

Nauman Smith

A T T O R N E Y S A T L A W

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April 29, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

**In 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 535 148 L) crosses, at grade, one track of Norfolk Southern Company in Guilford Township, Franklin County
Docket No. I-2016-2527248**

Dear Secretary Chiavetta:

Attached please find the Answer of Norfolk Southern Railway Company in Opposition to Randy E. Fisher's Petition to Intervene and Certificate of Service, evidencing service of the same, in the above-captioned matter.

Please contact me if you have any questions.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCDjr/io
attachment
cc w/ attachment: all parties of record

**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 : I-2016-2527248
Lighthouse Road (DOT 535 148 L) crosses, at :
grade, one track of Norfolk Southern Railway :
Company in Guilford Township, Franklin County :

**ANSWER OF NORFOLK SOUTHERN RAILWAY COMPANY IN OPPOSITION TO
RANDY E. FISHER’S PETITION TO INTERVENE**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its counsel, NAUMAN, SMITH, SHISSLER, & HALL, LLP, hereby files the within Answer in Opposition to the Petition to Intervene by Randy E. Fisher (“Fisher”) in the above captioned matter, pursuant to 52 Pa. Code § 5.66(a),¹ responding as follows:

1. Admitted upon information and belief.
2. Admitted upon information and belief.
3. Denied. Fisher attempts to establish grounds for his Petition to Intervene in a proceeding which is close to resolution by complaining of things outside of the PUC’s jurisdiction.

Because the Public Utility Commission (“PUC” or “Commission”) is limited to awarding damages only to property owners adjacent to crossings and has power to hear controversies concerning crossings but not roadways, it is without jurisdiction over the

¹ Mr. Fisher filed his letter seeking intervention in this proceeding with the Commission on September 11, 2019, without serving it on the other parties or on Administrative Law Judge Steve Haas, who had been assigned to this matter. After being made aware of the letter, ALJ Haas, in a series of emails with Mr. Fisher and the parties on April 9, 2020, determined that he would treat the letter as a Petition to intervene (“Petition”), allow the other parties 20 days, until April 29, 2020, to respond to the letter, and permit service by email due to the coronavirus pandemic.

matters of which Fisher complains. Fisher thus does not establish his eligibility to intervene pursuant to 52 Pa. Code § 5.72.

A. Petitioner is Not Eligible to Intervene.

The Commission regulations at 52 Pa. Code § 5.72 provide that persons claiming rights or interests that make intervention necessary or appropriate may intervene under three circumstances, *i.e.*, when that person 1) has a right conferred by a statute of the United States or the Commonwealth, 2) has an interest which may be directly affected and which is not adequately represented by the existing participants and an action by the Commission would be binding on the petitioner, and 3) another interest of such nature that participation of the petitioner may be in the public interest. The petitioner does not meet any of these criteria, and therefore his Petition to Intervene should be denied.

Fisher has not asserted, nor can he assert, any statutory right to intervene. Fisher also does not have a directly affected interest which is not adequately represented by the existing parties, nor will the PUC bind the petitioner in regard to his expressed concerns. Furthermore, the public interest is the concern of all other parties already involved: the PUC's Bureau of Investigation and Enforcement ("BIE"), the Pennsylvania Department of Transportation ("PennDOT"), and Guilford Township ("Township"). Because the allegations of Fisher's Petition, taken as true for purposes of deciding his Petition, do not establish any eligibility for his intervention, the Petition must be denied.

B. The Commission's jurisdiction is limited to the crossing itself.

66 Pa.C.S. § 2704 provides, "[t]he compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after

due notice and hearing, be ascertained and determined by the commission.” This provision allows the PUC to compensate owners of adjacent property for injury sustained in the abolition of a crossing. Id. Those individuals complaining of such injury sustained due to an abolition would potentially have standing to intervene in an abolition proceeding.

Fisher, however, does not complain in his Petition of any of his property being “taken, injured or destroyed” in connection with the proposed abolition of the crossing. He instead complains of the extension of Archer Drive with Lighthouse Road and new traffic patterns to follow the construction of a highway interchange off I-81, which he alleges would make ingress and egress from his property unsafe.² He adduces no evidence to show that the abolition of the crossing itself would be problematic for him, but instead focuses solely on the new traffic flow which is outside the PUC’s jurisdiction.

Indeed, courts have stated that the roadway authority retains jurisdiction over the highways themselves. “In giving jurisdiction to the [PUC] as to crossings, the legislature certainly did not intend ‘to take from the Department of Highways all jurisdiction in the relocation of state roads and commit that control to another agency’.” Borough of Bridgewater v. Pa. Pub. Util. Comm'n, 124 A.2d 165, 172 (Pa. Super. 1956). In fact, it is PennDOT and the Township who retain the “full power to change the location of a highway in such manner as in [its] discretion may seem best in order to eliminate dangerous conditions or inconvenience to the traveling public.” Id. at 171.

“The legislature intended to place matters pertaining to the state highway system, its construction and maintenance, under the authority of the Department of Highways, subject to the limitation that where any highway, state, county, or township, is crossed by the facilities of a public utility, then matters pertaining to the crossing are subject to the exclusive jurisdiction of the Public Utility Commission.”

² See Right-of-Way Abandonment Plans attached hereto as Exhibit “A”, which illustrate the planned extension of Archer Drive to connect with Lighthouse Road at Fisher’s property, located about 4/10 of a mile from the crossing proposed to be abandoned, as alleged in Fisher’s Petition.

Dep't of Highways of Pa. v. Pa. Pub. Util. Comm'n, 14 A.2d 611, 612–13 (Pa. Super. 1940),
citing Somerset County v. Pa. Pub. Util. Comm'n, 1 A.2d 806, 812 (Pa. Super. 1938).

Because Fisher made no complaint regarding the actual abolition of the crossing, but is instead concerned with a separate matter, the rerouting of traffic due to a proposed highway extension, his complaints are outside of the jurisdiction of the Commission.

C. Standing is limited to those individuals with property adjacent to the crossing.

The same provision from Section 2704 of the Public Utility Code limits which property owners may be compensated. “The compensation for damages which *the owners of adjacent property* taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission.” 66 Pa.C.S. § 2704 (emphasis added). Thus, only property owners adjacent to the crossing are eligible for compensation due to its abolition.

Fisher’s property, however, is over a quarter of a mile down Lighthouse Road from the crossing. In fact, multiple other property parcels are adjacent to the crossing and between Fisher’s property and the railroad tracks. Because there is such distance, his property is not properly classified as adjacent and he is not entitled to compensation as such a distant relationship was not contemplated in the appropriate statute.

Furthermore, the Archer Drive extension will allow Plaintiff access to the main thoroughfares should he need to reach either U.S. Route 11 or Interstate 81.³ He will only need

³ See Google maps:
<https://www.google.com/maps/place/4291+Lighthouse+Rd,+Chambersburg,+PA+17202/@39.875887,-77.6852309,15z/data=!4m5!3m4!1s0x89c99bc08901f87b:0x414f8a6b59ab68f0!8m2!3d39.875887!4d-77.6764762>

to drive a short distance further to enter onto Route 11, and he will be provided with an additional entry onto Interstate 81 once the Archer Drive extension is completed. His slightly increased travel distance will be a mild inconvenience at most, and damages caused by the inconvenience of traveling a short distance out of the way cannot be sustained. Borough of Platea v. Com., Pub. Util. Comm'n, 322 A.2d 780, 783 (Pa. Commw. 1974); *see also*, Spang & Co. v. Com., 126 A. 781, 782 (Pa. 1924) (Every slight inconvenience cannot be compensated in damages). Therefore, since any changes in ingress and egress to his property will be due to development of the area having at most an indirect relationship with the abolition of the crossing and Fisher will suffer at most, mild inconvenience in travel times, he will not be entitled to damages. This coupled with the fact that his intervention would be for reasons outside of the scope of allowable reasons under 52 Pa. Code § 5.72, requires the PUC to deny his Petition.

D. The parties are already drafting a Petition for Settlement and have agreed to mutually work to close the crossing at issue.

Over four years ago, the PUC initiated an investigation into this crossing, which all parties have deemed dangerous. Years of site visits, conferences and negotiations followed until a tentative settlement agreement was recently reached. Although delayed by the Covid-19 pandemic, the parties are currently cooperatively drafting a Petition for Settlement. The Petition for Settlement will establish which parties will be responsible for the work and costs of abolishing the crossing and its approaches.⁴

It should be recognized that “an intervenor, takes the case as it stands.” Citizens Coal Council v. Dep’t of Env’tl. Prot., 110 A.3d 1051, 1060 (Pa. Commw. Ct. 2014) *citing* Pa. Coal Mining Ass’n v. Dep’t of Env’tl. Resources, 444 A.2d 637, 638 (Pa. 1982). Since “an intervenor

⁴ Exhibit “A” illustrates that even if the vacated portion of Lighthouse Road were to be considered the crossing “approaches,” it still would not establish any direct relationship with Fisher’s property.

must raise claims in subordination to and in recognition of the propriety of the original action,” Fisher would be coming in to a nearly finalized action. Appeal of Municipality of Penn Hills, 546 A.2d 50, 52 (Pa. 1988). If Fisher were allowed to intervene now, he would be subject to an almost completed Settlement Petition, and any disagreement therewith or negotiation thereon, based on reasons having nothing to do with the safety of the crossing, would result in this dangerous crossing remaining open yet longer.

WHEREFORE, as Randy E. Fisher’s Petition to Intervene concerns issues outside the Commission’s jurisdiction for property which is not adjacent to the crossing, elucidates no allowable reasons that would make him eligible to intervene under 52 Pa. Code § 5.72, and would bring him into a proceeding which is currently finalizing a Petition for Settlement, Norfolk Southern Railway Company respectfully requests that his Petition to Intervene be denied.

Respectfully Submitted,

NAUMAN, SMITH, SHISSLER, & HALL, LLP



Benjamin C. Dunlap, Jr., Esquire

Supreme Court ID # 66283

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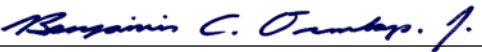
Date: April 29, 2020

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Company in Guilford Township, Franklin County :

VERIFICATION

I, Benjamin C. Dunlap, Jr., Esquire, a member of the firm of Nauman, Smith, Shissler & Hall, attorneys for Norfolk Southern Railway Company in the above-captioned proceedings, make this verification on behalf of Norfolk Southern Railway Company, and do state that as an attorney for Norfolk Southern Railway Company, I am authorized to make this Verification on behalf of Norfolk Southern Railway Company, and further state that, based on information provided to me by Norfolk Southern Railway Company, the facts set forth in the foregoing *Answer of Norfolk Southern Railway Company in Opposition to Randy E. Fisher’s Petition to Intervene* are true and correct to the best of my knowledge, information and belief. I understand that my statements are made subject to 18 Pa. C.S. §4904 providing for criminal penalties for unsworn falsification to authorities.



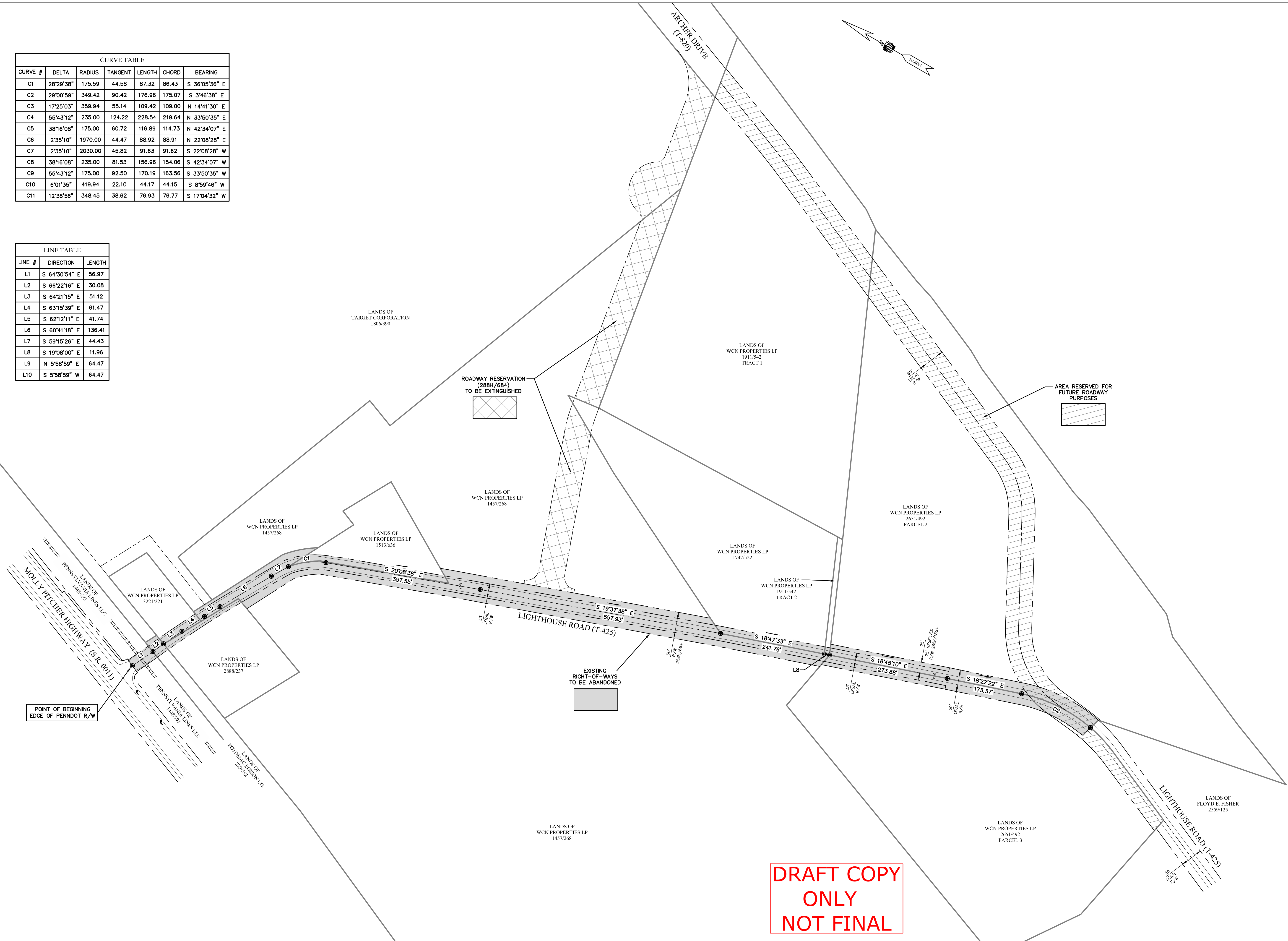
Benjamin C. Dunlap, Jr., Esquire

Date: April 29, 2020

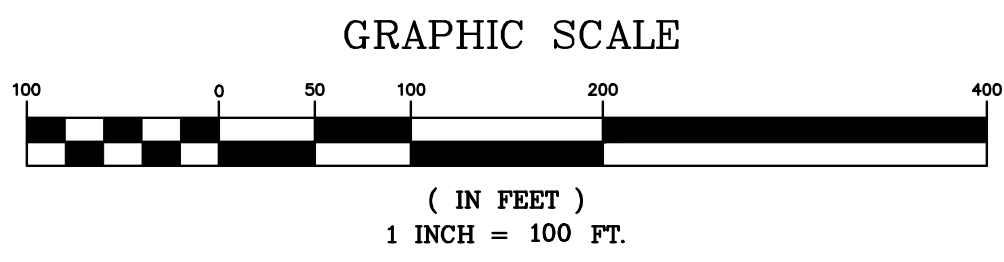
EXHIBIT “A”

| CURVE TABLE | | | | | | |
|-------------|-----------|---------|---------|--------|--------|---------------|
| CURVE # | DELTA | RADIUS | TANGENT | LENGTH | CHORD | BEARING |
| C1 | 28°29'38" | 175.59 | 44.58 | 87.32 | 86.43 | S 36°05'36" E |
| C2 | 29°00'59" | 349.42 | 90.42 | 176.96 | 175.07 | S 3°46'38" E |
| C3 | 17°25'03" | 359.94 | 55.14 | 109.42 | 109.00 | N 14°41'30" E |
| C4 | 55°43'12" | 235.00 | 124.22 | 228.54 | 219.64 | N 33°50'35" E |
| C5 | 38°16'08" | 175.00 | 60.72 | 116.89 | 114.73 | N 42°34'07" E |
| C6 | 2°35'10" | 1970.00 | 44.47 | 88.92 | 88.91 | N 22°08'28" E |
| C7 | 2°35'10" | 2030.00 | 45.82 | 91.63 | 91.62 | S 22°08'28" W |
| C8 | 38°16'08" | 235.00 | 81.53 | 156.96 | 154.06 | S 42°34'07" W |
| C9 | 55°43'12" | 175.00 | 92.50 | 170.19 | 163.56 | S 33°50'35" W |
| C10 | 6°01'35" | 419.94 | 22.10 | 44.17 | 44.15 | S 8°59'46" W |
| C11 | 12°38'56" | 348.45 | 38.62 | 76.93 | 76.77 | S 17°04'32" W |

| LINE TABLE | | |
|------------|---------------|--------|
| LINE # | DIRECTION | LENGTH |
| L1 | S 64°30'54" E | 56.97 |
| L2 | S 66°22'16" E | 30.08 |
| L3 | S 64°21'15" E | 51.12 |
| L4 | S 63°15'39" E | 61.47 |
| L5 | S 62°12'11" E | 41.74 |
| L6 | S 60°41'18" E | 136.41 |
| L7 | S 59°15'26" E | 44.43 |
| L8 | S 19°08'00" E | 11.96 |
| L9 | N 5°58'59" E | 64.47 |
| L10 | S 5°58'59" W | 64.47 |



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NOT FINAL



| NO. | REVISION | BY | DATE | APP'D |
|-----|----------|----|------|-------|
| 4. | | | | |
| 3. | | | | |
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DRAWN BY S.A.R.
 DATE 10/14/19
 CHECKED BY
 DATE
 APPROVED BY
 SCALE 1"=100'
WILLIAM A. BRINDLE ASSOCIATES, INC.
 ENGINEERING SURVEYING PLANNING
 336 LINCOLN WAY EAST CHAMBERSBURG, PA. 17201 PHONE/FAX (717) 264-2790

DRAFT OF RIGHT-OF-WAY ABANDONMENT
 FOR
GUILFORD TOWNSHIP - LIGHTHOUSE ROAD (T-425)
 SITUATED IN
 FRANKLIN COUNTY PENNSYLVANIA

| | |
|--------------|---------|
| SHEET NO. | 1 OF 1 |
| DRAWING NAME | 176SP5B |
| FILE NO. | 176- |

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Lighthouse Road (DOT 535 148 L) crosses, at :
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Company in Guilford Township, Franklin County :

CERTIFICATE OF SERVICE

I hereby certify that I served one (1) copy of the foregoing *Answer of Norfolk Southern Railway Company in Opposition to Randy E. Fisher’s Petition to Intervene* on behalf of Norfolk Southern Railway Company, in the above-referenced matter, this day, via electronic mail as noted below :

Honorable Stephen K. Haas
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/s/ Ijeoma N. Okereke
Ijeoma N. Okereke, Legal Assistant to
Benjamin C. Dunlap, Jr., Esquire

Dated: April 29, 2020