

BEFORE THE PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

Application of Norfolk Southern Railway Company for approval to reconstruct the Crossing of the North Avenue/Brighton Road Bridge crossing above its tracks in The City of Pittsburgh, Allegheny County (DOT No. 507450B), and for an exemption from the Commission's overhead clearances regulations

Docket No. A-2018-3006432

Application of Norfolk Southern Railway Company for approval to reconstruct the Rehabilitation of the below-grade crossing (DOT No. 507446L) where Merchant Street passes under the tracks of Norfolk Southern Railway Company in the City of Pittsburgh, Allegheny County

Docket No. A-2018-3001039

**PETITION FOR RECONSIDERATION  
OF THE  
FIRST INTERIM ORDER MOTION TO CONSOLIDATE**

AND NOW comes Rail Pollution Protection Pittsburgh (RP3), by and through its undersigned counsel, and pursuant to 52 Pa. Code §5.572(a)-(c) respectfully requests that the Commission reconsider its decision to dismiss the Motion to Consolidate of RP3 the Administrative Law Judge's Interim Order in this matter. In support of this request, RP3 avers the following:

**Background**

1. By interim order entered March 8, 2019, the Commission denied the Motion to Consolidate filed by the Rail Pollution Protection Pittsburgh.

2. The Commission ruled that as of the date of the Interim Order, the Commission's Office of Administrative Law Judge currently has jurisdiction over only two bridge crossings identified in the Motion to Consolidate, the Merchant Street crossing at Docket No. A-2018-3001039; and the North Avenue/Brighton Road crossing at Docket No. A-2018-3006432. In this Petition for Reconsideration, RP3 limits its request for consolidation to these Dockets only.

### **Legal Standard for Reconsideration**

3. The Commission is empowered by 66 Pa. C.S. 703(g) at any time, after notice and opportunity to be heard, to rescind or amend any order made by it. The standard for granting a Petition for Reconsideration is stated in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982). A petition for reconsideration under the provisions of 66 Pa. C.S. 703(g) need not plead newly discovered evidence, nor change of circumstance since the Commission's order.<sup>1</sup> In addition to new and novel arguments, considerations which appear to have been overlooked or not addressed by the Commission are properly subject to petition for reconsideration. "A petition for reconsideration may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part."<sup>2</sup>
4. Pursuant to 52 Pa. Code §5.81(a), the Commission or presiding officer may order proceedings involving a common question of law or fact to be consolidated.

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<sup>1</sup> *Duick* at 13

<sup>2</sup> *Duick* at 12.

5. The PUC's jurisdiction over rail-highway crossings is to "effectuate the prevention of accidents and the promotion of the safety of the public" 66 Pa.C.S. §2702(b).

### **Analysis**

6. As discussed herein, consolidation of these dockets is within the limits of the Commission's grant of authority and jurisdiction "to protect the safety of the public at and around rail-highway crossings with the goal to prevent accidents and promote public safety."<sup>3</sup>
7. The two subject crossings docketed at A-2018-3001039 and A-2018-3006432 involve crossings which are adjacent and closely connected to one another. Northside Leadership Conference's Motion to Consolidate Exhibit A, filed in the record of this docket, demonstrates the close proximity of the five streets impacted by the crossings and/or bridges. The Commission held the February field visits on the two subject crossings one immediately following the other at the same location, between the crossings, closer to North Avenue/Brighton Road. Rather than make the short walk to the Merchant Street crossing, the A-2018-3001039 field visit was held in the same location, with the same parties, between the two nearby crossings. This was an effective, expedient and commendable approach since, upon information and belief, all or substantially all parties present for the A-2018-3006432 remained for the subsequent meeting addressing the issues related to the Merchant Street crossing and continued to

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<sup>3</sup> Interim Order at 14.

discuss and confer informally regarding proceedings and facts related to both dockets.

8. The subject crossings are also connected by virtue of the trough through historic Allegheny Commons. As confirmed by PUC Senior Civil Engineer Manager Ronald Hull at the February 7, 2019 field investigation, raising the Merchant Street bridge as requested by the City would result in a further raising of the North Avenue bridge beyond the height exemption requested by Norfolk Southern. A further raising presents a significant safety risk to pedestrians and vehicles endeavoring to navigate the North Avenue and Brighton Road intersection. The issue is directly within the exclusive powers for the Commission to determine how to construct highway crossings to maintain and protect public safety and prevent accidents. 66 Pa. C.S.A. 2702(b).
9. While the analysis of the Interim Order implied to some extent that the Motion to Consolidate asked the Commission to go beyond its authority and into Norfolk Southern's rail operations, the stated intention of the Applicant is to operate double-stack rail cars, and the propriety of these operations is not what RP3 asks the Commission to consider here. Rather, these intended operations have implications for the crossings themselves, including the infrastructure, potential for accidents and public safety at these rail-highway crossings that raise common questions of fact and law and are properly within the specified grant of jurisdiction limiting the Commission's power. For example, the additional stress on infrastructure that includes defective railroad ties averred in federal court by

the Applicant to be inherently hazardous<sup>4</sup> will raise common questions at both crossings and should be understood prior to approval of the Application for the protection of public safety.

10. Both dockets present serious safety concerns. Given the paramount importance of public safety, it is necessary to take into account how the two applications and design solutions are inextricably intertwined, not discrete or segmented, but complex-- along with their related impact on a possible third option of lowering the tracks and not changing the elevation of either bridge. Taking a more holistic analysis of the replacement project for the Merchant Street crossing in order to fully consider these concerns is in keeping with the Commission's stated goals for rail-highway crossings that they be safe and in the public interest. Although the projects are on slightly different timetables, and the Merchant Street crossing Docket No. A-2018-3001039 is further along in the planning process, proceeding to a segregated approval prior to the consideration of the shared safety concerns raised at the nearby crossings is inconsistent the Commission's stated goals of protecting public safety. Considering these issues together will empower the Commission to fulfill its statutory mission to "determine and prescribe... the manner in which such crossing[s] may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public." 66 Pa.

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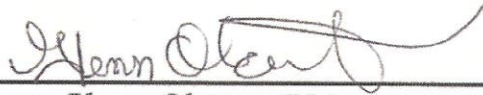
<sup>4</sup> *Norfolk Southern Railway Co. v. Boatright Railroad Products, Inc.*, 2:17-cv-01787-AKK (U.S. Dist. Ct. N.D. Alabama 2018).

C.S.A. 2702(b). These authorizations are irreversible, and if the evaluation will necessitate a thorough review, it is not clear that the Commission's goal of expediency should take precedence over public safety goals.

**Conclusion**

11. In order to fulfill the PUC's mission to balance safe and reliable rail service, while also protecting the public interest, and based on the common questions of fact and law, common parties, records, administrative burdens and unnecessary expense to the parties raised in each of these proceedings, consolidation of the above referenced dockets under 52 Pa. Code §5.81 is warranted and requested.

Respectfully submitted,



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Docket No. A-2018-3001039

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of March, 2019, one (1) copy of the foregoing Petition for Reconsideration on behalf of Rail Pollution Protection Pittsburgh (RP3) was served by US First Class Mail, Postage Pre-Paid, addressed as follows:

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