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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In The Matter of the Petition of Norfolk Southern Railway Company to Close to Vehicular Traffic the Stores Road/Township Road 159 Grade Crossing (DOT No. 472543T), Located in Brown Township, Paulding County, Ohio.	:	Case No. 12-2145-RR-UNC
	:	<b><u>NORFOLK SOUTHERN RAILWAY COMPANY'S CLOSING BRIEF</u></b>
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This Closing Brief is submitted in support Norfolk Southern Railway Company's petition to close the Township Road 159 grade crossing (DOT No. 472543T) located in Brown Township, Paulding County, Ohio.

As supported by the credible evidence (testimony and exhibits) introduced at the evidentiary hearing of March 6, 2014, Norfolk Southern submits that its petition should be deemed well-taken, and the crossing ordered closed.

**History of Proceeding:**

On July 23, 2012, Norfolk Southern filed a petition to close the TR159 crossing. The matter was set for public hearing which was held in Brown Township on January 17, 2013; notably, the hearing was attended by the township's three trustees, but absolutely none of the township's "few thousand" residents. The parties thereafter engaged in extended discussions toward achieving agreed resolution; when these efforts failed, the matter proceeded to evidentiary hearing on March 6, 2014, at the Commission's office in Columbus, Ohio.

**Summary of Evidentiary Hearing:**

The evidentiary hearing began with the township calling two witnesses: Marty Adams and Michael Porter.

Mr. Adams testified that in his opinion the TR 159 crossing should remain open, primarily toward "future expansion" – specifically, "we don't know what's going to be there 50 years from now." On cross-examination, Mr. Adams acknowledged that there is but one single residence on the entire roadway, and that two-thirds of the roadway (which is one mile long total) is unpaved – specifically, "stone and dirt." Mr. Adams next contended that closing the crossing could negatively impact emergency response time since it would force responders to take an alternate route – to the south – which is a "little" (actually just .35 of a mile) longer.<sup>1</sup> Mr. Adams' testimony in this regard was not credible in various respects. First, he submits that the involved roads – speaking primarily of TR159 and TR82 aka CR82 (hereafter "TR82") – are both "narrow," but was then forced to acknowledge that he had never actually measured them. (NS later introduced evidence that TR82 – the alternate roadway – is not only paved, but approximately twice as wide as TR159.) Second, Mr. Adams suggested that using the

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<sup>1</sup> At the public hearing, Mr. Adams purported to testify that the alternate route was more than a "little" longer – specifically, that it was a "couple of miles more."

alternate/south route may add up to two to three minutes in response time. Again, Mr. Adams was forced to acknowledge that this was a mere “estimation” – in this instance a glorified term for an uneducated guess, since he had never timed the respective routes. (NS later introduced evidence that, in actuality, the south route is not only as fast but faster than the north route.)

Mr. Porter offered mistaken testimony with respect to the existence of active versus passive warning devices at one alternate crossing, and acknowledges that he had not measured the involved roadways, nor does he know which is the narrowest – “I haven’t got a clue.” Importantly, Mr. Porter concedes that he has probably used the TR159 crossing only a “half a dozen” times in the past two years – so taking his testimony at face value, in the event of closure, once every four months or so Mr. Porter would need to forgo his preferred cut-through route. Mr. Porter then resorted to suggesting that closure might perhaps negatively impact a local company (Cooper Farms), in the event Cooper Farms at some point in the future saw fit and was able to acquire additional property in the township. Mr. Porter was forced to concede on cross-examination, however, that he is not employed by Cooper Farms, that he had not been authorized to speak on Cooper Farms’ behalf, and that in fact he has absolutely no clue as to whether Cooper Farms supports or opposes – or frankly, has any interest whatsoever in – the instant petition.

The evidentiary hearing continued with Norfolk Southern calling two witnesses: Cathy Stout and William Barringer.

Ms. Stout testified that she is the Manager of Safety Programs with the Ohio Rail Development Commission (“ORDC”), and in that capacity is responsible for evaluating which of the state’s crossings may be appropriate for closure. Ms. Stout testified that the ORDC did in fact evaluate the TR159 crossing in this respect, and that in her opinion the crossing should be

closed since, among other reasons: TR159 is only one mile long, the crossing/roadway is lightly traveled (approximately 26 vehicles per day), closure would not landlock anyone, and there are viable alternate crossings with active – as opposed to passive – warning devices. Accordingly, in Ms. Stout’s opinion this is a “redundant grade crossing” that “should be closed.”

Mr. Barringer testified that he is Norfolk Southern’s Director of Grade Crossing Safety, and the Chairman of the Board of the National Operation Lifesaver Program. Mr. Barringer confirmed that he has inspected and evaluated the TR159 crossing and the alternate crossings and roadways “many times,” and then spent considerable time going through the various factors to be considered by the Commission. This information will be delved into later, in greater specificity. But in sum, Mr. Barringer confirmed that TR159 is not a through but rather a one mile long cut-through route, that the road is paved only to the south of the sole residence located on the roadway, that TR159 is more narrow than any adjacent roadway, that the roadway/crossing are lightly traveled (15 to 26 vehicles per day), that the crossing has a higher “profile” than the alternate crossings located half a mile in each direction, and that the TR159 crossing has passive warning devices whereas the alternate crossings have active warning devices. For these and other reasons, Mr. Barringer testified that in his opinion there is no demonstrable need for the TR159 crossing but, rather, “this is a classic case for consolidation,” and “this is just a classic textbook case where a crossing needs to be consolidated with the adjacent crossings”.

Importantly, Mr. Barringer also refuted Mr. Adams’ testimony that closure would or may result in delayed emergency response to the sole residence on TR159. Specifically, and in great detail, Mr. Barringer confirmed that in the rare instance (once a year versus once every five, etc.) that emergency responders would need to service the residence, then they can get there

as or more quickly by traveling the south route from a common intersection in Melrose (specifically, by taking TR177 south to TR82 west to TR159 north) as opposed to the north route (specifically, TR177 north to SR613 west to TR159 south), since the south route utilizes paved roads for the entire transit, whereas the north route would require responders to utilize an unpaved (stone and dirt) roadway for the entire northern stretch (two-thirds of a mile) of TR159. And what should be of primary importance to the Commission, Mr. Barringer confirmed that the south route enables responders to avoid two separate crossings of Norfolk Southern's tracks, which crossings provide opportunity for rail-vehicle collisions and, further, can lead to delay in the event any train is present. Stated more clearly, the north route requires responders to cross Norfolk Southern's mainline tracks on two separate occasions, whereas the south route enables responders to avoid these crossings altogether. And again, the south route is quicker.

Brown Township concluded the hearing by calling State Representative Anthony Burkley whose presence was appreciated, but added little by way of substance. Most notably, Representative Burkley conceded that of the "few thousand" residents of the township, he's been made aware that not one single resident attended the public hearing which was held right there in Brown Township. And while Representative Burkley hypothesized that perhaps the residents are akin to geese, and had flown south for the winter, this did not and does not pass the "straight-face" test.

**Statute:**

It is well-established that the Commission is vested with the statutory authority to close grade crossings located in municipal corporations, pursuant to R.C. §4907.474, and to close rural grade crossings not on state highways, pursuant to R.C. §4907.475. These sections require that an applicant seeking to close a grade crossing to vehicular traffic demonstrate that there is

not a demonstrable need for the grade crossing to exist. While the term “demonstrable need” is not specifically defined, §4907.474 provides some guidance in this regard, stating that in making its determination, the Commission shall consider the following: the daily vehicular and train traffic at the crossing and at alternate crossings; the increase in vehicular traffic at alternate crossings resulting from the crossing closure; the nature of the roadway at any alternate crossings; the total number of crossings within one linear mile of the crossing to be closed; the type of warning devices and site distances at alternate crossings; the impact of the closure on vehicular traffic, emergency vehicles, commercial enterprises, and municipal corporations and other populated areas; and any other factor that Commission determines appropriate.

Norfolk Southern’s witnesses presented testimony on the above factors, which will be discussed below.

**A. Daily vehicular and train traffic at the crossing and at alternate crossings:**

Ms. Stout and Mr. Barringer confirmed that the official PUCO traffic count for the TR159 crossing is 26 vehicles per day, and Mr. Barringer confirmed that more recently, Norfolk Southern commissioned a private traffic count which confirmed approximately 15 vehicles per day.

The township presented no evidence to refute these numbers (and in fact stipulated to the supporting exhibits), so these are the only numbers before the Commission. The township nevertheless suggested that perhaps the numbers could be a bit higher seasonally. In response, Ms. Stout testified that “based on what I observed in July of 2011 when I was out there, I can’t imagine that there would be anything significantly more than what was in the [official PUCO database].” And Mr. Barringer confirmed that on the multiple occasions he has visited the township, he has never observed a single vehicle utilizing the roadway.

As for the alternate crossings, Norfolk Southern presented evidence that the official PUCO traffic count for TR165 is 70 vehicles per day and that the count for TR151 is 332 vehicles per day, and that the updated counts for these crossings were 9 and 121 vehicles per day, respectively. Again, the township did not and cannot refute these numbers.

As for train counts, Norfolk Southern presented evidence that the three mainline crossings (specifically, TR159 and the two adjacent crossings, TR165 and TR151) experience between 32 to 34 trains per day, with this traffic expected to increase in the future.

**B. Daily increase in vehicular traffic at alternate crossings resulting from the crossing closure:**

Mr. Barringer confirmed that, utilizing the highest numbers in the record (specifically, those in the official PUCO database), if the TR159 crossing was closed then the increase in vehicular traffic at the alternate crossings would be approximately 26 vehicles per day, or approximately 13 additional vehicles per day (so approximately 1 vehicle every other hour) at each of the alternate crossings.

**C. Total number of crossings within one linear mile of the TR159 crossing:**

Ms. Stout and Mr. Barringer both testified that there are two crossings within one linear mile of the TR159 crossing – specifically, the TR165 crossing which is approximately one-half of a mile to the east, and the TR151 crossing which is approximately one half of a mile to the west.

**D. Nature of the roadway at the alternate crossings:**

Mr. Barringer confirmed that TR159 is unpaved (stone and dirt) in the vicinity of the crossing (specifically, to the north of the sole residence), and that it is approximately nine feet wide, so more narrow than the adjacent roadways. He also confirmed that TR165 and TR151 are both paved, with TR165 being approximately 11 feet wide, and TR151 approximately

18 feet wide. Further, Mr. Barringer and various other witnesses confirmed that the crossing profile at the TR159 crossing is higher, and thus the geometry better at the two alternate crossings.

**E. Type of advance warning devices and site distances at the alternate crossings:**

But for the mistaken testimony of Mr. Porter, the two Norfolk Southern and various other witnesses confirmed that the alternate crossings (TR165 and TR151) are both protected by active warning devices (gates, lights, and bells), whereas the TR159 crossing is passive, with crossbucks and a yield sign. Further, Mr. Barringer confirmed that the site distances at the alternate crossings are without concern, in that you can “see a country mile either way”.

**F. Impact of the closure on vehicular traffic, emergency vehicles, commercial enterprises, and any other factors pertinent to municipal corporations and other populated areas:**

As Mr. Barringer confirmed, and even assuming the highest numbers in the record (those from the official PUCO inventory), closure would result in the diversion of a very small number of vehicles (approximately 26 per day) to the alternate crossings – so approximately 13 additional vehicles per day at each of the alternate crossings. Importantly, these vehicles would be directed to better roadways (wider, and paved) and to crossings with lower profiles (so better geometry) and active warning devices as opposed to passive.

As noted previously, Mr. Barringer also confirmed that on the rare occasion that emergency response would be necessary to the sole residence on TR159, then such responders could safely and efficiently service the residence via the “south” route, which he confirmed is actually quicker than the north route, since it enables responders to travel on paved (and wider) roads for the entire transit. More importantly, Mr. Barringer confirmed that the south route



enables responders to altogether avoid two separate crossings of the Norfolk South tracks, including the relatively high profile crossing at TR159.

With respect to commercial enterprises, and importantly, not a single representative of any commercial and/or farming enterprise appeared at public or evidentiary hearing to offer testimony in opposition to the requested closure; accordingly, no competent, credible evidence exists in the record in support of such opposition, if any.

Further, Mr. Barringer confirmed that most of the farmers in the involved quadrant own multiple, connected parcels, and could thus cut-across their own property as opposed to being forced to utilize the alternate roadways. But to the extent that the use of such roadways proves necessary, Mr. Barringer confirmed that he would prefer, from a rail safety perspective, that commercial and/or farming vehicles be redirected to the alternate crossings on TR165 or TR151 since, again, the alternate roadways are better (wider and paved), and the crossings have lower profiles and are equipped with active warning devices.

Finally, the inhabitants of the sole residence on TR159 did not appear at either the public or the evidentiary hearing; accordingly, there is no evidence in the record that these inhabitants oppose the requested closure. (They may, but no such evidence exists in the record.)

**G. Any other factor the Commission determines appropriate:**

Based upon the credible testimony of Ms. Stout (of the ORDC) and Mr. Barringer, Norfolk Southern submits that there is no demonstrable need for the TR159 crossing, and that it should be closed upon this basis.

But in addition to same, Mr. Stout also testified that in her opinion, and notwithstanding that it has no accident history, the TR159 crossing should be closed from a rail safety perspective (in light of the relatively high profile/hump, etc.), with traffic diverted to the

alternate crossings that have lower profiles and are equipped with active warning devices (lights, bells, and gates).

Mr. Barringer appeared to share Ms. Stout's interest in being proactive in this regard.

**Conclusion:**

TR159 is a one-mile long, narrow, largely unpaved, cut-through route. The roadway is extremely lightly traveled, with the evidence in the record supporting vehicle traffic of only 15 to 26 vehicles per day. Assuming the TR159 crossing's closure, this traffic can be easily diverted to the adjacent, alternate crossings which are on better (wider, paved) roadways with lower profile crossings protected by active warning devices.

And there is but one (1) single residence on the entire roadway. In the rare instance when emergency responders might need to service the residence, they can do so via the "south" route which although .35 of a mile longer is actually quicker than the north route, as responders can travel on wider, paved roads for the entire transit. Importantly, the south route enables responders to altogether avoid two separate crossings of Norfolk Southern's mainline tracks, including the relatively high profile crossing at TR159.

As Ms. Stout and Mr. Barringer opined, there is no demonstrable need for this crossing. The crossing is redundant, period, and should be closed.

Importantly, and in what may be a first for cases of this sort before the Commission, there was a near total absence of community opposition to the instant petition – more specifically, not one of the "few thousand" of the township's residents appeared at the local public hearing to offer opposition to the requested closure.

This crossing should have been closed voluntarily, at the township level. Unfortunately, it wasn't, thereby dropping the issue into the Commission's lap.

For the foregoing reasons, Norfolk Southern respectfully requests that the Commission issue an Opinion and Order granting Norfolk Southern's petition for the closure of the TR159 crossing.

Respectfully submitted,

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### **PROOF OF SERVICE**

A copy of the foregoing *Norfolk Southern Railway Company's Closing Brief* was filed with the Commission electronically this 11th day of April, 2014. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

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