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February 26, 2016

**Via Electronic Mail**

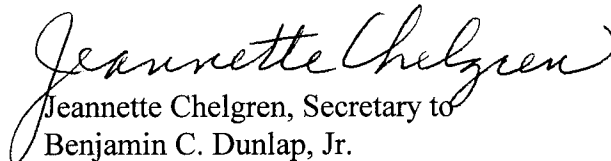
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P. O. Box 3265  
Harrisburg, PA 17105-3265

**RE: John J. Shelkons, Complainant vs. Norfolk Southern Railway Company, Baden Borough, Beaver County and Commonwealth of Pennsylvania, Department of Transportation  
Docket No. C-2014-2443608**

Dear Secretary Chiavetta:

I am enclosing herewith a Petition for Protective Order for filing on behalf of Norfolk Southern Railway Company in the above-referenced matter. As evidenced by the attached Certificate of Service, a copy of the Petition has been served on all interested parties.

Sincerely yours,

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

Enclosure

cc: All Interested Parties of Record  
Timothy Bentley, Esquire

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>JOHN J. SHELKONS, Complainant</b>	:	
<b>vs.</b>	:	
<b>NORFOLK SOUTHERN RAILWAY CO.,</b>	:	
<b>Baden Borough, Beaver County and</b>	:	<b>PUC Docket No. C-2014-2443608</b>
<b>Commonwealth of Pennsylvania, Department</b>	:	
<b>of Transportation</b>	:	<b>Filed Electronically</b>
	:	

**PETITION FOR PROTECTIVE ORDER**

AND NOW, comes Norfolk Southern Railway Company (NS), by and through its counsel, Nauman, Smith, Shissler & Hall, LLP, and submits the following in support of its Petition for Protective Order, pursuant to 52 Pa. Code § 5.365:

1. Complainant, John J. Shelkons, filed his Complaint with the Commission on August 1, 2014. In his Complaint he alleged that NS was preventing him and other members of the public from utilizing the subject Pinney Street bridge contrary to a Commission Order dated October 15, 1956, at Application Docket No. 82520.

2. At the field conference on November 13, 2014, the Commission requested a recent bridge inspection report for the subject bridge (DOT No. 861 316 L), which no party could provide. The Commission, by way of a January 8, 2015, Secretarial Letter, ordered NS to perform an inspection of the subject bridge and submit the report to the parties of record and to the Commission.

3. A March 6, 2015, inspection report was generated subsequent to a February 16, 2015, inspection of the subject bridge. Contrary to the assertion in the February 4, 2016, Secretarial Letter, this report was submitted to the Commission's Bureau of Technical Utility Services, Transportation Division – Rail Safety Section ("TUS-Rail Safety") on October 20, 2015.

4. NS did not submit the report to any other party, and it is NS's understanding from TUS-Rail Safety that only Mr. Shelkons, a private individual, is requesting a copy of the bridge inspection report.

5. As disclosed to TUS-Rail Safety, NS is performing repairs to the bridge as recommended in the safety report, with which TUS-Rail Safety took no exception.

6. The Commission issues a Protective Order "when a participant demonstrates that the potential harm to the participant of providing the information would be substantial and that harm to the participant if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process." 52 Pa. Code § 5.365(a).

7. One of the factors that the Commission weighs in determining whether to grant or to deny a protective order includes consideration of other statutes or regulations dealing specifically with disclosure of the information. 52 Pa. Code § 5.365(a)(5).

8. Public disclosure of the detailed bridge inspection report could pose a danger to the safety or physical security of the structure and therefore only redacted bridge inspection reports are provided pursuant to the "Right-to-Know Law". 65 P.S. §§ 67.101, 67.102, 67.706.

9. The subject report is also protected from discovery and production into evidence in any federal or state court cases under 23 U.S.C. § 409.

10. Requiring NS to submit a bridge inspection report for the subject bridge into the public record of the Commission, or directly to any member of the public, is in direct conflict with the federal and state prohibitions and protections provided under the aforementioned statutes.

11. Requiring NS to submit a bridge inspection report into the public record of the Commission, or directly to any member of the public, creates and poses potentially significant

security concerns to NS's Conway Yards located at the crossing that substantially outweigh the public's interest in open access to the administrative hearing process.

12. Permitting the bridge report to be submitted into the public record of the Commission, or directly to any member of the public, creates a risk of the report being widely distributed through the news media, potentially creating irreparable damage and harm to NS.

13. Producing any structure safety inspection report for general public review, scrutiny and use undercuts the main reason that these reports are treated as confidential. Confidentiality promotes independent and critical analysis of bridges by engineering professionals without concern for the potential liability concerns that the results of such reports might raise. See Harrison v. Burlington Northern R. Co., 965 F.2d 155, 160 (7<sup>th</sup> Cir. 1992).

14. In order to properly evaluate and critically assess the status of a bridge structure, engineers performing bridge inspections must not be concerned with the ramifications of their report in a court proceeding.

15. The Commission's need for the report stems from its responsibility to evaluate the status of the bridge and to determine what, if any, work should be performed on the bridge in consideration of the conditions shown.

16. The commission must limit the use of the submitted bridge inspection report for the sole and express purpose of determining the current condition of the subject bridge structure.

17. Complainant has no need to receive the report. He did not raise an issue regarding the condition of the bridge and, upon information and belief, is not an engineer qualified to evaluate the inspection report. The sole matter about which Mr. Shelkons complained, *i.e.*, utilization of the bridge, has been resolved by NS confirming its use by the public.

18. NS requests that the bridge inspection report be treated as under seal.

19. NS will disclose the bridge inspection report to any public entity party requesting a copy of the report.

20. NS requests that the Commission require any party provided with the report to treat the report as confidential and agree not to provide the bridge inspection report, or any data contained therein, to any third party or to use the report in any litigation other than this current proceeding.

21. The potential harm to NS outweighs the public's interest in free and open access to the administrative hearing process, insofar as the bridge inspection reports are not normally subject to disclosure to any party other than the bridge owner or the party that maintains the bridge.

22. The Commission must provide that any protective order issued be served on any and all parties who receive a copy of the bridge inspection report.


23. The Commission must provide that any party who discloses the bridge inspection report, or any reports, surveys, schedules, lists or data contained in such report, to a third party or uses such bridge inspection report, or any reports, surveys, schedules, lists or data contained in such report in other litigation matters be subject to appropriate sanctions from the Commission.

WHEREFORE, based upon the foregoing, Norfolk South Railway Company respectfully requests that the Commission enter the following Protective Order:

- a. That Norfolk Southern Railway Company's petition for protective order is granted.

- b. That Norfolk Southern Railway Company is ordered to submit the March 6, 2015 bridge inspection report regarding the subject bridge and any public entity party requesting a copy of the report.
- c. That neither counsel nor witnesses for the parties receiving the bridge inspection report for the subject bridge shall provide access to the inspection report to any other person except as authorized by this Order or the Commission or the presiding officer.
- d. That any party who discloses the inspection report to any person other than those persons or parties set forth in this Order will be subject to sanctions by the Commission.
- e. That any copy of the inspection report that is made part of the official record be placed under seal.
- f. That upon completion of this proceeding, including any administrative or judicial review, all copies of the report shall be returned to Norfolk Southern Railway Company. In the alternative, parties may provide an affidavit of counsel stating that the inspection report has been destroyed.

NAUMAN, SMITH, SHISSLER & HALL, LLP

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

200 North Third Street, 18<sup>th</sup> Floor  
P. O. Box 840  
Harrisburg, PA 17108-0840  
717-236-3010  
Attorney for Norfolk Southern Railway Company

Date: February 26, 2016

**VERIFICATION**

I, Kevin Hauschildt, P.E., Chief Engineer Bridges & Structures for Norfolk Southern Railway Company ("Norfolk Southern") in the foregoing proceeding, make this verification on behalf of Norfolk Southern, and do state that as the Chief Engineer Bridges & Structures for Norfolk Southern, I am authorized to make this Verification on behalf of Norfolk Southern, and further state that, based on information provided to me, the facts set forth in the foregoing **Petition for Protective Order**, 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.



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**Kevin Hauschildt, P.E.**

Date: 2/25/2016

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**JOHN J. SHELKONS, Complainant** :  
vs. :  
**NORFOLK SOUTHERN RAILWAY CO.,** :  
**Baden Borough, Beaver County and** : **PUC Docket No. C-2014-2443608**  
**Commonwealth of Pennsylvania, Department** :  
**of Transportation** : **Filed Electronically**  
:

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the foregoing Petition for Protective Order of Norfolk Southern Railway Company, in the above action, this day by depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

John J. Shelkons  
785 Athalia Street  
Baden, PA 15005

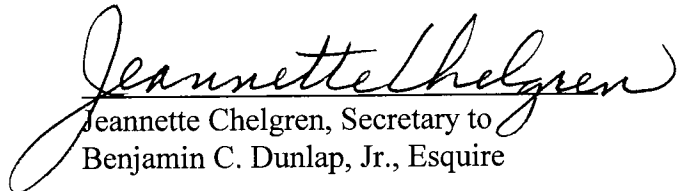
Baden Borough  
Attention: Baden Borough Solicitor  
149 State Street  
Baden, PA 15005

William Rodgers III, Esquire  
Damian, Amato & Start, P.C.  
601 Broad Street  
Sewickley, PA 15142

Beaver County  
Attn: Joseph A. Askar, Chief County  
Solicitor  
Beaver County Courthouse  
810 Third Street  
Beaver, PA 15009

William J. Cressler, Chief Counsel  
PennDOT  
P. O. Box 8212  
Harrisburg, PA 17105-8212

Date: February 26, 2016

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