



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

April 28, 2020

**Via Electronic Filing**

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

Re: Investigation upon the Commission's Motion into matters pertaining to the proper safety of the traveling public traversing the crossing where Lighthouse Road (DOT 535148L) crosses, at grade, one track of Norfolk Southern Railway Company in Guilford Township, Franklin County  
Docket No. I-2016-2527248

**I&E Answer in Opposition to the Late-Filed Petition to Intervene**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the **Bureau of Investigation and Enforcement's Answer in Opposition to the Late-Filed Petition to Intervene** in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,

Kayla L. Rost  
Prosecutor  
Bureau of Investigation & Enforcement  
PA Attorney ID No. 322768  
(717) 787-1888  
[karost@pa.gov](mailto:karost@pa.gov)

KLR/ac  
Enclosure

cc: Per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s :  
Motion into matters pertaining to the :  
proper safety of the traveling public :  
traversing the crossing where Lighthouse : Docket No. I-2016-2527248  
Road (DOT 535148L) crosses, at grade, :  
one track of Norfolk Southern Railway :  
Company in Guilford Township, Franklin :  
County :

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT  
IN OPPOSITION OF THE LATE-FILED PETITION TO INTERVENE BY  
RANDY FISHER**

**TO THE HONORABLE STEPHEN K. HAAS:**

The Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.66, files this Answer opposing Randy Fisher’s Petition to Intervene<sup>1</sup> (“Petition”) in this proceeding as it was untimely filed by several years without good cause and not properly served to the parties.

**I. BACKGROUND**

This matter was initiated over four (4) years ago by Order entered February 25, 2016, when the Commission initiated, upon its own motion, an investigation for purposes of determining all matters relating to the safety of the Crossing where Lighthouse Road (T-425) crosses, at grade, one track of Norfolk Southern in the Guilford Township and the future disposition of the Crossing. The Order listed the parties as Guilford Township,

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<sup>1</sup> Mr. Fisher filed a letter with the Commission requesting to be added as a party to the proceeding. For ease of reference, the letter will be referred to as the “Petition.”

Franklin County, the Pennsylvania Department of Transportation, Norfolk Southern Railway Company, CenturyLink, Comcast, and First Energy.

On March 15, 2016, the Commission's Technical Utility Services, Rail Safety Division, held a field conference at the subject crossing to determine whether an amicable resolution of the investigation could be reached. Petitioner, Mr. Fisher, did not attend the field conference. The parties were unable to reach an amicable resolution, resulting in Rail Safety referring the matter to the Office of Administrative Law Judge for the scheduling of an evidentiary hearing.

Sometime in the late Spring of 2019,<sup>2</sup> Mr. Fisher contacted Daniel Helfrich from Rail Safety to inquire about the investigation. Mr. Helfrich explained to Mr. Fisher that he needed to be added as a party of record if he intended to be heard on the matter. Mr. Helfrich also explained that Mr. Fisher would have to follow the Commission's procedures and regulations on being added as an intervener on a case.

On or about September 11, 2019, over three (3) years from the initiation of the investigation, Mr. Fisher filed the "Petition" with the Commission's Secretary's Bureau. The Petition failed to include a certificate of service and was not provided to the parties or Administrative Law Judge Stephen Haas.

For the reasons to be discussed below, Mr. Fisher's Petition should be dismissed.

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<sup>2</sup> The exact date could not be ascertained at the time of this filing. Due to Governor Tom Wolf's directives to limit the spreading of COVID-19 and the closure of the Keystone Building, Mr. Helfrich is unable to access his physical file and handwritten notes on this investigation. Mr. Helfrich recalls the phone conversation with Mr. Fisher, but is unable to recall from memory the exact date the call took place.

## II. THE PETITION IS UNTIMELY

Mr. Fisher's Petition should be dismissed because it was filed almost three and a half (3.5) years after the filing deadlines prescribed in Section 5.74(b) of the Commission's regulations. 52 Pa. Code § 5.74(b). Section 5.74(b) provides:

- (1) No later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53 (relating to applications requiring notice; and time of filing) absent good cause shown.
- (2) No later than the date fixed for filing protests as published in the Pennsylvania Bulletin except for good cause shown.
- (3) In accordance with § 5.53 if no deadline is set in an order or notice with respect to the proceedings.

52 Pa. Code § 5.74(b). Section 5.53 provides "If no protest time is specified, the protest shall be filed within 60 days of publication of the notice." 52 Pa. Code § 5.53.

Mr. Fisher filed the Petition on September 11, 2019, approximately 1,294 days after the February 25, 2016 Order was issued. Accordingly, the Petition is untimely and should be dismissed except for good cause.

When a petition to intervene is filed late, the Commission will grant the petition if good cause is shown. *PA Public Utility Commission, Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket No. C-2012-2307244, \*13 (Order Entered Aug. 29, 2013) (West Penn Power Order). In the *Joint Application of Pennsylvania-American Water Company and Thames Water Aqua Holdings GmbH*, Docket Nos. A-212285F0096 and A-230073F0004 (Opinion and Order entered May 9, 2002), at 6, the Commission established four (4) standards to determine whether good

cause has been established to accept a late-filed protest. Those standards are as follows: (a) whether the petitioner has a reasonable excuse for missing the due date; (b) whether the proceeding was contested at the time of the filing of the protest; (c) whether the receipt of the late filed protest would delay the orderly progress of the case; and (d) whether the late filed protest significantly broadens the issues or shifts the burden of proof. The same criteria have been analyzed concerning late-filed interventions in I&E enforcement proceedings. *See West Penn Power Order*, Docket No. C-2012-2307244 (Order entered August 29, 2013).

**a) The petition fails to offer any reasonable excuse.**

Mr. Fisher fails to offer any excuse or reasoning for failing to timely file the Petition. Thus, the Petition should be dismissed as good cause has not been shown.

**b) The proceeding was contested at the time of the filing.**

Acknowledging that mediation was not successful, the parties have been discussing settlement since May 18, 2016. On or about May 2018, the parties engaged in amicable negotiations and, in 2019, began circulating a draft Joint Petition for Settlement. Thus, the parties had a settlement in principle and continued to circulate and discuss settlement terms when the Petition was filed in September 2019. Accordingly, the proceeding was not contested at the time of the filing of the Petition and should be dismissed.

**c) The late-filed intervention will delay the orderly progress of the case.**

Allowing Mr. Fisher to intervene at this stage will delay the orderly progress of the case. The parties have a Joint Petition for Settlement drafted and circulated. However,

the Joint Petition cannot be filed at this time since the closure of non-essential businesses has delayed the parties' ability to draft the exhibits.

If Your Honor is so inclined to grant the Petition, Mr. Fisher will be prevented from impacting the terms of the Joint Petition for Settlement because he must take the record as is. The Commission has determined that any party intervening after the expiration of a protest period takes the record as it exists. *PUC v. West Penn Power Co.*, Docket No. C-2012-2307244 at \*17-18 (citing Final Rulemaking for the Revision of Chapters 1, 3, and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission, Docket No. L-00020156 (Order entered January 4, 2006) (Final Rulemaking Order)). In *West Penn Power Co.*, the Commission granted the two petitioners' late-filed petition to intervene, however, since the parties had already reached a Settlement by the time of the intervention, the late interveners were only permitted to file comments on the Settlement. *Id.* Thus, it is conceivable that allowing Mr. Fisher to intervene and object to the Joint Petition for Settlement will unduly delay the approval of the settlement and the implementation of the corrective, safety measures agreed upon by the parties. Accordingly, the Petition should be dismissed.

**d) The late-filed intervention will significantly broaden the issues.**

Allowing Mr. Fisher to intervene will significantly broaden the issues outlined by the February 25, 2016 Order because Mr. Fisher will attempt to "speak for all taxpayers." The February 25, 2016 Order provides:

The crossing is currently equipped with crossbucks and stop signs. The Commission is concerned whether the existing conditions at the crossing are adequate to effectuate the prevention of accidents and the promotion of safety of the public. We will institute an investigation to review all alternatives for

enhancing the safety of the crossing. We therefore will institute an investigation into the safety of this crossing, its future disposition, what work shall be performed at the crossing, and allocation of the costs of any work ordered . . .

I-2016-2527248 (Order Entered February 25, 2016).

To the contrary, Mr. Fisher argues in his Petition that he is concerned that “the actions of the Guilford Township have favored the interests of the developer(s) while disregarding the interests of the tax paying citizens.” Mr. Fisher continues to voice his concern that the closing of the crossing will further the local landowner’s, WCN Properties, LP, development purposes.

The Commission’s investigation is centered solely on the existing condition of the subject crossing and what alternatives are available to enhance the safety of the crossing. The parties have agreed that the location of the crossing prevents the requisite access to electricity to install the enhanced safety features needed to make the crossing safe. As such, the parties have agreed that the crossing, in the interest of public safety, should be abolished. The allegations submitted by Mr. Fisher do not relate to the safety of the crossing, but rather allege that Guilford Township is not acting on behalf of its citizens. It is not the Commission’s responsibility or within its jurisdiction to consider the reasoning of a township’s actions or decisions, especially when the Commission’s Rail Safety Section agrees that the crossing should be abolished.

In conclusion, the Petition should be dismissed because Mr. Fisher failed to demonstrate good cause for filing the Petition late and failed to provide any reasoning or excuse for its untimeliness.


### **III. THE PETITION WAS NOT SERVED ON THE PARTIES**

Apart from the lateness of the Petition, the Petition was also not served upon the parties in accordance with Section 5.75. 52 Pa. Code § 5.75. Section 5.75 provides “Petitions to intervene, when tendered to the Commission for filing, must show service thereof upon all parties to the proceeding in conformity with § 1.54 (relating to service by a party).” 52 Pa. Code § 5.75.

On its face, the Petition clearly does not include a certificate of service or any indication that the Petition was served upon the parties. Furthermore, the Petition was not served to I&E and Rail Safety. Thus, the Petition should be dismissed for failing to attach a certificate of service and for failing to serve to the parties as prescribed in Section 5.75.

### **IV. CONCLUSION**

Wherefore, for all of the foregoing reasons, and importantly noting that even without intervenor status Mr. Fisher will still have the opportunity to submit comments to any Settlement Agreement brought before the Commission for approval, the Bureau of Investigation and Enforcement respectfully requests that the late-filed Petition to Intervene of Randy Fisher be denied and dismissed.

  
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Kayla L. Rost  
Prosecutor  
Bureau of Investigation & Enforcement  
PA Attorney ID No. 322768

Dated: April 28, 2020



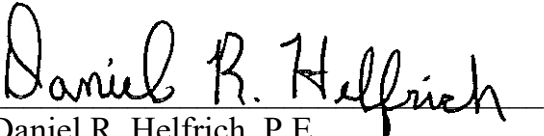
**BEFORE THE  
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Road (DOT 535148L) crosses, at grade,	:	
one track of Norfolk Southern Railway	:	Electronically Filed
Company in Guilford Township, Franklin	:	
County	:	

**VERIFICATION**

I, Daniel R. Helfrich, P.E., Bureau of Technical Utility Services - Rail Safety Section, hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: 4/28/2020

  
Daniel R. Helfrich, P.E.  
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Bureau of Technical Utility Services  
Rail Safety Section  
Commonwealth Keystone Building  
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(717) 787-5189

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing **I&E Answer in Opposition to the Late-Filed Petition to Intervene** dated April 28, 2020, upon the parties listed below.

**Service by Email**


Honorable Stephen K. Haas  
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