the subject crossing, and representatives of D&J, among others, attended the conference. At the conference, TUS-Rail reiterated the continued public safety concern at the crossing and, accordingly, a Commission staff engineer directed D&J to submit proposed alternative plans. See *February 2026 Secretarial Letter* at 1.

⁶ On June 30, 2025, the Commission approved detailed situation and circuitry plans submitted by D&J.

the withdrawal of the Application, and as the Applicant, is the party seeking affirmative relief from the Commission. Therefore, D&J is the party with the burden of proof.⁷

D&J has the burden to establish its entitlement to the relief sought in its Petition by an evidentiary standard of a preponderance of the evidence. *Re Consolidated Rail Corporation*, 95 Pa. P.U.C. 24 (2001); Commission Docket: Application No. A-00115212 (Order entered January 12, 2001); 2001 WL 1542335 (Pa.P.U.C.) (*Consolidated Rail*) (citing *Se-Ling Hosiery v. Margulies*, *supra*). The term ‘preponderance of the evidence’ means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other side. If a party has satisfied its burden of proof, it must then be determined whether the opposing party has submitted evidence of ‘co-equal’ value or weight to refute the first party’s evidence. *Id.* (citing *Morrissey v. Commonwealth of Pa., Depart. of Highways*, 225 A.2d 895 (Pa. 1987)).

As noted, the Petition was filed pursuant to 52 Pa. Code § 5.44(a) of the Commission’s Rules of Administrative Practice and Procedure. This section provides that:

(a) Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless reconsideration is sought from the Commission within 20

⁷ See *Application of 610 Hauling, LLC, t/a College Hunks Hauling Junk, for the right to begin to transport, as a common carrier, by motor vehicle, household goods in use, from points in the counties of Chester, Delaware, Montgomery, Philadelphia, and Bucks, to points in Pennsylvania*, Docket Nos. A-2012-2334103 and A-8915269 (Opinion and Order entered November 5, 2015) (citing *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950)).

days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

52 Pa. Code § 5.44(a).

Courts have held that “[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pennsylvania PUC*, 578 A.2d 600, 602 (Pa. Cmwlt. 1990).

Additionally, any order of this Commission granting an application, in whole or in part, must be based on substantial evidence. *Consolidated Rail* (citing *Dutchland Tours, Inc. v. Pa. PUC*, 337 A.2d 922, 925 (Pa. Cmwlt. 1975)). Pennsylvania courts have defined the term ‘substantial evidence’ to refer to such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Id.* (citing *Murphy v. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382, 386 (Pa. Cmwlt. 1994)); *Erie Resistor Corporation v. Unemployment Compensation Board of Review*, 166 A.2d 96, 97 (Pa. Sup. Ct. 1961).

1. Commission Authority Pursuant to Section 2702

The Commission has jurisdiction over rail highway crossings pursuant to 66 Pa.C.S. §§ 2702 and 2704. The general rule granting jurisdiction over rail highway crossings is set forth in 66 Pa.C.S. § 2702(a), which states as follows:

(a) General rule.--No public utility engaged in the transportation of passengers or property, shall, without prior order of the Commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or

different levels; and no highway without like order, shall be so constructed across the facilities of any such public utility, and, without a like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.⁸

66 Pa.C.S. § 2702(a).

When a crossing is within the Commission's jurisdiction, the Commission has the authority, pursuant to 66 Pa.C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. *Southeastern Pennsylvania Trans. Auth. v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991).

The Commission is empowered, pursuant to 66 Pa.C.S. § 2702(b), to determine and prescribe the manner in which such a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated or protected. The Commission is also empowered, pursuant to 66 Pa.C.S. § 2702(c), to order the relocation, alteration, suspension or abolition of a crossing upon such reasonable terms and conditions as the Commission prescribes. In evaluating a rail/highway crossing matter, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. PUC*,

⁸ See *Application of the Township of Taylor, Blair County, Pennsylvania for Approval of the Alteration of Crossing (DOT 529 097 P) and Crossing (DOT 968 073 L) by Way of Vacation of Papermill Road (T-360) as a Public Road, Where Papermill Road (T-360) Crosses at Grade the Tracks of Everett Railroad Company at Crossing (DOT 529 097 P) and Where Papermill Road (T-360) Crosses below Grade the Tracks of Everett Railroad Company at Crossing (DOT 968 073 L), Located in Taylor Township, Blair County*, Docket No. A-2019-3012902 (Opinion and Order entered August 4, 2022); 2022 WL 3226675 (Pa.P.U.C.) (*Application re Papermill Road*).

737 A.2d 201, 213 (Pa. 1999) (citing *Bell Atlantic-Pa., Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1995)).

B. D&J’s Petition

In its Petition, D&J, essentially, argues that the withdrawal of its Application is within D&J’s discretion and that the Commission lacks the authority to require D&J to comply with the directives of the *February 2024 Secretarial Letter* approving the Application, because D&J is not a certificated public utility under the Code. Petition at 4 ¶ 22 (citing 66 Pa.C.S. § 102).

In support of its position, D&J comments that Section 2701 of the Code, 66 Pa.C.S. §§ 2701, *et seq.*, permits the Commission to regulate “public utility[ies] engaged in a railroad business...” D&J states that it is not a public utility, nor is it engaged “in a railroad business.” D&J admits it is an owner of property that abuts State Route 0050. However, D&J emphasizes that it does not own the subject Crossing, did not install it, and does not maintain it. Petition at 4 ¶¶ 23-25. D&J further elaborates:

* * *

27. While 66 Pa.C.S. § 2702(c) grants the Commission the power to order a rail crossing to be relocated or altered, such order may only be issued upon the Commission’s own motion or upon complaint, and upon notice to all parties in interest, including the owners of adjacent property, and after a hearing is held.

28. 66 Pa.C.S. § 2702(c) further dictates that the Commission “may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth or an established nonprofit organization with a recreational or conservation purpose.”

29. No complaint or motion has been filed to initiate a proceeding related to the relocation or abolishment of the Crossing, and no hearing has been held to determine the appropriateness of any relocation or alteration of the Crossing or the terms and conditions for such relocation or alteration.

* * *

Id. at 5 ¶¶ 27-29 (emphasis omitted).

C. Disposition

As a preliminary matter, we note that any issue or argument that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. Petition to Withdraw D&J's Application

As a threshold consideration, we decline to consider the D&J's Application to be rendered moot by D&J's Petition to Withdraw the Application and the lack of any objections to the Petition. *See Utility Workers Union of America, Local 69, AFL-CIO v. Pa. PUC*, 859 A.2d 847, 849 (Pa. Cmwlth. 2004) (“[a]n actual case or controversy must exist at all stages of the judicial or administrative process” or the matter will be dismissed as moot.).

In the present case, D&J seeks withdrawal of an Application which remains the subject of actual controversy, specifically, the outstanding safety issues addressed by the directives of the *February 2024 Secretarial Letter* and the new questions raised by

D&J's Petition, *i.e.*, whether the Commission has jurisdiction over D&J in the circumstances of this case.

With respect to withdrawal of a pleading, the Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.94, permits parties to withdraw a pleading in a "contested proceeding." Whether this proceeding should be considered under the provisions of the Commission's Rules of Practice and Procedure as "contested" or "uncontested," is not material to our analysis. Under our consideration of the withdrawal or termination of proceedings, whether uncontested, pursuant to 52 Pa. Code § 1.82, or, as noted, contested (*i.e.*, 52 Pa. Code § 5.94), consideration of the public interest is required. *See* 52 Pa. Code § 1.82:

§ 1.82. Withdrawal or termination.

(a) A party that desires to terminate an uncontested matter or proceeding before final decision by the Commission or otherwise desires to withdraw a submittal or pleading, shall file a petition for leave to withdraw the appropriate document. If no party objects to the petition within 10 days of service, the matter may be stricken by the Commission or by the presiding officer. If upon review the presiding officer or the Commission determines that the public interest requires continuation of the proceedings, the petition will be denied and the staff may be directed to participate.

52 Pa. Code § 1.82(a).

The provision at 52 Pa. Code § 5.94(a) allows withdrawal of a pleading by a petition for leave to withdraw the pleading. Such petition is granted only by permission of the Presiding Officer or the Commission before final decision by the Commission. The Presiding Officer or Commission must consider the petition, any objections thereto and the public interest in determining whether to permit withdrawal of the pleading. 52 Pa. Code § 5.94(a). *See Application of CMV Sewage Company, Inc. to Abandon and*

Discontinue Service, Docket No. A-2015-2513381 (Final Order entered September 29, 2016).

The instant proceeding seeks reconsideration of the Commission's denial of D&J's Petition to Withdraw. We find it significant that D&J is attempting to withdraw its Application that was approved by the Commission more than two years ago by the *February 2024 Secretarial Letter*. The directives of the *February 2024 Secretarial Letter* have remained in full-effect in the more than two years that have elapsed since the Commission approved D&J's Application. We note that no Party filed a Petition for Reconsideration from Staff Action from the Secretarial Letter. Thus, it became a final action of the Commission. We also note that no Party filed reconsideration of either of the subsequent Secretarial Letters - the *March 2024 Secretarial Letter* or the *July 2025 Secretarial Letter*. Therefore, D&J attempts to withdraw an Application for which a final decision has been issued. Thus, to the extent that D&J, in the instant Petition, seeks to withdraw its Commission approved Application via the *February 2024 Secretarial Letter* at this time, we shall deny this request.

Also, to the extent D&J raises the argument that it is in the public interest to grant the withdrawal of the Application, we reject those arguments. We note that generally, the public interest is not that of a private entity. And, in the context of Chapter 27 of the Code, the financial ability of a party to pay is not controlling or determinative when allocating costs in rail cases. *East Rockhill Township v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth. 1988); *Faxon Co. v. Pa. PUC*, 419 A.2d 818 (Pa. Cmwlth. 1980).

For the above reasons, we reject D&J's argument and find that the public interest is not served by allowing the withdrawal of the Application where outstanding safety issues remain. Having denied D&J's withdrawal of the Application, we now turn to the remaining issue whether the Commission has proper jurisdiction to compel D&J's

compliance with the duties assigned to it by the Commission's approval of D&J's Application.

2. Commission Jurisdiction over D&J to Require Compliance of the Commission Decision(s)

The remaining question is whether the Commission maintains proper jurisdiction to require D&J to comply with the Commission's February 2024 secretarial Letter approving D&J's Application, and any subsequent Commission decision modifying that approval.

D&J contends it has raised a colorable jurisdictional argument in support of its Petition. That is, D&J alleges that it is not an entity that is enumerated in Section 2702(c) of the Code, 66 Pa.C.S. § 2702(c), such that it is subject to our exclusive mandate authority to order the construction, *i.e.*, relocation, alteration, suspension or abolition of a crossing:

(c) Mandatory relocation, alteration, suspension or abolition. Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. In determining the plans and specifications for any such crossing, the commission may lay out, establish, and open such new highways as, in its opinion, may be necessary to connect such crossing with any existing highway, or make such crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, suspension or

abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth or an established nonprofit organization with a recreational or conservation purpose.

66 Pa.C.S. § 2702(c) (emphasis added).

D&J would additionally buttress its position concerning jurisdiction by raising a procedural due process concern that no hearings have been held in this matter and this proceeding was initiated as a result of a voluntary filing by the Petitioner, which it now seeks to abandon.⁹

While D&J may challenge the authority of the Commission to direct it to proceed with the project at its initial cost and expense, based on its status as a non-jurisdictional/enumerated entity, the public interest and safety considerations regarding the Millers Run Road Crossing are not abated by D&J's proposed withdrawal of the Application. *See, e.g., Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022); 2022 WL 2915415 (Pa.P.U.C.)¹⁰ – in the context of a petition seeking a declaratory order, withdrawal by the petitioning party was determined not to be in the public interest to the extent public interest requires continuation.

⁹ *See Heath Ressler, et al. v. Reading, Blue Mountain and Northern Railroad Company, Schuylkill County and Girardville Borough*, Docket Nos. C-00004081, C-00004082, *et al.* (Order entered November 15, 2002); 2002 WL 34560327 (Pa.P.U.C.) discussing adequate notice for purposes of due process.

¹⁰ Opinion and Order on Remand entered August 2, 2023; 2023 WL 5011987 (Pa.P.U.C.).

In the *February 2026 Secretarial Letter*, the Commission Staff identified certain safety concerns which are not addressed by the mere abandonment of the current Application:

* * *

2. Within fifteen (15) business days of the date of [the *February 2026 Secretarial Letter*], D&J Fox Holdings, LLC, at its initial cost and expense, is directed to close the unprotected area of track/crossing surface along the southern side of State Route 0050 (Millers Run Road) from the existing guiderail end treatment to the existing mast-mounted cantilevered railroad warning device in the southwest quadrant and to close off the unprotected area of track/crossing surface within its property from the existing concrete barrier to the existing mast-mounted cantilevered railroad warning device in the southwest quadrant. The track shall be protected from vehicular access temporarily by use of long-term channelizing devices, in accordance with Pennsylvania Department of Transportation Publication 213, Temporary Traffic Control Guidelines, until such time that a permanent solution is implemented. In accordance with the Commission's minimum lateral (side) clearance required by 52 Pa. Code, Section 33.122, no temporary traffic control devices shall be placed within 12 feet of the centerline of track.

* * *

5. In lieu of Paragraph 3 and Paragraph 4 [on pages 2 and 3 of the *February 2026 Secretarial Letter*], D&J Fox Holdings, LLC, at its sole cost and expense and within sixty (60) days of the date of [the *February 2026 Secretarial Letter*], submit an alternative plan to address the safety concerns at the crossing to all parties for review and to the Commission for approval.

* * *

February 2026 Secretarial Letter at 2 ¶ 2, and 3 ¶ 5.

Based on the limited record before us and because the issue of jurisdiction is raised for the first time in the Petition, we shall refer this matter to the Office of Administrative Law Judge (OALJ) for such further proceedings as deemed necessary for issuance of a decision on the question of jurisdiction.

Generally, when a crossing is within the Commission's jurisdiction, the Commission has the authority, pursuant to 66 Pa.C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. *SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991).

Consistent with Section 2702(f) of the Code, 66 Pa.C.S. § 2702(f), should the Commission find that there is an immediate danger to the safety and welfare of the travelling public, we may order the appropriate entity to perform repairs immediately, and refer the matter to OALJ for such further proceedings as may be warranted to allocate costs and resolve any outstanding issues. *Carl Hill v. Reading Blue Mountain and Northern Railroad Company, Hazel Township, Luzerne County, Commonwealth of Pa. Dept. Transp.*, Docket No. C-2012-2303046 (Order entered on reconsideration January 10, 2013); 2013 WL 175688 (Pa.P.U.C.).

Additionally, the statutory reach of Chapter 27 has been interpreted to apply to a "concerned party" to a rail crossing. *Norfolk Southern Ry. Co. v. Pa. PUC*, 77 A.3d 619 (Pa. 2013); *see also, Investigation upon the Commission's motion into matters pertaining to the proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 formally crosses, below grade, the track of Bessemer and Lake Erie*

Railroad in Brady's Bend Township, Armstrong County, Docket No. I-2019-3012769 (Opinion and Order entered July 10, 2025); 2025 WL 1925200 (Pa.P.U.C.).

Based on the foregoing, notwithstanding that D&J is not an entity enumerated in Section 2702(c), it remains a concerned Party to this matter and given the public safety issues involved, we shall grant, in part, and deny, in part, the Petition and refer the matter to OALJ for such further proceedings as deemed necessary and for issuance of a decision.

IV. Conclusion

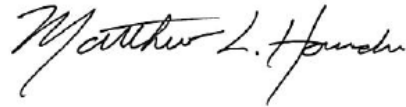
Based on the foregoing and in consideration of the Petition for Reconsideration filed March 6, 2026, to the Commission Secretarial Letter issued February 19, 2026, we shall grant, in part, and deny, in part the instant Petition, consistent with the discussion in this Opinion and Order. D&J's Application shall be assigned to the OALJ for such expedited proceedings as deemed necessary and the issuance of a decision; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration of Staff Action filed on March 6, 2026, to the Commission Secretarial Letter issued February 19, 2026, is granted, in part, and denied, in part, consistent with the discussion in this Opinion and Order.

2. That the above docket shall be referred to the Commission's Office of Administrative Law Judge (OALJ) for such expedited proceedings as deemed necessary and for the issuance of a decision on the issue of jurisdiction.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Matthew L. Homsher". The signature is written in a cursive style with a large initial "M".

Matthew L. Homsher
Secretary

(SEAL)

ORDER ADOPTED: April 16, 2026

ORDER ENTERED: April 16, 2026