

Nauman Smith

Attorneys At Law

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com
Telephone Extension: 21

March 13, 2017

Via Electronic Filing

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

**RE: A. Edward Schwartz v. Norfolk Southern Railway Company, Lackawanna County, LaPlume Township, and Commonwealth of Pennsylvania, Department of Transportation.
Docket No. C-2016-2570929**

Dear Secretary Chiavetta:

I am enclosing Norfolk Southern Railway Company's Motion for Summary Judgment. In accordance with the accompanying Certificate of Service, we are providing a copy of this document to all interested parties. If you have any questions, please advise.

Sincerely yours,



Benjamin C. Dunlap, Jr., Esquire

Enclosure

cc: All Interested Parties (via email w/enc.)
The Honorable David A. Salapa (via email w/enc.)

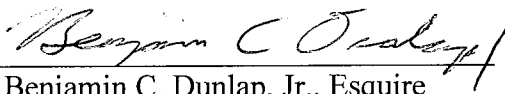
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. EDWARD SCHWARTZ	:	
Complainant	:	
	:	Docket No. C-2016-2570929
v.	:	
	:	
NORFOLK SOUTHERN RAILWAY COMPANY,	:	Filed Electronically
LACKAWANNA COUNTY, LAPLUME	:	
TOWNSHIP, AND COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondents	:	

NOTICE TO PLEAD

Pursuant to 52 Pa. Code §5.102 and the Order Directing Filing of Motions for Summary Judgment of Administrative Law Judge David A. Salapa dated February 9, 2017, you are hereby notified that you must file and serve an answer to this Motion on or before April 7, 2017.

NAUMAN, SMITH, SHISSLER AND HALL, LLP

By: 
Benjamin C. Dunlap, Jr., Esquire
Supreme Court ID No. 66283

200 North Third Street
P.O. Box 840
Harrisburg, PA 17108
Telephone: (717) 236-3010
Counsel for Norfolk Southern Railway Company

Date: March 13, 2017

BEFORE THE
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A. EDWARD SCHWARTZ	:	
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	:	Docket No. C-2016-2570929
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TOWNSHP, AND COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION,	:	
Respondents	:	

**MOTION FOR SUMMARY JUDGMENT OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its counsel Nauman, Smith, Shissler & Hall, LLP, hereby files this Motion for Summary Judgment pursuant to 52 Pa. Code §5.102 as follows:

I. INTRODUCTION

1. Following the Prehearing Conference on February 8, 2017, the Commission directed the Respondents to this matter to move for summary judgment pursuant to Section 5.102 of the Commission’s regulations on the issue of whether the Commission has jurisdiction over matters involving alleged de facto takings of property not directly appropriated or condemned by the Commission. Norfolk Southern moves for summary judgment on the basis that neither the Public Utility Code, Pennsylvania’s appellate courts, nor past Orders or Opinions of the Commission establish that the Commission has jurisdiction to adjudicate the issues of whether a de facto taking occurred and, if so, the measure of damages for the alleged taking.

2. The Eminent Domain Code, 26 Pa. C.S. §101 et seq., establishes the complete and exclusive procedure and law governing condemnations of property, including inverse

condemnations or de facto takings. 26 Pa. C.S. §102(a). However, the Eminent Domain Code expressly does not affect the Commission's jurisdiction or power. 26 Pa. C.S. §102(b).

3. The Commission is vested by statute with the limited power to appropriate property for railroad crossings, and this power includes the right to direct the construction, alteration, relocation, suspension, or abolition of such crossings. 66 Pa. C.S. §2702(b). Where the Commission appropriates property, it may, after due notice and hearing, determine appropriate compensation for damages. 26 Pa. C.S. §2704(a). In this case, the Commission did not appropriate or condemn any portion of Mr. Schwartz's property. Moreover, the Commission did not condemn *any* property; instead, it closed the crossing in the interest of public safety, and therefore exercised the police powers of the Commonwealth for which damages are not recoverable. See German v. City of Philadelphia, 683 A.2d 323, 327-328 (Pa. Cmwlth. 1996), *appeal denied*, 700 A.2d 444 (Pa. 1997).

4. Mr. Schwartz alleges that a de facto taking occurred due to the closure and subsequent demolition of the bridge formerly carrying S.R. 4009 over Norfolk Southern's railway facilities. The Public Utility Code does not provide a process or procedure for the Commission to assess whether a de facto taking occurred, nor does Section 2704(a) describe a procedure for determining damages in a de facto taking case. See Norfolk Southern's Prehearing Conference Memorandum, Exhibit "A," Stanford Cramer v. Pa. Dep't. of Transp., et al., 1232 CD 2005 (Opinion and Order filed Feb. 28, 2006), 10-11.

5. Given that the Public Utility Code does not provide any authority for the Commission to address de facto taking matters, de facto takings are therefore subject to the Eminent Domain Code. Parties claiming to be affected by a de facto taking must file a petition for the appointment of viewers with the trial court under Section 502(e) of the Eminent Domain

Code, which is the only legal recourse for the alleged wrongful taking and damages asserted by Mr. Schwartz.

II. PROCEDURAL HISTORY

6. On September 21, 2016, Mr. Schwartz filed his “Application for Determination as to Compensation of Damages Sustained Due To Abolition of Railroad Crossing” (“Application”) with the Commission alleging that a de facto taking occurred and seeking compensation pursuant to Section 2704(a) of the Public Utility Code.

7. The Commission, in a Secretarial Letter dated October 31, 2016, stated that this Application would be treated as a Complaint and noted that the Commission “does not have the jurisdiction or the authority to award damages.”

8. In response to the Application and the Secretarial Letter dated October 31, 2016, Norfolk Southern filed its Answer with New Matter on November 21, 2016, denying that any taking occurred and raising the defenses of collateral estoppel based on the Commission’s 2013 Opinion and Order relating to this crossing as well as the release signed by Mr. Schwartz’s and Norfolk Southern’s predecessors in title. See Norfolk Southern Answer with New Matter, p. 8 ¶¶35-36.

9. On January 18, 2017, the Commission issued a Prehearing Conference Order scheduling an initial telephonic prehearing conference on February 8, 2017. Following the submission of prehearing conference memoranda by Mr. Schwartz, the Pennsylvania Department of Transportation (“PennDOT”), and Norfolk Southern, the prehearing conference occurred on February 8, 2017.

10. Administrative Law Judge David A. Salapa issued an Order on February 9, 2017, directing the Respondents in this matter to file motions for summary judgment on the issue of whether the Commission has jurisdiction over the de facto taking issues raised in Mr. Schwartz's Application.

III. FACTUAL BACKGROUND & PRIOR PUC PROCEEDINGS

A. Former S.R. 4009 Crossing

11. The Delaware, Lackawanna, and Western Railroad Company constructed a bridge over its rail line in 1915. This rail line bisected a farm owned at the time by Emma Slayton. See Recommended Decision Upon Remand, C-2011-2237486 (August 2, 2013) ("Recommended Decision"), pp. 11-12.

12. Following the merger of the Delaware, Lackawanna, and Western Railroad Company with the Erie Railroad in 1960, the rail line changed hands several times and is currently owned by Norfolk Southern. See *id.*, p. 12. The owner of the line immediately prior to Norfolk Southern was the Delaware and Hudson Railway Company d/b/a/ Canadian Pacific Railroad ("D&H"). See *id.*

13. The bridge carried S.R. 4009 over the rail lines owned and operated by Norfolk Southern. See *id.*

14. Mr. Schwartz owns, and for all times pertinent to this matter has owned, property on both the eastern and western side of Norfolk Southern's rail lines where he operates a farm. See Application, pp. 1-2.

15. On April 15, 2011, Mr. Schwartz filed a Complaint with the Commission against D&H and PennDOT alleging that the bridge carrying S.R. 4009 was not properly maintained. This Complaint was docketed at C-2011-2237486.

16. Based on the recommendations of the Recommended Decision, the Commission issued an Opinion and Order on December 5, 2013, directing the demolition of the bridge and abolition of the crossing carrying S.R. 4009 over the rail lines. See Opinion and Order, C-2011-2237486 (December 5, 2013), p. 25, ¶11.

17. At that time, the bridge contained a single 12-foot wide traffic lane with a 13-ton weight restriction.

18. Demolition of the bridge was completed to the satisfaction of the Commission following Norfolk Southern's acquisition of the D&H line at this location. See Secretarial Letter, C-2011-2237486 (July 20, 2016).

B. Edward Schwartz's Property (Raintree Farm)

19. Mr. Schwartz's property is comprised of approximately 20 acres on the western side and 70 acres on the eastern side of Norfolk Southern's right-of-way ("Premises"). See Application, pp. 1-2.

20. The Premises are located in LaPlume Township, Lackwanna County.

21. At no point in the prior PUC proceedings was any portion of the Premises condemned by Order of the PUC or any other entity with the power of eminent domain.

22. Following the demolition of the bridge, Mr. Schwartz continues to have roadway access to both portions of his property via an alternate route.

23. Additionally, the Recommended Decision notes that alternate routes are available generally to members of the public, including Mr. Schwartz, who formerly used the bridge. See Recommended Decision, p. 34.

IV. GROUNDS FOR SUMMARY JUDGMENT

24. Norfolk Southern requests that the Commission enter summary judgment in its favor on the basis that the Commission lacks jurisdiction over the determination of whether a de facto taking or inverse condemnation occurred and the assessment of damages for said de facto taking or inverse condemnation.

25. Under the provisions of 52 Pa. Code §5.102(d)(1), summary judgment is to be granted under the following conditions:

The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

26. Whether the Commission has jurisdiction to determine if a de facto taking occurred is an issue of law. Based on the record, it is clear that there are no genuine issues of material fact that affect the question of whether the Commission has jurisdiction to determine if a de facto taking occurred.

V. ARGUMENT

A. The Public Utility Code does not confer jurisdiction on the Commission to adjudicate whether a de facto taking occurred and, if so, to determine damages for the taking; rather, the Courts of Common Pleas have jurisdiction over de facto taking matters

27. The Eminent Domain Code “provides a complete and exclusive procedure to govern all condemnations of property for public purposes and the assessment of damages.” 26 Pa. C.S. §102(a).

28. The Eminent Domain Code establishes a procedure for owners asserting that their property interest has been condemned without a declaration of taking (de facto taking) to file for an appointment of viewers. See 26 Pa. C.S. §502(c).

29. Petitions for the appointment of viewers under the Eminent Domain Code must be brought in the Courts of Common Pleas. See id.

30. Despite the Eminent Domain Code stating that it provides the complete and exclusive procedure governing condemnations, certain exceptions apply. Namely, “[n]othing in the [Eminent Domain Code] shall be construed: (1) to affect the jurisdiction or power of the Pennsylvania Public Utility Commission or any statute providing for the assessment of benefits for public improvements on the properties benefitted.” 26 Pa. C.S. §102(b)(1).

31. The Public Utility Code confers upon the Commission the exclusive power to appropriate property for railroad crossings and the power to relocate, alter, suspend, or abolish such crossings. See 66 Pa. C.S. 2702(b), (c).

32. Further, Subsection (d) of section 2702 of the Public Utility Code specifically identifies the procedure the Commission must follow for appropriating property under Section 2702:

(d) Procedure for appropriation of property. --When any real property is appropriated by the commission under this section, each parcel of such property

so appropriated, shall be accurately described by metes and bounds, and the record owner of each such parcel shall be named in the order of appropriation. Unless otherwise recorded, the commission shall file with the recorder of deeds of the proper county, a copy of that portion of the order of the commission which appropriates such property, and such plans and other detailed information as the commission may deem necessary. Such portion of the commission's order dealing with the specific property appropriated shall be recorded and indexed under the name or names of the record owners of such specific property at the expense of the utility or utilities, political subdivision, municipality or municipalities, governmental agency, including the Department of Transportation and Public Utility Commission, corporation or persons upon whose instigation, petition or complaint the said crossing was constructed, reconstructed, relocated, altered, suspended or abolished, as may be ordered, to bear such expense or recording by the commission. When such appropriation of real property has been recorded under the provisions of any other statute, such recording shall not be duplicated under the terms of this subsection.

33. Where the Commission formally appropriates property under Section 2702(b), which did not occur here, the Commission has original jurisdiction to determine the award of damages upon receipt of an application by an aggrieved party. See CSX Transp., Inc. v. Dept. of Transp. of Com. of Pa., 641 A.2d 705, 707-708 (Pa. Cmwlth. 1994).

34. In Com., Dept. of Transp. v. Smoluk, 514 A.2d 1000 (Pa. Cmwlth. 1986), the complainant brought an action in the Court of Common Pleas against PennDOT alleging a de facto taking. The Pennsylvania Commonwealth Court noted that, because the Commission did not “itself appropriate property under Section 2702(b) of the Public Utility Code,” the Commission did not have initial jurisdiction to assess damages. Smoluk, 514 A.2d at 1001, n. 2 (citing Huss v. Dept. of Transp., 512 A.2d 1356 (1986)). The same court made the same observation in another case that year also involving an alleged de facto taking by PennDOT. See Com., Dept. of Transp. v. Kemp, 515 A.2d 68, 70, n. 2 (Pa. Cmwlth. 1986) (citing Huss).

35. Here, like in Smoluk and Kemp, the Commission did not appropriate any property owned by Mr. Schwartz in any Order issued by the Commission pursuant to the dictates of

Section 2702(d) of the Code. Therefore, no condemnation or appropriation of Mr. Schwartz's property by the Commission ever occurred.

36. Section 2702(d) and the Public Utility Code generally, unlike the Eminent Domain Code, do not provide a procedure for a party alleging that a de facto taking or inverse condemnation occurred to file a petition for the appointment of viewers or otherwise file a complaint with the Commission alleging that a de facto taking or inverse condemnation occurred.

37. Further, in a prior Opinion issued by this Commission, the Commission explained that where the Commission has not appropriated property as part of a project to demolish a bridge crossing, the Commission does not have authority to determine damages. See Application of Consolidated Rail Corp., Docket No. A-00107458, 2002 WL 34558657 (Pa. P.U.C., Oct. 28, 2002). Where the Commission's order does not conform to the requirements found in 2702(d), including "a direction to appropriate property, a property description or the name of the record owner of the property to be appropriated," a taking has not occurred under the Code. See id.

38. In an unreported decision addressing a similar matter involving an alleged de facto taking in a bridge crossing demolition matter, Stanford Cramer v. Pa. Dep't. of Transp., et al., 1232 CD 2005 (Opinion and Order filed Feb 28, 2006), the Commonwealth Court held that "the Public Utility Code does not provide a procedure for the PUC to address de facto taking matters." See Norfolk Southern's Prehearing Conference Memorandum, Exhibit "A," Stanford Cramer v. Pa. Dep't. of Transp., et al., 1232 CD 2005 (Opinion and Order filed Feb. 28, 2006), 10-11.

39. The Commonwealth Court's opinion in Cramer confirms that the absence of any procedure for an aggrieved party to file a petition or other complaint for damages with the

Commission in the Public Utility Code means that the Commission does not have jurisdiction to determine whether a de facto taking occurred and what damages should be awarded for the alleged taking.

B. The Commission has jurisdiction to transfer this matter to the Lackawanna County Court of Common Pleas

40. While the authority cited in Paragraphs 27-39 above demonstrates that the Commission does not have jurisdiction over the alleged de facto taking described in Mr. Schwartz's Application, the Commission may still transfer this matter to the Lackawanna County Court of Common Pleas.

41. The Public Utility Code authorizes the Commission to, on its own motion, refer to the Courts of Common Pleas for a determination of the amount of damages owed to a property owner for condemnation related to a railroad crossing project. See 66 Pa. C.S. §2704(b).

42. In Cramer, the Commonwealth Court held that the Commission did not have jurisdiction to handle de facto taking matters; however, the court did not find any issue with the Commission's order referring the matter to the appropriate trial court. See Cramer, 1232 CD 2005 at 11 ("Presumably recognizing that the Public Utility Code provides only a procedure for the PUC to refer this matter to the trial court for a determination of the amount of damages due, the PUC made the referral.").

43. Further, 42 Pa. C.S. §5103 states: "A matter which is within the exclusive jurisdiction of a court or magisterial district judge of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district.

44. A "tribunal" under Section 5103 includes "a court or magisterial district justice or other judicial officer of this Commonwealth vested with the power to enter an order in a matter,

the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.” 42 Pa. C.S. §5103(d). The Commonwealth Court implicitly held that the Public Utility Commission constitutes a “tribunal” under §5103. See County of Erie v. Verizon North, Inc., 879 A.2d 357, 365 (Pa. Cmwlth. 2005) (holding that trial court should transfer matter regarding telephone service to Commission under Section 5103 rather than dismissing matter without prejudice).

45. Therefore, pursuant to Cramer and Section 5103, the Commission, as a tribunal, may properly transfer this matter to the Lackawanna County Court of Common Pleas for further proceedings on whether a de facto taking occurred.

VI. CONCLUSION

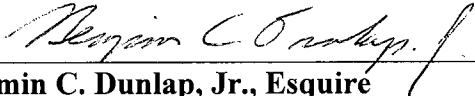
46. Mr. Schwartz’s Application alleges that a de facto taking or inverse condemnation of his property occurred. The Public Utility Code does not provide a procedure for the Commission to assess whether a de facto taking occurred, and, if a taking did occur, to determine damages for such a taking. Rather, the Eminent Domain Code provides the exclusive remedy for landowners alleging a de facto taking.

47. While the Commission does not have jurisdiction to address de facto taking matters, pursuant to 42 Pa. C.S. §5103 and Cramer, the Commission may transfer this matter to the Lackawanna County Court of Common Pleas for further proceedings.

48. Norfolk Southern respectfully requests that Summary Judgment be entered in its favor on the basis that the Commission lacks jurisdiction over the alleged de facto taking and that this matter be transferred to the Lackawanna County Court of Common Pleas.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: 
Benjamin C. Dunlap, Jr., Esquire
Supreme Court I.D. #66283
200 North Third Street, 18th Floor
P.O. Box 840
Harrisburg, PA 17108-0840
Telephone: (717) 236-3010
Facsimile: (717) 234-1925
Counsel for Norfolk Southern Railway Company

Date: March 13, 2017

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CERTIFICATE OF SERVICE

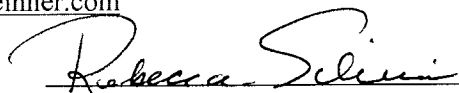
I hereby certify that I served one (1) copy of the Motion for Summary Judgment of Norfolk Southern Railway Company in the above-referenced matter, this day, via electronic mail, addressed to:

LAWRENCE M LUDWIG ESQUIRE
238 VASSAR AVENUE
CLARKS GREEN PA 18411
lawludwig@epix.net

GINA M D'ALFONSO ESQUIRE
PENNDOT
PO BOX 8212
HARRISBURG PA 17105-8212
GDALFONSO@pa.gov

DONALD J FREDERICKSON JR ESQUIRE
LACKAWANNA COUNTY GENERAL
COUNSEL
200 ADAMS AVENUE 6TH FLOOR
SCRANTON PA 18503
kobelfrederickson@yahoo.com

DAVID J GROMELSKI ESQUIRE
148 ADAMS AVENUE
SCRANTON PA 18503
djgromelski@wrightreihner.com


Rebecca Silvia, Secretary to
Benjamin C. Dunlap, Jr., Esquire

Dated: March 13, 2017