

April 29, 2020

VIA EFILING

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17101

**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:

Please find enclosed for filing the Answer of Guilford Township in Opposition to Randy E. Fisher's Late-Filed Petition to Intervene. If you have any questions or concerns, please feel free to contact me at the address listed above.

Very Truly Yours,

SALZMANN HUGHES, P.C.

/s/ Scott T. Wyland

Scott T. Wyland

STW/nas

Enclosure

Cc: The Honorable Stephen K. Haas
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 : 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 GUILFORD TOWNSHIP IN OPPOSITION TO RANDY E. FISHER’S
LATE-FILED PETITION TO INTERVENE**

TO THE HONORABLE STEPHEN K. HAAS:

Pursuant to 52 Pa. Code §§ 5.61 and 5.66, Guilford Township (“Guilford”) by and through its legal counsel, Salzmann Hughes, P.C., hereby files this Answer in Opposition to Randy E. Fisher’s (“Fisher”) Late-Filed Petition to Intervene (“Petition”). In support thereof, Guilford states as follows:

I. BACKGROUND

1. This proceeding concerns an at-grade crossing where T-425 (Lighthouse Road) crosses a single track of Norfolk Southern Railroad Company (DOT No: 535 148 L) in Guilford Township, Franklin County, Pennsylvania (the “Crossing”).

2. By Order entered February 25, 2016, the Pennsylvania Public Utility Commission (“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 Township and the future disposition of the Crossing.

3. A field conference was held on March 15, 2016, for the purpose of determining whether an amicable resolution of the various matters involved in this proceeding could be reached.

4. During the initial field conference, the parties were unable to arrive at a mutually acceptable resolution of the issues related to the Crossing.

5. Fisher did not attend the March 15, 2016 field conference.

6. The Commission thereafter referred the proceeding to the Commission's Office of Administrative Law Judge Steven K. Haas for the scheduling of an evidentiary hearing.

7. A Prehearing Conference was held on Wednesday, May 18, 2016, attended by counsel for Norfolk Southern, Guilford, Pennsylvania Department of Transportation ("PennDOT"), and the Commission's Bureau of Investigation and Enforcement ("BI&E").

8. Fisher did not attend the May 18, 2016 Prehearing Conference.

9. Following the Prehearing Conference, this matter was referred to the Commission's Mediation Unit upon agreement of the parties.

10. The parties were initially unable to resolve the issues involved through proceedings before the Commission's Mediation Unit.

11. A Scheduling Order was set on March 12, 2018, for further proceedings before ALJ Haas.

12. At the request of the parties, ALJ Haas issued an order suspending the litigation to give the parties additional time to attempt to finalize a settlement.

13. Thereafter, the parties engaged in amicable negotiations to address the concerns raised in this matter and to achieve terms of resolution acceptable to all parties for the benefit of the public.

14. The parties are currently in the process of finalizing a Joint Petition for Settlement to resolve this case. The COVID-19 pandemic has delayed the parties' ability to finalize and file the Joint Petition for Settlement.

15. On September 11, 2019, more than three (3) years after the initiation of this proceeding, Fisher filed his Petition with the Commission.

16. There is no Certificate of Service attached to the Petition. Fisher did not serve the parties or ALJ Haas with the Petition.

17. During the course of settlement discussions, the Petition was brought to the attention of the parties.

18. On April 9, 2020, the parties made ALJ Haas aware of the Petition.

19. Also on April 9, 2020, ALJ Haas instructed that he would treat Fisher's letter as a Petition to Intervene under the Commission's regulations. ALJ Haas also provided the parties until April 29, 2020, to respond to the Petition.

20. Guilford now files its Answer in Opposition to the Petition, respectfully requesting that the Petition be denied for failure to serve the Petition on the parties and as untimely.

II. ARGUMENT

A. Fisher's Petition to Intervene should be denied because the Petition does not contain a certificate of service and Fisher failed to serve the Petition on the parties in accordance with 52 Pa. Code §§ 1.54 and 5.75.

21. Fisher's Petition should be denied because it contains no Certificate of Service and the Petition was not served on ALJ Haas or any of the parties to this proceeding as required by 52 Pa. Code §§ 1.54 and 5.75.

22. When a petition to intervene is submitted to the Commission for filing, the petition must show service thereof upon all parties to the proceeding in conformity with Section 1.54. 52

Pa. Code § 5.75. Section 1.54 requires that all documents filed with the Commission are served upon parties in the proceeding and upon the presiding officer. 52 Pa. Code § 1.54.

23. Fisher's Petition indicates on its face that Fisher mailed his Petition to the Commission for filing on September 6, 2019. According to its docket sheet, the Commission received and docketed the Petition on September 11, 2019.

24. There is no Certificate of Service attached to the Petition or any other indication that the Petition was served on ALJ Haas or any of the parties.

25. Guilford, therefore, respectfully requests that the Petition be denied for failure to contain a Certificate of Service and Fisher's failure to effectuate service of his Petition on the parties and ALJ Haas as mandated by 52 Pa. Code §§ 1.54 and 5.75.

B. Fisher's Petition to Intervene should be denied because it was untimely filed and Fisher has failed to set forth good cause for his untimely Petition.

26. A petition to intervene must be filed (1) no later than the date fixed for the filing of responsive pleadings but not less than the notice and protest period established under Sections 5.14 and 5.53 of the Commission's regulations 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, or (3) in accordance with Section 5.53 of the Commission's regulations if no deadline is set in an order or notice with respect to the proceedings. 52 Pa. Code § 5.74(b).

27. Because no deadline was set in an order or notice, the deadline for a petition to intervene in this case is as set forth in 52 Pa. Code § 5.53. 52 Pa. Code § 5.74(b)(3). According to Section 5.53, the deadline was sixty (60) days from the date of publication of the applicable notice.

28. By Order entered February 25, 2016, the Commission initiated the instant investigation. The Commission also issued a press release notifying the public of this proceeding on February 25, 2016.¹

29. There was no time specified for protests (or petitions to intervene) in the February 25, 2016 Order or press release. As such, a petition to intervene in this proceeding was required to be filed within sixty (60) days of the February 25, 2016 Order and press release. *See* 52 Pa. Code §§ 5.53 and 5.74(b)(3).

30. Fisher's Petition was, therefore, due on or before April 25, 2016. Fisher did not file his Petition until September 11, 2019, more than three years after the intervention deadline. The Petition was untimely pursuant to the Commission's regulations.

31. Because the Petition was untimely, Fisher was required to set forth good cause in his Petition as to why it was untimely. Otherwise, the Petition is properly dismissed. *Application of Three-Lane Utilities, Inc.*, Docket No. A-210116F0002, 2007 WL 7230409, at 3 (Pa. PUC. Feb. 8, 2007) (stating that "[a] late-filed intervention which fails to establish 'good cause' as to why it is untimely is properly dismissed); *Joint Application of PPL Interstate Energy Co. & PPL Elec. Utilities Corp.*, Docket No. A-2014-2435752, 2014 WL 5810354, at 4 (Pa. PUC. Oct. 17, 2014); 52 Pa. Code § 5.74(b).

32. "The Commission has developed a standard with four prongs which must be met before untimely intervention is allowed. These are: (1) where the petitioner has a reasonable excuse for missing the [intervention] due date; (2) where the proceeding is contested at the time of the filing of a petition for intervention; (3) where the grant of intervention will not delay the orderly progress of the case; and (4) where the grant of intervention will not broaden significantly the

¹ Pennsylvania Public Utility Press Releases, PUC Initiates Safety Investigation of Railroad Crossing in Franklin County (February 25, 2016), http://www.puc.pa.gov/about_puc/press_releases.aspx?ShowPR=3666.

issues, or shift the burden of proof.” *Joint Application of PPL Interstate Energy Co. & PPL Elec. Utilities Corp.*, Docket No. A-2014-2435752, 2014 WL 5810354, at 4 (Pa. PUC. Oct. 17, 2014).

33. Each of the above four standards must be met before late intervention is permitted. *Id.* at 5. Accordingly, if the petitioner fails to establish even a single one of the factors noted above, it is proper for the Commission to deny his petition.

34. Fisher has failed the first prong of the test. Fisher fails to set forth any justification whatsoever in his Petition for why it was untimely filed and, even more substantially, why it was filed more than three years beyond the intervention deadline.

35. As for the second prong, this proceeding is not presently contested. There are no other intervenors or protestors in this case. Prior to the Petition filed on September 11, 2019, the parties engaged in amicable negotiations and prepared and circulated a Joint Petition for Settlement to resolve this case. Fisher’s intervention in this uncontested proceeding would effectively create a contested proceeding that would broaden the issues significantly and delay the orderly progress of this case. *See Application of Three-Lane Utilities, Inc.*, Docket No. A-210116F0002, 2007 WL 7230409, at 4 (Pa. PUC. Feb. 8, 2007).

36. The third prong requires that Fisher’s intervention will not delay the orderly progress of this case. Fisher’s intervention will, particularly at this late stage where settlement is forthcoming, delay the orderly progress and resolution of this case. The parties have drafted a Joint Petition for Settlement and circulated the same. The COVID-19 pandemic has, however, delayed the parties’ ability to finalize and file the Joint Petition for Settlement.

37. The fourth prong requires that the grant of intervention will not significantly broaden the issues or shift the burden of proof. Fisher’s Petition fails this prong because this is an uncontested proceeding and his interest in the proceeding is not presently before the Commission.

See Application of Three-Lane Utilities, Inc., Docket No. A-210116F0002, 2007 WL 7230409, at 4 (Pa. PUC. Feb. 8, 2007); *Joint Application of PPL Interstate Energy Co. & PPL Elec. Utilities Corp.*, Docket No. A-2014-2435752, 2014 WL 5810354, at 5 (Pa. PUC. Oct. 17, 2014).

38. Per the Commission's February 25, 2016 Order, the Commission initiated this investigation to "determin[e] all matters relating to the safety of the crossing. . . as well as the future disposition of the crossing, what work shall be performed at the crossing, and allocation of the cost of any work ordered."

39. The parties have acknowledged that the Crossing is a public safety hazard and agreed the Crossing should be abolished.

40. Fisher fails to raise any issues related to the safety of the Crossing, the subject of this investigation, on the face of his Petition.

41. Instead, in his Petition, Fisher requests a hearing to state his personal concerns and general displeasure with the prospect that a portion of Lighthouse Road may be vacated to an adjacent property owner. Fisher's Petition does little more than state his personal dissatisfaction with his local government.

42. Fisher should not be permitted to intervene in order to raise such allegations that are unrelated to the issue of this investigation.

43. Fisher fails to set forth any justification for his untimely intervention and, therefore, it is proper for the Commission to dismiss his Petition. Additionally, as set forth above, Fisher has failed to meet each of the four prongs for granting his untimely intervention.

44. Further, granting Fisher's intervention is not in the public interest. The resolution of this proceeding and the anticipated abolition of the Crossing are designed to eliminate a public

safety hazard. Fisher's intervention will unnecessarily delay the resolution of this proceeding and the elimination of a public safety hazard, which is clearly not in the interest of the public.

45. Accordingly, Guilford respectfully requests that the Petition be denied as untimely.²

WHEREFORE, Guilford Township respectfully requests the Commission deny Fisher's Petition to Intervene.

Respectfully Submitted,

SALZMANN HUGHES, P.C.

Dated: April 29, 2020

By: /s/ Scott T. Wyland
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² In the alternative, if Fisher's late intervention is granted, Guilford submits that Fisher is required to take the case as it stands at the time of intervention. *PUC v. West Penn Power Co.*, Docket No. C-2012-2307244 (Order and Opinion entered August 29, 2013) (noting that this procedure is consistent with 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, which established that any party intervening after the expiration of a protest period takes the record as it exists). In that event, Fisher should not be permitted to have any effect on terms of the Joint Petition for Settlement in order to ensure that the orderly progress of the proceeding and settlement is maintained. *See id.* (holding that later interveners were allowed only to file comments on a Joint Petition for Settlement where the proposed settlement was agreed upon prior to their intervention).

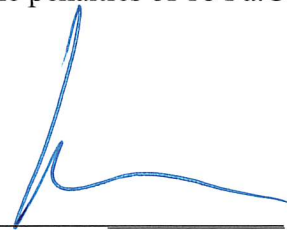
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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VERIFICATION

I, Don Clapper, Chairman of the Board of Supervisors of Guilford Township, 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: April 29, 2020



Don Clapper
Chairman of Board of Supervisors
Guilford Township, Franklin County
115 Spring Valley Road
Chambersburg, PA 17202

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer of Guilford Township in Opposition to Randy E. Fisher’s Late-Filed Petition to Intervene was served upon the parties listed below by e-mail:

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SALZMANN HUGHES, P.C.

Dated: April 29, 2020

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Scott T. Wyland