**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| 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  | ::::::: |  I-2016-2527248 |

**ORDER DENYING PETITION TO INTERVENE OF**

**RANDY FISHER**

By Order entered February 25, 2016, the Pennsylvania Public Utility Commission (Commission) initiated 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 Guilford Township and the future disposition of the Crossing. The Commission also issued on February 25, 2016 a press release notifying the public of this proceeding.[[1]](#footnote-2) There was no time specified in either the Commission’s February 25, 2016 order or its press release as a deadline for the filing of Petitions to Intervene.

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. 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.

On or about September 11, 2019, Randy Fisher filed a letter with the Commission in which he requested to be made a party of record in this proceeding. A Certificate of Service was not attached to Mr. Fisher’s letter and there is otherwise no indication that the letter was served on any of the parties to the proceeding or on the Administrative Law Judge. By e-mail message to the parties dated April 9, 2020, after having been made aware of Mr. Fisher’s letter, I informed the parties that I would treat the letter as a Petition to Intervene and I established a deadline of April 29, 2020 for the filing of Answers to the Petition. Norfolk Southern, Guilford Township, the Commission’s Bureau of Investigation and Enforcement and the Pennsylvania Department of Transportation filed Answers in opposition to Mr. Fisher’s Petition to Intervene.

For the reasons to be discussed below, Mr. Fisher’s Petition will be denied.

Section 5.74(b) of the Commission’s regulations provides that petitions to intervene shall be filed:

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.

 As noted, the Commission’s February 25, 2016 order and press release did not include a deadline for filing responsive pleadings or protests. Accordingly, under the Commission’s regulation at 52 Pa. Code § 5.53, petitions to intervene were due within sixty days of the date of the Commission’s order and press release, or by April 25, 2016.

Mr. Fisher filed his petition on September 11, 2019, well over three years after the Commission’s February 25, 2016 Order and press release were issued and the April 25, 2016 deadline expired. Accordingly, the petition is late filed.

When a petition to intervene is filed late, the Commission may still 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), the Commission established a four-part test to determine whether good cause has been established to accept a late-filed protest. The four 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) (*West Penn)*. All four standards must be met in order to grant a late filed petition to intervene. *Joint Application of PPL Interstate Energy Co. & PPL Elec. Utilities Corp.,* Docket No. A-2014-2435752, 2014 WL 5810354 (Pa. PUC, October 17, 2014).

In his petition, Mr. Fisher merely requests that he be added as a party of record in this proceeding, and he presents his reasons for so requesting. He does not, however, offer any explanation or excuses for his failure to meet the April 25, 2016 filing deadline. Accordingly, Mr. Fisher has not demonstrated that he has a reasonable excuse for missing the due date. Since he has failed to meet the first of the four standards, Mr. Fisher’s Petition should be dismissed on this basis alone. In any event, I will briefly address the remaining three standards in support of my decision to deny the Petition.

**The proceeding was contested at the time of the filing of the petition**

As noted by the parties in their respective answers to Mr. Fisher’s Petition, on or about May 2018, the parties engaged in amicable negotiations and, in 2019, began circulating a draft Joint Petition for Settlement prior to the filing of Mr. Fisher’s Petition in September of 2019. The parties noted that the onset of the Covid-19 pandemic has delayed the completion and filing of the Joint Petition for Settlement. Thus, the parties had a settlement in principle and continued to circulate and discuss settlement terms prior to the Petition being filed in September 2019. I agree with the parties that the proceeding was not contested at the time of the filing of the Petition. This factor weighs against approval of Mr. Fisher’s Petition.

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

The parties argue that, allowing Mr. Fisher to intervene at this stage will likely delay the orderly progress of the case. The parties have a Joint Petition for Settlement drafted and circulated. However, the finalization and filing of the Joint Petition has been delayed due to the closure of non-essential businesses.

It is noted here that, if the Petition is granted, Mr. Fisher would be limited to taking the record in this proceeding as it currently exists, as the Commission has held in previous proceedings 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, if Mr. Fisher’s Petition were approved, his participation would be limited to providing comments on the proposed settlement once it is filed. His objections to the Joint Petition for Settlement will most likely cause some degree of delay in the review of the settlement and the potential implementation of corrective, safety measures proposed and agreed upon by the parties. Although it cannot be determined to what degree that approval of Mr. Fisher’s Petition will unduly delay the orderly progress of the case, Mr. Fisher certainly has not demonstrated that approval of his Petition **will not** unduly delay this proceeding, as he is required to do under *West Penn.*

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

The Commission’s 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).

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 asserts 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 and have prepared a Joint Petition for Settlement that reflects these agreements. The allegations raised by Mr. Fisher in his Petition do not relate to the safety of the crossing, but rather allege that Guilford Township is not acting on behalf of its citizens. If Mr. Fisher were permitted to intervene and raise these concerns at this point in the proceeding, it would result in a significant broadening of the issues at a very late stage in the case. This factor weighs against approval of the Petition.

Because Mr. Fisher failed to demonstrate good cause for filing the Petition over three years beyond its due date, his Petition will be denied.

May 12, 2020 /s/

 Steven K. Haas

 Administrative Law Judge

**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**

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1. PA Public Utility Commission Press Release, 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 [↑](#footnote-ref-2)