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August 31, 2018

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Investigation upon the Commission's own motion to determine the condition and disposition of six (6) existing structures carrying various highways above the grade of the tracks of the Canadian Pacific Railroad in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, Susquehanna County and Benton Township, Lackawanna County; Docket No. I-2015-2472242


Dear Secretary Chiavetta:

Enclosed for electronic filing are the Exceptions of Great Bend Township to the Recommended Decision in the above-referenced matter. Copies of the Exceptions are being served in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By 
Charles E. Thomas, III

Enclosure

cc: Certificate of Service
Brian O'Connor, Chairman (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's own	:	
motion to determine the condition and	:	
disposition of six (6) existing structures	:	
carrying various highways above the grade	:	
of the tracks of the Canadian Pacific	:	Docket No. I-2015-2472242
Railroad in Great Bend Township, New	:	
Milford Township, Brooklyn Township, Hop	:	
Bottom Borough, Lathrop Township,	:	
Susquehanna County and Benton Township,	:	
Lackawanna County	:	

**EXCEPTIONS OF
GREAT BEND TOWNSHIP**

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DATED: August 31, 2018

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Pursuant to 52 Pa. Code § 5.333, Great Bend Township, Susquehanna County (“Great Bend” or the “Township”), files the following Exceptions to the Recommended Decision (“R.D.”) of Administrative Law Judge (“ALJ”) David A. Salapa dated July 17, 2017 and issued by Secretarial Letter dated August 6, 2018.¹

I. INTRODUCTION

This proceeding concerns the Pennsylvania Public Utility Commission’s (“Commission”) investigation into the condition and disposition of six existing structures carrying various highways above the grade of tracks of Norfolk Southern Railway Company (“Norfolk Southern” or “NS”) (formerly the tracks of the Canadian Pacific Railroad) in Great Bend Township, New Milford Township, Brooklyn Township, Hop Bottom Borough, Lathrop Township, all in Susquehanna County, and Benton Township, Lackawanna County, and a related proceeding involving a bridge structure in Nicholson Borough, Wyoming County, at Docket No. M-2013-2364201. Great Bend’s interest in this proceeding, and thus these Exceptions, is limited to the crossing structure that carries Township Road T-821 (or Old Lackawanna Trail) over the tracks of Norfolk Southern (DOT # 263 952 J) in the Township (the “T-821 Bridge”).

Consisting of 154 Findings of Fact, 6 Conclusions of Law, and 87 recommended Ordering Paragraphs, the R.D. assigns maintenance and inspection responsibilities for all seven crossing structures, orders some of the structures to be repaired, and orders other structures to be replaced. For the existing T-821 Bridge, ALJ Salapa assigns Norfolk Southern, at its initial cost and expense, inspection and maintenance responsibility and directs Great Bend to reimburse Norfolk Southern 10% of those costs. Norfolk Southern is also ordered to repair the existing bridge at its sole cost. The ALJ also orders, however, the bridge to be subsequently removed and

¹ By Secretarial Letter dated August 14, 2018, the respective deadlines for submitting Exceptions and Replies to Exceptions to the R.D. were extended to August 31, 2018 and September 24, 2018.

replaced on a set time schedule and, in conjunction therewith, directs Great Bend, at its initial cost and expense, to prepare plans and perform all work, with Norfolk Southern reimbursing the Township \$400,000. Lastly, the ALJ assigns all future maintenance and cost responsibility for the T-821 Bridge, following its replacement, to Great Bend.

Several of the conclusions and recommendations concerning the disposition of the T-821 Bridge are contrary to and unsupported by the evidence of record and applicable law. As set forth in the exceptions below, Great Bend respectfully submits that the ALJ erred by:

- Recommending Great Bend should reimburse Norfolk Southern for 10% of the costs incurred for inspecting and maintaining the existing bridge, when there are Commission Orders directing Norfolk Southern to bear sole cost and expense for all inspection and maintenance;
- Failing to decide the scope and extent of requisite repairs to be performed on the bridge based on the record conclusively developed in this proceeding and instead directing Norfolk Southern to first submit repair plans for examination and Commission approval before being undertaken;
- Failing to assign interim maintenance and cost responsibility for the bridge following completion of Norfolk Southern's repairs and prior to the recommended replacement of the bridge;
- Recommending the removal and replacement of the bridge and concomitantly assigning Great Bend primary responsibilities related thereto, in addition to sole maintenance and cost responsibility after the bridge is replaced;
- Directing Great Bend to take action on an accelerated time schedule well in advance of the end of useful service life of the bridge after extended by the repairs; and
- Ordering Norfolk Southern to only reimburse Great Bend \$400,000 for costs incurred with removing and replacing the bridge.

As a final preliminary matter, Great Bend reiterates that the only two issues concerning the T-821 Bridge which are disputed in this proceeding involve (1) the proper scope and extent of necessary repairs to be undertaken for the existing bridge, and (2) the appropriate party or parties to be assigned responsibility for future inspection, maintenance, and repair and related

costs. The assignment of responsibility for current inspection, maintenance, repair, and rehabilitation of the T-821 Bridge and related costs was *never at issue*. In fact, based on the Commission's prior Orders relating to the T-821 Bridge, Norfolk Southern has acknowledged and accepted it has sole responsibility for current inspection, repair, rehabilitation, maintenance and costs for the bridge.² Moreover, those assignments remain controlling not just for the present, but also as to future maintenance and cost responsibility. Accordingly, Norfolk Southern, as the party advocating for a reassignment of responsibilities already determined, bears the affirmative burden of proving why reassignment should be ordered,³ a burden it failed to carry and the ALJ apparently overlooked.

² NS St. No. 1 at 5; Tr. 196.

³ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990); *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950); 66 Pa.C.S. § 332(a).

II. EXCEPTIONS

Great Bend Exception No. 1:

The ALJ erred in recommending that Great Bend should reimburse Norfolk Southern for 10% of the costs incurred for inspecting and maintaining the existing T-821 Bridge, as current cost and maintenance responsibility for the existing T-821 Bridge are not at issue in this proceeding and have already been resolved by prior Commission Orders. (Ordering Paragraph Nos. 55 and R.D. at 72-73; Great Bend M.B. at 11-13)

In the R.D., ALJ Salapa concludes that “it is just and reasonable for Great Bend to reimburse NS 10% of the costs of inspection and maintenance” related to the existing T-821 Bridge. R.D. at 72. The ALJ reaches this conclusion because both NS and Great Bend benefit from the continued existence of the grade-separated crossing and both parties purportedly bear some responsibility for the deteriorated condition of the crossing. *Id.* at 72-73. Ordering Paragraph No. 55, thus, recommends that “Great Bend Township reimburse Norfolk Southern Railway Company 10% of the costs that Norfolk Southern Railway Company incurs in inspecting and maintain the existing T-821 bridge.” R.D. at 85. The ALJ erred in this conclusion and recommendation for three reasons.

First, the question of which party bears responsibility for present inspection, maintenance, repair, and costs of the T-821 Bridge was never at issue or in dispute in this proceeding, and the ALJ’s recommendation contradicts the Commission’s prior Orders addressing this matter. In its Order entered April 9, 2015 initiating the investigation at the instant docket,⁴ the Commission did not assign specific maintenance responsibilities for the T-821 Bridge, but instead expressly ordered that “any assignments for maintenance previously assigned to any party of record in any prior Commission Orders or Secretarial Letters **remain in**

⁴ Docket No. I-2015-2472242 (Order entered Apr. 9, 2015) (“*April 9 Order*”); PennDOT Exh. D-1.

full force and effect.⁵ As the record evidence demonstrates, the T-821 Bridge is the subject of a series of Commission Orders dating back to 1915,⁶ all of which assigned maintenance and costs responsibilities exclusively to the railroad. *See also* Great Bend M.B. at 11-13. The most recent of those orders – the Order entered February 22, 1985 at Docket No. C-79081404 – directed the Delaware and Hudson Railway Company (owned by Canadian Pacific) (“D&H”) (NS’s predecessor), **“at its sole cost and expense, [to] do all work and furnish all materials necessary thereafter to maintain its railroad facilities at the crossing, including the bridge substructure and superstructure, exclusive of the bituminous roadway wearing surface.”**⁷

As part of that order, the Commission specifically denied the railroad’s attempt to have another party assume maintenance responsibility.⁸

Based on the *April 9 Order* and *T-821 1985 Order*, Norfolk Southern, as successor to D&H, clearly bears sole responsibility for present inspection, repair, maintenance, and costs of the T-821 Bridge. This fact was not even in dispute as part of this proceeding, and at no time did Norfolk Southern advocate for a reassignment of current maintenance and cost responsibility for the T-821 Bridge. Instead, Norfolk Southern presented testimony accepting its maintenance and cost responsibility, as assigned by these prior Orders, and agreeing to perform and pay for current repair work on the T-821 Bridge.⁹ It also confirmed its responsibility related to the T-

⁵ *April 9 Order*, slip op. at 3 (Order ¶ 7) (emphasis added).

⁶ *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Aug. 14, 1980) (“*T-821 1980 Order*”) (PennDOT Exh. D-10); *Great Bend Twp. v. Consolidated Rail Corp., et al.*, Docket No. C-79081404 (Order entered Feb. 22, 1985) (“*T-821 1985 Order*”) (PennDOT Exh. D-11); *In the Matter of the Abolition of Grade Crossings of the Delaware, Lackawanna and Western Railroad Company’s Tracks over the Cochection and Great Bend Turnpike, and the Construction of a Crossing above Grade in the Township of Great Bend, Susquehanna County*, 1 PA PUC 361, Docket No. A-321, 1914 (Order entered Apr. 8, 1915) (“*T-821 1915 Order*”) (PennDOT Exhibit D-12).

⁷ *T-821 1985 Order* (emphasis added); PennDOT Exh. D-11.

⁸ *Id.*

⁹ NS St. No. 1 at 5-6; Tr. 196-97.

821 Bridge in briefing,¹⁰ even stating that the maintenance for the bridges carrying SR 2041 and T-821 “have not expressly been left open for reassignment” as part of this proceeding.¹¹

Second, although the ALJ concludes that “Great Bend failed to perform any meaningful repairs or maintenance to the structure even though the bridge carries a township highway” and, thus, should be jointly responsible for the deteriorating condition of the crossing (R.D. at 72-73), there is no evidence of record to support such a conclusion. To the contrary, the record evidence confirms that none of the Commission’s prior orders related to the T-821 Bridge assigned any responsibility specifically to Great Bend.¹² Moreover, none of the critical priority code items (i.e., items labeled as either a priority 1, 2 or 3) identified in PennDOT’s December 19, 2017 inspection report for the T-821 Bridge and explained in testimony of PennDOT witness Babinski relates to the roadway surface features, for which Great Bend would assume responsibility.¹³ Simply put, no party to this proceeding has alleged or otherwise argued that Great Bend had a responsibility to perform and failed to perform meaningful repairs or maintenance on the structure.

On the other hand, the record evidence conclusively demonstrates that the railroad is solely responsible for the deterioration of the T-821 crossing structure which has led to the need for the existing repair work. As Norfolk Sothern witness Hauschildt candidly stated, there was “a lot of deferred maintenance” when Norfolk Southern purchased the D&H Line from Canadian

¹⁰ NS M.B. at 13; N.S. R.B. at 14-15.

¹¹ N.S. R.B. at 15. That assignment remains controlling and is barred by *res judicata*. See *Norfolk Southern Railway Co. v. Pa. P.U.C.*, 875 A.2d 1243 (Pa. Cmwlth. 2005) (holding that the validity of 75-year old order requiring a railroad to maintain pedestrian crossing was entitled to *res judicata* effect). Thus, future maintenance responsibility for the T-821 Bridge is also not properly subject to adjudication as part of the Commission’s investigation at this I-docket.

¹² See PennDOT Ex. D-11; *T-821 1985 Order*; *April 9 Order*. Indeed, based on these orders, there would be no requirement or expectation for Great Bend to perform any work, and it would have been reasonable to believe that the existing railroad bore full responsibility.

¹³ PennDOT St. No. 2A at 32-33; see also Confidential PennDOT Exh. E-7.

Pacific in September 2015.¹⁴ While Norfolk Southern claims it did not receive much information from its predecessor regarding the work performed on the rail line and structures along it,¹⁵ that appears to be a failure on Norfolk Southern's part in conducting its due diligence and certainly not the fault of Great Bend or any other party to this proceeding, and should not serve to shield Norfolk Southern from its maintenance and cost responsibilities for the T-821 Bridge, especially considering this investigation was ongoing at the time of the purchase. Consequently, it is wholly appropriate to leave all maintenance and cost responsibilities squarely on the shoulders of Norfolk Southern.

Third, Ordering Paragraph No. 55 and the related conclusions are internally inconsistent with the ALJ's analysis and conclusions on pages 55-56 of the R.D. concerning the bridge carrying SR 2041, which, along with the T-821 Bridge, was the only other structure at issue in this proceeding where there was a prior Commission order assigning maintenance to Norfolk Southern's predecessor at its sole cost and expense.¹⁶ However, unlike his conclusion for the T-821 Bridge which disturbed the Commission's prior Orders assigning sole maintenance and cost responsibility to the railroad, the ALJ concludes with respect to the SR 2041 bridge that it is just and reasonable for the parties to continue to bear cost and maintenance responsibility in accordance with the Commission's prior orders (which included the *April 9 Order* and an Order entered August 5, 1947 at A-68459). Like the *T-821 1985 Order*, the underlying 1947 order specifically directed the Norfolk Southern's predecessor to maintain the entire substructure and superstructure of the 2041 bridge.

¹⁴ NS St. No. 1 at 3; *see also* Tr. 178.

¹⁵ *Id.*

¹⁶ *See* NS R.B. at 14-15.

In reaching this conclusion for the SR 2041 bridge, the ALJ noted that Norfolk Southern's predecessors constructed the bridge and created the crossing, both parties benefit from the continued existence of the grade-separated crossing, and that Norfolk Southern's predecessors bear responsibility for the deteriorated condition of the crossing. While the latter two items were addressed by the ALJ in his analysis for the T-821 Bridge (although incorrectly as discussed above), the ALJ appears to have overlooked the fact that the evidence of record clearly establishes that (i) Norfolk Southern's predecessor railroad, DL&W, designed and built the T-821 Bridge,¹⁷ and (ii) that the Township roadway (Old Lackawanna Trail or T-821) did not exist until after the construction of the crossing structure.¹⁸ The party that built the crossing and whether the roadway existed before or after the construction of the crossing is a factor that the Commission may consider in allocating costs and assigning maintenance.¹⁹

In conclusion, Great Bend respectfully submits that the evidence in this proceeding and the Commission's prior Orders supporting the assignment of sole maintenance and cost responsibility to the railroad remain controlling, and it is neither just nor reasonable to assign 10% of the costs related to the current inspection, maintenance and repair of the T-821 Bridge to Great Bend. The only current costs and maintenance Great Bend should be responsible for are those related to maintaining the highway approaches to the bridge and the bituminous roadway wearing surface on the bridge. Therefore, Ordering Paragraph No. 55 and the related conclusions on pages 72-73 of the R.D. should be reversed.

¹⁷ NS St. No. 1 at 3; PennDOT St. No. 3 at 6; PennDOT Exh. D-12.

¹⁸ *T-821 1915 Order*, 1 PA PUC at 362 ("A new public highway is to be laid out to connect the Upper Road and Lower Road with this above grade crossing.).

¹⁹ *Greene Twp. v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995).

Great Bend Exception No. 2:

The ALJ erred by failing to address the scope and extent of requisite repairs to be performed on the T-821 Bridge in accordance with the record conclusively developed in this proceeding and instead directing Norfolk Southern to first submit repair plans for examination and Commission approval before being undertaken. (Ordering Paragraph Nos. 56 and 57 and R.D. at 73)

Ordering Paragraph Nos. 56 and 57 of the R.D. recommend:

56. That Norfolk Southern Railway Company, at its sole cost and expense, within three (3) months of the date of this Order, prepare and submit to all parties of record for examination and to this Commission for approval, complete detailed final repair plans, consistent with the repairs outlined in the evidence in this proceeding and this order, for the proposed repair of the existing bridge carrying T-821, including repair of the bridge seats and abutments.

57. That Norfolk Southern Railway Company, at its sole cost and expense, within twelve (12) months from the date that the Commission approves its submitted repair plans, shall furnish all materials and do all work necessary to repair the T-821 bridge in accordance with the approved plans.

R.D. at 85. While the ALJ correctly affirms Norfolk Southern's duty to make repairs to the T-821 Bridge at its sole cost and expense (consistent with established Commission orders), the ALJ failed to address and decide the scope and extent of those repairs, despite a thoroughly developed record on this issue. The ALJ, instead, directs Norfolk Southern to first submit repair plans for examination and Commission approval before being undertaken. Great Bend respectfully submits that these Ordering Paragraphs, if adopted, would undermine the purpose of this proceeding in the first instance, unduly delay the prompt repair and reopening of the T-821 Bridge and orderly resolution of this proceeding, and create additional litigation over an issue that has already been conclusively developed on the record.

The parties to this proceeding have expended considerable time and resources in preparing testimony and exhibits, participating in hearings, submitting briefs, and developing a substantial evidentiary record to be used to assist the Commission in determining the condition

and disposition of the T-821 Bridge and the five other existing structures being investigated at this docket. While it is indisputable that considerable repairs to the T-821 Bridge are required to ensure the bridge is adequate for the safety, accommodation, and convenience of railway, highway, and pedestrian traffic, the scope and extent to which repairs are necessary and should be performed is a central issue to this proceeding. That issue is ripe for a ruling and well within the Commission's purview as part of this investigation and should not be deferred to a procedure that requires further submissions and approvals, as currently recommended in Ordering Paragraph Nos. 56 and 57.

Furthermore, while Ordering Paragraph No. 56 directs Norfolk Southern to submit complete detailed final repair plans "consistent with the repairs outlined in the evidence in this proceeding" and the R.D., it fails to clarify which repairs should be made. In particular, Norfolk Southern, PennDOT, and I&E all presented testimony on the scope of repairs required to be made on the T-821 Bridge. The R.D. briefly references the plans developed by Norfolk Southern to repair the bridge seats and abutments (R.D. at 73), but fails to reference, analyze, or discuss PennDOT's or I&E's proposals. To the extent the ALJ's oversight of these other proposals constitutes a rejection of those proposals, that rejection was erroneous.

Great Bend provided a thorough discussion of these competing proposals in Section V.B.3 of its Main Brief, which it hereby incorporates by reference.²⁰ In that discussion, Great Bend expressed serious concerns over the repair plans developed by Norfolk Southern, which sought to "incentivize" the Commission to assign future maintenance responsibility to Great Bend in exchange for completing "additional" work it considers unnecessary at this time²¹ and which failed to address or satisfy all of the priority maintenance items identified in PennDOT's

²⁰ See Great Bend M.B. at 13-17.

²¹ See Great Bend M.B. at 13-14.

most recent inspection report for the T-821 Bridge which was mandated by the Commission as part of this proceeding.²² The repairs proposed by Norfolk Southern are not as extensive as Norfolk Southern would have the Commission believe, but rather only achieve the bare minimum.

Ultimately, the public interest requires that the present repairs on the T-821 Bridge be as comprehensive as possible, while being undertaken as soon as practical in light of the closure and its impact on the surrounding area.²³ Repairs performed in accordance with the priority maintenance items in the PennDOT inspection report will ensure comprehensiveness and also extend the service life of the bridge to the fullest extent. If the Commission were to adopt Norfolk Southern's limited repairs, there will be deficiencies identified by the inspection report that remain unaddressed, which will cause continued deterioration at an ever-accelerating rate and require further action and repairs in the future.²⁴ Moreover, regardless of how minor or "unnecessary" Norfolk Southern may deem the priority maintenance items to be, the Commission's directive to Norfolk Southern's predecessor-in-interest was crystal clear – the railroad shall, "at its sole cost and expense, furnish all materials and perform all work to maintain" the crossing structure.²⁵ Norfolk Southern should not be excused from these obligations, especially at the expense of Great Bend which would be left with the burden of completing work that should have been done by the railroad in the first place.

For these reasons, Great Bend respectfully submits that the Commission should reverse Ordering Paragraph Nos. 56 and 57 and instead direct Norfolk Southern, at its sole cost and

²² See Great Bend M.B. at 13-15; Confidential PennDOT Exh. E-7.

²³ See Great Bend M.B. at 9-10.

²⁴ PennDOT St. No. 4 at 1.

²⁵ *T-821 1985 Order* at 2 (emphasis added).

expense, (i) within three (3) months of a final Commission Order, to complete the \$200,000 in repairs proposed in its plans, and (ii) within fifteen (15) months of a final Commission Order, to complete the remaining priority maintenance items identified in PennDOT's December 19, 2017 inspection report for the T-821 Bridge,²⁶ with the exception of items related to the roadway features which would remain Great Bend's responsibility. The three month window should not pose a problem for Norfolk Southern, as the record evidence confirms Norfolk Southern would be able to complete the repairs proposed in its plans within three months of the commencement of field construction.²⁷ Proceeding in this fashion will also ensure that the bridge is reopened to vehicular and pedestrian traffic as quickly as possible.

Great Bend Exception No. 3: **The ALJ erred by failing to assign interim future maintenance and cost responsibility for the T-821 Bridge following completion of Norfolk Southern's current repairs to the T-821 Bridge.**

The primary issue in this proceeding relating to the T-821 Bridge is which party or parties should be assigned responsibility for future inspection, maintenance, repair, and replacement of the T-821 Bridge and related costs after the current repairs are completed by Norfolk Southern. The R.D., however, fails to address this critical question and instead unilaterally recommends an improper process for removing and replacing the bridge which no party has advocated. *See* R.D. at 73-75 and 85-86 (Ordering Paragraph Nos. 61-67).²⁸ As a result, maintenance and cost responsibility for the T-821 Bridge will remain unassigned for a considerable period of time following the completion of Norfolk Southern's current bridge repairs and until the proposed removal and replacement of the bridge occurs.

²⁶ Confidential PennDOT Exh. E-7.

²⁷ *See* NS St. No. 1 at 9; NS Exh. 1.

²⁸ Great Bend addresses these Ordering Paragraphs in Exceptions 4 through 6.

Here, again, the R.D. is internally inconsistent with its recommendations regarding the disposition of the two bridges where there are clear and undisputed Commission orders assigning future maintenance to Norfolk Southern at its sole cost and expense. Following the completion of Norfolk Southern's required repairs on the SR 2041 bridge, the ALJ specifically recommends that Norfolk Southern, "at its sole cost and expense, furnish all material and perform all work necessary to maintain the entire SR 2041 bridge until December 31, 2043." R.D. at 82 (Ordering Paragraph No. 40). Although Great Bend defers to the other parties on the scope of proper repairs for the SR 2041 bridge, that date coincides with the evidence of record which established that Norfolk Southern's proposed repairs for that structure would likely extend the service life of the bridge by an additional 25 years.²⁹

For the T-821 Bridge, Norfolk Southern testified that its proposed repairs would provide approximately 20 years of additional useful life to the bridge.³⁰ Without explanation, the ALJ appears to have overlooked or simply ignored this evidence. Moreover, that 20-year figure would almost certainly be greater if the ordered repairs are made so as to satisfy all priority items identified in PennDOT's December 19, 2017 inspection report for the T-821 Bridge. Nevertheless, consistent with the disposition of the SR 2041 bridge, the Commission's prior orders on the T-821 Bridge, and the thorough analysis of relevant factors discussed in Great Bend's Main Brief,³¹ Norfolk Southern should be assigned future maintenance and cost responsibility, at a bare minimum, until December 31, 2038 or upon satisfaction of compliance requirement in Ordering Paragraph No. 60, whichever is later. The R.D.'s failure in this regard is erroneous.

²⁹ N.S. St. No. 1 at 12; Tr. 197.

³⁰ N.S. St. No. 1 at 12; *see also* Tr. 203-04, 210-11.

³¹ *See also* Great Bend M.B. at 18-25 (discussing assignment of future maintenance and cost responsibility).

Great Bend Exception No. 4:

The ALJ erred in recommending that the T-821 Bridge should be removed and replaced and assigning Great Bend primary responsibilities related thereto, as well as all future maintenance and cost responsibility following replacement. (Ordering Paragraph Nos. 61-67 and R.D. at 73-75)

Ordering Paragraph Nos. 61 through 67 of the R.D. state as follows:

61. That Great Bend Township, at its initial cost and expense, within five (5) years of the date of this Order, prepare and submit to all parties of record for examination and to this Commission for approval, complete detailed final plans for the removal and replacement of the T-821 bridge.

62. That Great Bend Township, at its initial cost and expense, within two (2) years from the date that the Commission approves its submitted removal and replacement plans, shall furnish all materials and do all work necessary to remove and replace the T-821 bridge in accordance with the approved plans.

63. That Norfolk Southern Railway Company shall, at its sole cost and expense, furnish any watchmen, flagmen, inspectors and engineers deemed necessary by Norfolk Southern Railway Company to protect its operations and facilities during the time the T-821 improvement is being constructed in accordance with this order.

64. That Great Bend Township, at least ten (10) days prior to the start of work, notify all parties in interest of the actual date on which work will begin.

65. That Great Bend Township report to the Commission the date of actual completion of the work.

66. That Norfolk Southern Railway Company reimburse Great Bend Township \$400,000 of the costs that Great Bend Township incurs in removing and replacing the T-821 bridge.

67. That, upon the completion of the removal and replacement of the T-821 bridge, Great Bend Township, at its sole cost and expense, furnish all material and perform all work necessary to maintain and inspect the entire T-821 bridge.

R.D. at 85-86. These recommendations are not supported by either law or fact and should be rejected by the Commission.

A. The Evidence Supports Repair and Rehabilitation of the T-821 Bridge, not Removal and Replacement.

In support of removal and replacement of the bridge, the ALJ states as follows:

Since Great Bend has indicated that the crossing is necessary to the local highway system, the evidence supports only rehabilitation or replacement of the structure. NS is in the process of repairing the bridge. However, the bridge was previously repaired in the 1980s by Conrail. Given the history of the structure, rehabilitation does not appear to be a viable long-term solution to the structural problems that exist at the T-821 crossing.

Since there is a need for a crossing at this location, the existing bridge should be replaced since it will only continue to deteriorate, even if it is rehabilitated. ...

R.D. at 74.

The ALJ has overlooked two critical facts regarding the issue of rehabilitation versus replacement. First, the only reason rehabilitation appears not to be a viable long-term solution is Norfolk Southern's predecessor's (D&H) negligence with respect to the maintenance and upkeep of the bridge. While it is true the bridge was repaired in the 1980s by Conrail, it appears there was little to no work done in the intervening years, given the considerable "deferred maintenance" Norfolk Southern assumed when it purchased the D&H Line from Canadian Pacific in September 2015.³² Indeed, had Norfolk Southern's predecessor fulfilled its Commission-mandated obligations and maintained and repaired the T-821 Bridge in an appropriate and diligent manner, the bridge never would have deteriorated to its current condition, never would have had to be closed, and likely never would have been subject to the instant investigation by the Commission. The R.D. would reward NS for the negligence of its predecessor and require Great Bend to bear the burden of that negligence.

³² NS St. No. 1 at 3; *see also* Tr. 178.

Second, even with the railroad's negligence, the T-821 Bridge does not need to be replaced and further deterioration can be avoided so long as the Commission orders the bridge to be repaired consistent with the recommendations and priority items outlined in PennDOT's inspection report for the bridge³³ and not the more limited repairs proposed by Norfolk Southern. As Great Bend argued in its Main Brief, PennDOT witness Babinski explained the shortcomings of Norfolk Southern's repair plans:

It appears that the work that NS is proposing will address the majority of the priority 1s and 2s from the inspection reports. It's difficult to be sure given the vague descriptions. They do not address all the structural elements requiring repair that will continue to drive low bridge ratings. Without addressing barrier connection, abutment deterioration and major wing spalls, the structures will continue to deteriorate at an ever-accelerating pace. Priority 3 items in those areas will worsen to the priority 2 and 1 categories bringing us back to this same situation requiring action be taken within the specified time frames.³⁴

Accordingly, without a full rehabilitation which greatly reduces or even stops deterioration, the work proposed by Norfolk Southern may not result in the anticipated 20 year service life. To achieve that level of useful life (or greater), the work needs to be as complete as possible.³⁵ Moreover, any and all work should be discussed with PennDOT, as it volunteered, before construction begins to ensure that the crossing structure is designed to meet state and/or national standards.³⁶

Great Bend strongly prefers rehabilitation over replacement of the bridge. No party to this proceeding has advocated for the abolition of the T-821 Bridge,³⁷ and I&E is the only party

³³ Confidential PennDOT Exh. E-7; *see also* PennDOT St. No. 2A at 32-33.

³⁴ PennDOT St. No. 4 at 1.

³⁵ *Id.* at 2 and 8.

³⁶ *Id.* at 2.

³⁷ R.D. at 71.

that actively argued the T-821 Bridge should be replaced.³⁸ While the R.D. contends that PennDOT and Great Bend do not offer any opinion concerning the replacement of the T-821 Bridge (R.D. at 73), neither did Norfolk Southern. In fact, PennDOT deferred to Great Bend and Norfolk Southern on whether the bridge should be repaired or replaced.³⁹ Neither Great Bend nor Norfolk Southern argue that replacement of the bridge is necessary and, thus, their focus has been on the repair and rehabilitation of the structure. Replacement would create a costly precedent that is not in the public interest.

B. Even if the T-821 Bridge Is Programmed for Replacement, the Record Evidence Demonstrates that Great Bend Is Not the Proper Party to which Primary Work and Initial Cost Responsibility, as well as Future Maintenance and Cost Responsibility, Should Be Assigned.

In the R.D., the ALJ concludes that:

Great Bend should prepare plans for the demolition and removal of the existing T-821 bridge and replacement with a new structure. Upon Commission approval of those plans, Great Bend shall remove the structure and replace it at its initial cost and expense. NS shall reimburse Great Bend for \$400,000 of the costs of plan preparation, demolition and replacement. NS will also bear the costs of providing watchmen, flagmen and inspectors.

R.D. at 74; *see also* R.D. at 85-86 (Ordering Paragraph Nos. 61-65). In addition to initial cost and expense responsibility for the bridge's removal and replacement, the ALJ also assigns Great Bend all future maintenance and cost responsibility after the bridge is replaced. R.D. at 86 (Ordering Paragraph No. 67). The ALJ reaches these conclusions and recommendations for three apparent reasons: (i) Norfolk Southern's predecessors constructed the bridge and created the crossing; (ii) Norfolk Southern's predecessors bear "some responsibility" for the deteriorated condition of the crossing; and (iii) both Norfolk Southern and Great Bend will benefit from continued existence of the grade-separated crossing. *Id.* at 74-75.

³⁸ *See* I&E R.B. at 6.

³⁹ PennDOT St. No. 2A at 33.

The following relevant factors are consistently considered by the Commission in assigning responsibility and allocating costs in rail/highway crossing cases: (1) which party built the crossing and whether the roadway existed before or after the construction of the crossing; (2) the party that owned and maintained the crossing; (3) the relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which 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. *Greene Twp. v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995) (citations omitted). The Commission also has considered: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation. *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered Apr. 9, 1981).

While the Commission has considered the foregoing factors in prior cases, the Commission has discretion in determining which factors are relevant in assessing costs within the context of the particular case before it. *See PECO Energy Co. v. Pa. P.U.C.*, 791 A.2d 1155, 1163 (2002) (citing *AT&T v. Pa. P.U.C.*, 737 A.2d 201 (Pa. 1999)). The Commission, moreover, is not limited to any fixed rule, but takes all relevant factors into consideration, with the only requirement being that its order must be just and reasonable. *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, 778 A.2d 785 (Pa. Cmwlth. 2001); *AT&T, supra*; *East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988).

Based on the consideration of all relevant factors, Great Bend submits the ALJ's conclusions and rationales are neither just nor reasonable. Of the three factors considered – the party that constructed the crossing, the party responsible for the deterioration, and the benefits

conferred – the ALJ only cites to the benefits conferred as a reason why Great Bend should be responsible for performing the work and bearing the cost. On the other hand, the ALJ cites all three factors as reasons why Norfolk Southern should be assigned work and cost responsibility. Yet, for some inexplicable reason, the ALJ concludes, based solely on this single, shared factor, that Great Bend should be the party bearing responsibility for performing work and paying initial costs for the removal and replacement of the T-821 Bridge (*see* Ordering Paragraph Nos. 61-65) and then should be the party bearing responsibility for all future costs and maintenance related to the bridge after it is replaced (*see* Ordering Paragraph No. 67). This is even more perplexing when the record evidence clearly demonstrates that Norfolk Southern’s predecessor bears full (not partial) responsibility for the bridge’s deteriorating condition and contains no facts to suggest otherwise.⁴⁰

In addition to these three factors, Great Bend provided an extensive analysis of all of the factors traditionally considered by the Commission in in Section V.C.2.c. of its Main Brief, which it hereby incorporates by reference.⁴¹ The ALJ’s failure to consider these other factors when there was considerable evidence of record addressing these matters is untenable. Even when those other factors are also considered, there can only be one just and reasonable conclusion – *i.e.*, Norfolk Southern, not Great Bend, should be assigned both initial and future work and cost responsibility for the T-821 Bridge, including those related to the substructure and superstructure, irrespective of whether the bridge should rehabilitated or replaced.

Of particular note, in assigning work and costs to Great Bend, the ALJ fails to recognize the ample record evidence demonstrating that Great Bend is in a much worse position than

⁴⁰ *See* Exception No. 2 *supra* (discussing that there is no evidence of record suggesting Great Bend was required to maintain the bridge or failed to perform meaningful repairs or maintenance on the structure).

⁴¹ *See* Great Bend M.B. at 20-25.

Norfolk Southern, as Great Bend lacks the financial wherewithal and operational resources and expertise to assume bridge maintenance, repair, rehabilitation, or replacement projects.⁴² Great Bend witness Brian O'Connor explained:

In the event the Township was to be assigned future cost and maintenance responsibility for the bridge, it lacks the wherewithal to carry out that responsibility. Our yearly road budget for line items such as equipment, machinery, and road maintenance is approximately \$354,000, of which \$198,000 is from Impact Fee money that cannot be guaranteed from year-to-year. The budget is extremely tight, and we often have to push road paving and other projects off because there are insufficient funds available during a given year. If we were to no longer receive money from Impact Fees, we would be in further financial peril. Simply put, we could not and cannot take on the added responsibility of ongoing cost and maintenance for the Township Bridge. It would easily become one of the largest budget line items and place the Township into financial distress.⁴³

Placing Great Bend into financial distress and potential bankruptcy – which is exactly what is likely to happen should Ordering Paragraph Nos. 61-67 be adopted without modification – is not in the public interest. Neither is assigning both initial and future work and cost responsibility to an entity that is ill-equipped, both fiscally and operationally, to perform a complex, costly undertaking such as a bridge removal and replacement project. To do so would jeopardize the public safety and also leave Great Bend and the general public with the burden of completing work that should have been done by the railroad in the first place.⁴⁴ The R.D.'s recommendations in this regard are imprudent and, importantly, do not comport with the substantial record evidence.

The ALJ also fails to consider the equities of the particular situation. For more than a century, Norfolk Southern and its predecessor railroads have been charged with and assumed

⁴² Great Bend St. No. 1 at 3 and 8-9; Great Bend M.B at 24-25.

⁴³ Great Bend St. No. 1 at 8-9.

⁴⁴ PennDOT St. No. 4 at 8.

maintenance and cost responsibility for the T-821 Bridge. The R.D. would flip that practice and precedent on its head. Additionally, the evidence overwhelmingly shows that the deterioration and need for repairs is due to D&H's deliberate inaction and refusal to obey its Commission-ordered duties. Norfolk Southern, as successor, must shoulder responsibility for the deterioration of the structure and its need for repairs and be held accountable.⁴⁵ To conclude otherwise would reward non-compliance and let Norfolk Southern off the hook, while unjustly and unreasonably punishing Great Bend and the general public for the misdeeds of the railroad. Such a result, in light of all factors to be considered,⁴⁶ is neither equitable nor fair.

Accordingly, the Commission should reject Ordering Paragraph Nos. 61-67 and the related conclusions on pages 74-75 of the R.D. and instead modify the R.D. to provide for the repair and rehabilitation of the T-821 Bridge in accordance with the recommendations and findings found in PennDOT's inspection report for the bridge. To the extent the T-821 Bridge must be replaced, the Commission should assign Norfolk Southern, not Great Bend, primary responsibility for performing the work and bearing the costs. Irrespective of whether repair/rehabilitation or replacement is ordered, the Commission should direct that, upon completion of said repairs or replacement, Norfolk Southern, at its sole cost and expense, shall furnish all material and perform all work necessary to maintain and inspect the T-821 Bridge, exclusive of the bituminous roadway wearing surface which shall remain Great Bend's responsibility. These modifications will ensure a fair, just, and reasonable assignment of future work, maintenance, and cost responsibility for the bridge, consistent with the evidence of record and consideration of relevant factors.

⁴⁵ See *Wheeling & Lake Erie Ry. Co.*, 778 A.2d at 793 (concluding that it was just and reasonable to assign all reconstruction costs to a successor railroad where the predecessor railroad had failed to maintain the crossing in accordance with its Commission-ordered responsibility to maintain the bridge at its sole costs).

⁴⁶ See Great Bend M.B. at 20-25.

Great Bend Exception No. 5:

The ALJ erred in recommending Great Bend take action on an accelerated timeframe, which would require the preparation and submission of plans within five (5) years of the date of the Commission's Order and completion of the replacement within two (2) years of Commission approval. (Ordering Paragraph Nos. 61-62 and R.D. at 74)

Assuming *arguendo* that the T-821 Bridge must be removed and replaced and Great Bend assigned primary responsibilities related thereto (which should not be the case as discussed in Exception No. 4), the ALJ erred in recommending that Great Bend should take action on an accelerated timeframe, which would require the preparation and submission of plans within five (5) years of the date of the Commission's Order and completion of the replacement within two (2) years of Commission approval. *See* R.D. at 85-86 (Ordering Paragraph Nos. 61 and 62). The timeframes set forth in these recommendations are entirely premature and are not supported by the evidence of record in this proceeding.

As explained by Norfolk Southern witness Hauschildt, the proposed repairs to be performed by Norfolk Southern on the existing T-821 Bridge would add approximately 20 years of useful life to the bridge.⁴⁷ If Norfolk Southern is ordered to make repairs which address all priority items identified in PennDOT's December 19, 2017 inspection report for the bridge, that 20-year estimate almost certainly would increase. Thus, an estimated 20 years of useful life should be achieved at a minimum, regardless of whether the repairs are ordered to be made pursuant to Norfolk Southern's or PennDOT's recommendations.

Consequently, it is ill-logical to direct Great Bend to design and file plans for removing and replacing the bridge within five years of the Commission's final order when the bridge

⁴⁷ N.S. St. No. 1 at 12; *see also* Tr. 203-04, 210-11.

would not need to be replaced for at least another fifteen years.⁴⁸ It is equally premature to direct Great Bend to complete the bridge removal and replacement within two years of Commission approval of those plans when that date will assuredly fall more than a decade before the twenty year mark.

A more reasonable and prudent timeframe would require plans to be submitted within fifteen years of the completion of Norfolk Southern's repairs to the existing bridge, followed by a two year completion window after plan approval by the Commission. This will maximize the useful life of the bridge, while also ensuring that all inputs required for the project, including, among other things, costs, technology, contracts, and resources, will be accurate and up to date. It would also provide time for Great Bend, if ordered to do so, to secure funding, which it does not have at this time, for the project; provided, however, there would be no guarantee that funding would be available, as the Township would have to compete for funding among all the other local-owned *and* state-owned structures and there typically is less state and federal funding dispersed to rural communities, like Great Bend.⁴⁹

For these reasons, Great Bend Exception No. 5 should be granted to the extent Great Bend is assigned primary responsibility related to the removal and replacement of the T-821 Bridge.

⁴⁸ In fact, based on the timeframes set forth in Ordering Paragraph Nos. 56 and 57, Norfolk Southern would not even have to have the repairs to the existing bridge made for at least another 15 months in an absolute best case scenario which assumes the Commission approves the plans the same day they are submitted.

⁴⁹ Tr. 121-22, 133, 135.

Great Bend Exception No. 6:

The ALJ erred in recommending that Norfolk Southern should only reimburse Great Bend \$400,000 for the costs related to such removal and replacement. (Ordering Paragraph No. 66 and R.D. at 74)

Assuming again *arguendo* that the T-821 Bridge must be removed and replaced and Great Bend assigned primary responsibilities related thereto (which should not be the case as discussed in Exception No. 4), the ALJ also erred in recommending that Norfolk Southern should only reimburse Great Bend \$400,000 for the costs incurred in removing and replacing the Bridge. R.D. at 74 and 86 (Ordering Paragraph No. 66). This recommendation should be rejected for several reasons.

First, there is no evidential support for the \$400,000 figure the ALJ recommends, and the R.D. contains no discussion on how the ALJ arrived at that amount. It appears to be a number plucked from thin air, as the record is devoid of any evidence on the cost to replace the T-821 Bridge.

Second, a bridge removal and replacement project will likely cost millions of dollars. Thus, \$400,000 seems to severely underestimate what Norfolk Southern should be responsible for, especially based on the ALJ's discussion of relevant factors on pages 74 and 75 of the R.D., an analysis that points heavily toward assignment of work and cost responsibility to Norfolk Southern, not Great Bend, even before other traditional factors are considered.⁵⁰

Third, cost will be a critical component of any replacement project. However, as discussed in Exception No. 5 above, it is completely premature to consider a replacement project at this time – including the assignment of costs for that project – when the repairs to the existing bridge will provide at least twenty years more of service life.⁵¹

⁵⁰ See Great Bend Exception No. 4 (Section B), *supra*.

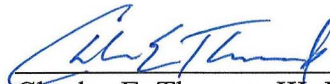
⁵¹ N.S. St. No. 1 at 12; *see also* Tr. 203-04, 210-11.

Accordingly, Great Bend Exception No. 6 should be granted.

III. CONCLUSION

For the reasons set forth above and in Great Bend's Main and Reply Briefs, Great Bend respectfully submits that the ALJ erred in several respects in connection with the disposition of the T-821 Bridge. The Commission should grant Great Bend's Exceptions as set forth above and modify and reverse the Recommended Decision consistent therewith.

Respectfully submitted,



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DATED: August 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of August, 2018, served a true and correct copy of the foregoing document upon the upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54:

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