

# Nauman Smith

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February 22, 2016

**Via Electronic Mail**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, PA 17105-3265

**In re: A. Edward Schwartz v. Canadian Pacific Railroad and  
Pennsylvania Department of Transportation  
Docket No. P-2011-2241780  
C-2011-2237486**

Dear Secretary Chiavetta:

I am enclosing Norfolk Southern Railway Company's Answer to Petition for Rescission or Amendment for filing in the above matter. As evidenced by the attached Certificate of Service, copies of the Answer are being served on all interested parties. If you have any questions please contact our office.

Sincerely yours,

  
Jeannette Chelgren, Secretary to  
to Benjamin C. Dunlap, Jr.

Enclosures

cc: All Parties of Record (w/enc.)  
Timothy Bentley, Esquire (w/enc.)

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**BEFORE THE  
COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ and	:	
Complainant	:	
	:	Docket No. C-2011-2237486
v.	:	(P-2011-2241780)
	:	
DELAWARE AND HUDSON RAILWAY	:	
COMPANY, INC. d/b/a CANADIAN PACIFIC	:	<b>Filed Electronically</b>
RAILROAD AND PENNSYLVANIA	:	
DEPARTMENT OF TRANSPORTATION,	:	
Respondents	:	

**ANSWER TO PETITION FOR RESCISSION OR AMENDMENT**

Norfolk Southern Railway Company (“Norfolk Southern”) by and through its counsel, Nauman, Smith, Shissler & Hall, LLP, hereby files this response to the Petition of Cassandra Colombo, Esquire (“Petitioner”), for Rescission or Amendment (“Petition”) as follows:

**Background Information and Procedural History**

1. By its Opinion and Order entered December 5, 2013, following a hearing, a bridge structural analysis conducted by the Pennsylvania Department of Transportation (“PennDOT”) and briefing, the Commission affirmed Administrative Law Judge David A. Salapa’s Recommended Decision Upon Remand, holding that because the bridge was structurally deficient and there was no public need for the subject crossing, it should be ordered abolished.

2. By Ordering Paragraph 11 of the aforementioned Opinion and Order, the Commission required the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad (“CP”) within 12 months from the date of the Commission’s approval of its submitted

demolition plans to demolish and remove the subject bridge carrying S.R. 4009 (Sunset Road) over CP's facilities.

3. By Secretarial Letter dated December 22, 2014, the Pennsylvania Public Utility Commission ("Commission"), approved and certified the "CM Project #114-180, Canadian Pacific Railway, SR 4009\* (Sunset Road) over CP Railway Bridge, La Plume Township, Lackawanna County, PA" demolition plan.

4. Norfolk Southern has purchased the CP line on which the subject crossing is located, with the sale being finalized in September 2015.

5. Due to the approximately 90-day proximity between the sale finalization and the December 22, 2015, deadline for CP to remove the bridge, Norfolk Southern, which assumed the bridge removal responsibility as part of the sales transaction, filed a Petition for Extension of Time until April 30, 2016, to perform the removal work.

6. PennDOT filed an Answer opposing Norfolk Southern's Petition for Extension of Time, which was served on January 6, 2016.

7. The Commission has not acted on Norfolk Southern's Petition for Extension of Time, and Norfolk Southern is proceeding on schedule to have the bridge removed by the requested deadline of April 30, 2016, according to the approved plans.

8. On December 31, 2015, Attorney Colombo filed a Petition for Rescission or Amendment without enclosing a certificate of service

9. By letter dated February 12, 2016, the Commission forwarded Attorney Colombo's letter to all parties to constitute service. All parties had ten days from the date of the letter to file an Answer to the Petition.

### Argument

10. Under the Public Utility Code, the Commission may, at any time after notice and the opportunity to be heard, rescind or amend any order made by it. 66 Pa. C.S. § 703(g).

11. Such requests under 66 Pa. C.S. § 703(g) must be consistent with 52 Pa. Code § 5.572 relating to petitions for relief following the issuance of a final decision.

12. 52 Pa. Code § 5.572 (a) requires that petitions “must be in writing and specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired.” Section 5.572 (b) requires that “a copy of every petition covered by subsection (a) shall be served upon each party to the proceeding”.

13. The present Petition failed to comply with the requirements of 52 Pa. Code § 5.572.

14. The PUC has the discretion whether to act on a petition for rescission or amendment, and because the relief of rescission or amendment under § 703(g) may result in the disturbance of final orders, it should be granted judiciously and only under appropriate circumstances. City of Pittsburgh v. Pennsylvania Department of Transportation, 416 A.2d 461 (Pa. 1980).

15. The legal standard for granting a rescission or amendment of a final order is well-established. In Duick v. Pa. Gas & Water Co., 51 P.U.R.4th 284 (Pa. PUC 1982), the Commission stated as follows:

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code to rescind or amend a prior order in whole or in part.

16. Under the standards of Duick, such Petitions for Reconsideration are likely to succeed only when the petition brings to light newly discovered evidence or a change in circumstances, or when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. Brink’s Inc. v. Pennsylvania Pub. Utility Commission, 328 A.2d 582 (Pa. Cmwlth. Ct. 1974) AT&T v. Pennsylvania Pub Utility Commission, 568 A.2d 1362 (Pa. Cmwlth. Ct. 1990).

17. Pursuant to 66 Pa.C.S.A. § 2702(c) of the Public Utility Code, “the commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated... or abolished upon such reasonable terms and conditions as shall be prescribed by the commission.”

18. Petitioner asserts in her Petition that she and her family are residents of 922 Lily Lake Road in North Abington Township, PA 18414, and that their property is affected by the bridge in question carrying Sunset Road over the railroad tracks in La Plume Township.

19. Per the map attached as Exhibit “A”, Petitioner’s residence is located approximately 3 miles from the bridge in question. Norfolk Southern contends that Petitioner’s property is not an “adjacent property,” in accordance with 66 Pa. C.S.A. § 2702.

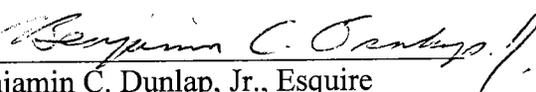
20. Petitioner’s grounds for seeking rescission are that the bridge in question is the only way to access their property without using a non-paved road. However, per Exhibit “A”, it appears that Petitioner has numerous paved routes to access her property, including U.S. 6 and 11, which are located much closer to her property than the bridge in question.

21. This matter has been fully litigated over a period of years. Petitioner is not an adjacent property owner, living three miles from the subject crossing, and is not even located in

the same Township as the subject crossing. She has no direct or substantial interest in the crossing at issue, and the matter should not be reopened a matter of weeks before the bridge is scheduled to be removed.

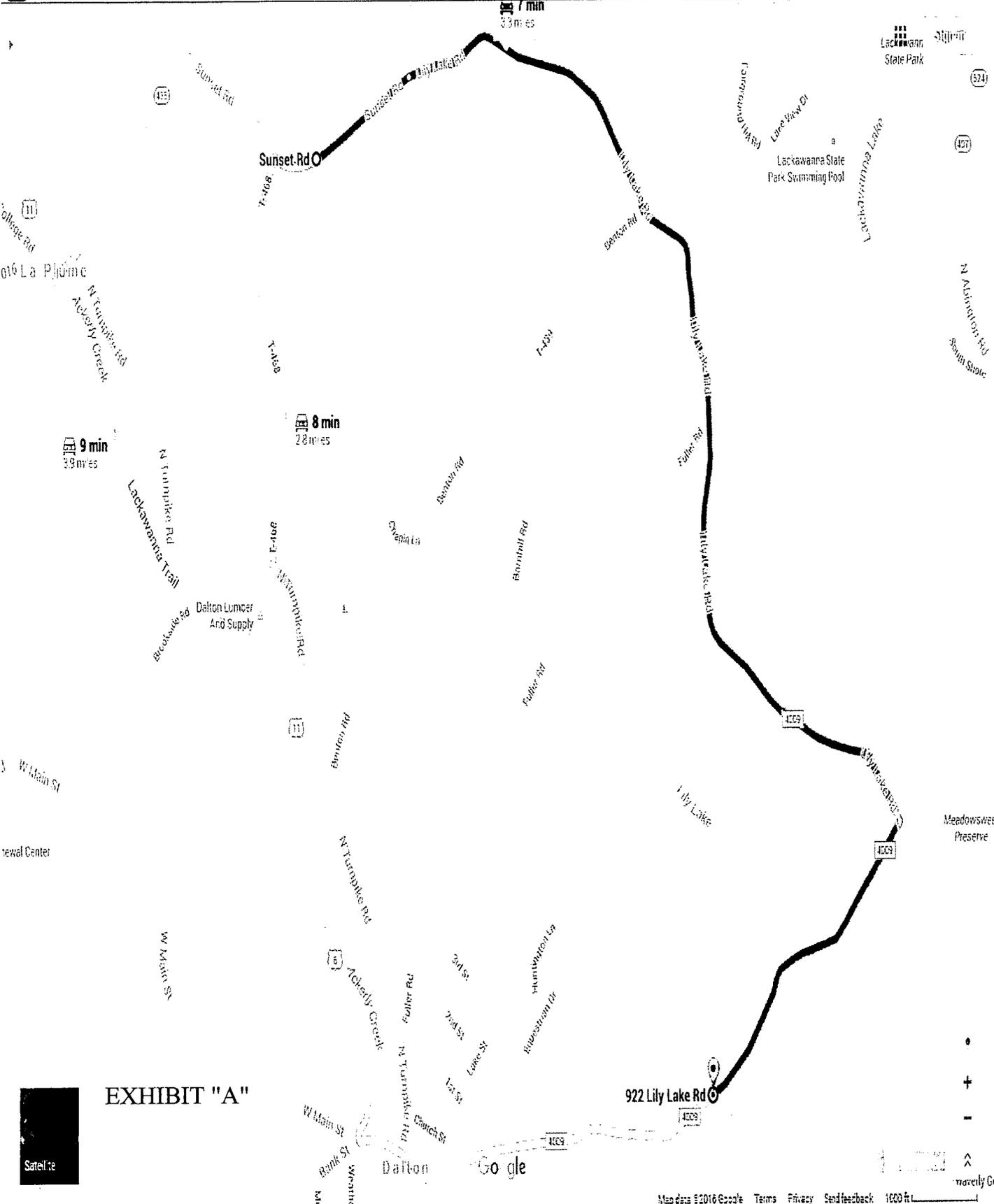
WHEREFORE, Norfolk Southern Railway Company, respectfully requests that this Honorable Commission deny Petitioner's Petition for Rescission or Amendment.

NAUMAN, SMITH, SHISSLER & HALL, LLP

By   
Benjamin C. Dunlap, Jr., Esquire  
Supreme Court I.D. #66283

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Date: February 22, 2016



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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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RAILROAD AND PENNSYLVANIA	:	
DEPARTMENT OF TRANSPORTATION,	:	
Respondents	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I served one (1) copy of the Answer to the Petition for Rescission or Amendment, in the above action, this day by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

Jill M. Spott, Esquire  
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Cassandra A. Colombo, Esquire  
922 Lily Lake Road  
Dalton, PA 18414

Dated: February 22, 2016

  
Jeannette Chelgren, Secretary to  
Benjamin C. Dunlap, Jr., Esquire