

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	
	:	
v.	:	C-2016-2570929
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

**RECOMMENDED DECISION**

Before  
David A. Salapa  
Administrative Law Judge

**INTRODUCTION**

A property owner alleges that the value of his property has decreased as a result of a Pennsylvania Public Utility Commission (Commission) order abolishing a rail highway crossing and removing a highway bridge adjacent to his property. This decision dismisses the property owner’s claim because the Commission lacks the jurisdiction to award damages and lacks jurisdiction to determine whether a de facto taking of his property has occurred.

**HISTORY OF THE PROCEEDING**

On September 21, 2016, A. Edward Schwartz (Schwartz) filed a pleading titled “Application for Determination as to Compensation for Damages Sustained Due to Abolition of Railroad Crossing”, pursuant to 66 Pa.C.S. § 2704(a), with the Pennsylvania Public Utility Commission (Commission). The application states that the Commission issued an order on December 5, 2013 at C-2011-2237486 directing that the Delaware and Hudson Railway Company d/b/a/ Canadian Pacific Railroad (D&H) remove a highway bridge carrying S.R. 4009

over its facilities located in LaPlume Township (Township), Lackawanna County (County). According to the application, the Commission's March 17, 2016 order at C-2011-2237486 indicated that Norfolk Southern Railway Company (NS) had acquired the D&H rail line and assumed D&H's responsibility for removing the S.R. 4009 bridge.

The application asserts that the S.R. 4009 bridge was demolished on or about May 9, 2016. The application references a Commission Secretarial Letter dated July 20, 2016 indicating that a Commission engineer conducted a final inspection on July 14, 2016 and that the removal work had been satisfactorily completed.

The application alleges that prior to the removal of the S.R. 4009 bridge, Schwartz used the S.R. 4009 bridge to travel between the two portions of his property which are bisected by the rail line. The application alleges that the Schwartz has been injured and sustained damages by the removal of the S.R. 4009 bridge. The application alleges that Schwartz is entitled to compensation for the damages he has suffered due to the de facto taking of his property. The application requests that the Commission determine compensation for his damages, pursuant to 66 Pa.C.S. § 2704(a).

The Commission treated Schwartz's pleading as a complaint and docketed it at C-2016-2570929. Pursuant to 52 Pa.Code § 3.361(a) the Commission made the Pennsylvania Department of Transportation (DOT), the Township, the County and D&H parties respondent and served copies of the complaint on those entities on October 12, 2016.

By Secretarial Letter dated October 31, 2016, the Commission informed the parties that it had mistakenly failed to serve Schwartz's complaint on NS. The Secretarial Letter indicated that the Commission would re-serve the complaint on the parties, including NS. The Secretarial Letter also stated that the Commission was removing D&H as a party respondent.

On November 15, 2016, DOT filed an answer with new matter. The answer admitted that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed.

The new matter asserts that Schwartz's complaint is seeking damages from the Commission. The new matter argues that DOT has been improperly joined as a party since the complaint is actually an application for damages.

The new matter avers that the Commission did not appropriate any property in the proceeding docketed at C-2011-2237486. In addition, no court of competent jurisdiction has determined that there has been a taking of Schwartz's property. The new matter contends that neither the Commission's order directing removal of the S.R. 4009 bridge nor its actual removal constitute a de facto appropriation of Schwartz's property. DOT asserts that if a court of competent jurisdiction determines that there has been a de facto taking of Schwartz's property, the Court of Common Pleas determines damages. DOT's answer with new matter requests that the Commission dismiss Schwartz's complaint.

On November 21, 2016, NS filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed.

The answer asserts that, by order dated December 17, 2015, the Court of Common Pleas of Lackawanna County determined that Schwartz had no legal right to a private crossing. A copy of the December 17, 2015 order is attached to the answer with new matter and marked as Exhibit A.

The new matter contends that Schwartz's current complaint alleges a de facto condemnation. The new matter argues that actions to protect the public safety do not constitute a de facto condemnation. The new matter states that the Commission did not appropriate any of Schwartz's property. The answer with new matter requests that the Commission deny Schwartz's complaint.

On November 30, 2016, the County filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits

that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed. The answer asserts that the County did not own or maintain the S.R. 4009 bridge.

The new matter contends that the County has been improperly joined as a party to this proceeding. The new matter further states that the Commission did not appropriate any of Schwartz's property. In addition, the County has never owned or maintained the crossing abolished by the Commission, was not responsible for its deterioration and did not receive any benefit from its removal. The answer with new matter requests that the Commission dismiss Schwartz's complaint or dismiss the County as a party.

On December 5, 2016, Schwartz filed a reply to DOT's new matter. The reply admits that that Schwartz's complaint is seeking damages from the Commission. The reply denies that DOT has been improperly joined as a party.

The reply admits that the Commission did not appropriate any property in the proceeding docketed at C-2011-2237486. The reply acknowledges that no court of competent jurisdiction has determined that there has been a taking of Schwartz's property. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 9, 2016, Schwartz filed a reply to NS' new matter. The reply admits that Schwartz's complaint is seeking damages from the Commission. The reply denies that Schwartz's complaint only alleges a de facto condemnation. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 16, 2016, Schwartz filed a reply to the County's new matter. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply admits that the County has never owned or maintained the crossing abolished by the Commission. The reply requests that the Commission determine compensation for damages to Schwartz's property.

On December 29, 2016, the Township filed an answer with new matter. The answer admits that Schwartz had filed the complaint docketed at C-2011-2237486. The answer admits that the Commission directed that the S.R. 4009 bridge be removed and that the bridge had been removed. The answer asserts that the Township did not own or ever maintain the S.R. 4009 bridge.

The new matter contends that the Township has been improperly joined as a party to this proceeding. The new matter further states that the Commission did not appropriate any of Schwartz's property. In addition, the Township has never owned or maintained the crossing abolished by the Commission, was not responsible for its deterioration and did not receive any benefit from its removal. The answer with new matter requests that the Commission dismiss Schwartz's complaint or dismiss the Township as a party.

On January 13, 2017, Schwartz filed a reply to the Township's new matter. The reply admits that the Commission did not appropriate any of Schwartz's property. The reply admits that the Township has never owned or maintained the crossing abolished by the Commission. The reply requests that the Commission determine compensation for damages to Schwartz's property.

By notice dated January 4, 2017, the Commission scheduled a telephonic prehearing conference for this matter on February 8, 2017 at 10:00 a.m. I issued a prehearing conference order dated January 18, 2017, setting forth the procedural matters to be addressed at the prehearing conference.

I conducted a telephonic prehearing conference in this case as scheduled on February 8, 2017 at 10:00 a.m. Participating were counsel for Schwartz, NS, the Township and DOT.

At the prehearing conference, several of the parties questioned whether the issues raised in Schwartz's complaint could be adjudicated by the Commission. N.T. 9-13. I concurred with these parties that the Commission should address whether it had jurisdiction over the issues

raised in Schwartz's complaint before establishing a litigation schedule and conducting hearings. N.T. 13-15.

By order dated February 9, 2017, I directed the parties to file motions for summary judgment on or before March 13, 2017 and answers to those motions on or before April 7, 2017, pursuant to 52 Pa.Code § 5.102, addressing whether the Commission has jurisdiction over the issues raised in Schwartz's complaint.

On March 8, DOT filed its motion for summary judgment. By letter filed March 8, 2017, the County joined in DOT's motion for summary judgment. On March 13, 2017, the Township, NS and Schwartz filed motions for summary judgment.

On April 7, 2017, DOT and NS filed answers to Schwartz's motion for summary judgment. By letter filed April 7, 2017, the County joined in DOT's answer to Schwartz's motion. By letter filed April 7, 2017, the Township joined in DOT's and NS' answers to Schwartz's motion. On April 7, 2017, Schwartz filed answers to DOT's and NS's motions for summary judgment.

The motions for summary judgment are ready for decision. For the reasons set forth below, I will grant NS' and DOT's motions for summary judgment and dismiss Schwartz's complaint.

#### FINDINGS OF FACT

1. Schwartz owns property located in LaPlume Township, Lackawanna County bisected by a rail line currently owned by NS.
2. The Commission issued an order on December 5, 2013 at C-2011-2237486 directing that D&H remove a highway bridge carrying S.R. 4009 over its facilities located adjacent to Schwartz's property.

3. Prior to the removal of the S.R. 4009 bridge, Schwartz used the S.R. 4009 bridge to travel between the two portions of his property which are bisected by the rail line.

4. The Commission did not appropriate any property in the proceeding docketed at C-2011-2237486.

5. The S.R. 4009 bridge was demolished on or about May 9, 2016.

### BACKGROUND

Before addressing the jurisdictional issues in this proceeding, I will first provide some background. Schwartz's complaint in this proceeding has its genesis in a previous Commission proceeding. Schwartz previously filed a complaint with the Commission at C-2011-2237486. That complaint alleged the bridge that carried S.R. 4009 over the rail facilities then owned by D&H was unsafe.

Schwartz owns property located along S.R. 4009. The complaint at C-2011-2237486 alleged that the condition of the S.R. 4009 bridge prevented Schwartz from receiving deliveries to his property. The complaint requested that the Commission direct that the S.R. 4009 bridge be repaired or alternatively, that the Commission direct that D&H construct and maintain an at-grade crossing.

The Commission issued an order on December 5, 2013 at C-2011-2237486 directing that D&H remove the S.R. 4009 bridge. The S.R. 4009 bridge was demolished on or about May 9, 2016.

### DISCUSSION

Having provided some background, I will now discuss the jurisdictional issues in this proceeding. I will preface this discussion with a brief discussion of the Commission's

standards for granting summary judgment and the Commission's jurisdiction at rail highway crossings.

The Commission's regulation at 52 Pa.Code § 5.102 governs motions for summary judgment. The Commission's regulation at 52 Pa.Code § 5.102(a) permits any party to move for summary judgment after the pleadings are closed, but within such time so as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admissions and supporting affidavits. 52 Pa.Code § 5.102(c). The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1). United Transportation Union v. Pa. Pub. Util. Comm'n, 68 A3d 1026 (Pa.Cmwlth. 2013), appeal denied 80 A.3d 779 (Pa. 2013).

The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. First Mortgage Co. of Pa. v. McCall, 459 A.2d 406 (Pa.Super. 1983); Mertz v. Lakatos, 381 A.2d 497 (Pa.Cmwlth. 1976). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Thomson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979). Summary judgment will be granted only where the right is clear and free from doubt.

The non-moving party in a motion for summary judgment must allege facts showing that an issue for trial exists. First Mortgage Co. of Pa. v. McCall, 459 A.2d 406 (Pa.Super. 1983); Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa.Cmwlth. 1978); Stover v. The United Telephone Co. of Pa., Docket No. C-00923833 (Final Order entered July 21, 1992). The Commission has interpreted 52 Pa.Code § 5.102(c) in conformity with Rule 1035 (now Rule 1035.1) of the Pennsylvania Rules of Civil Procedure. South River Power Partners, L.P. v. West Penn Power Co., Docket No. C-00935287 (Opinion and Order entered November 6, 1996). In civil practice, a non-moving party may not rely solely

upon denials in its pleadings, but must submit some materials to establish that a genuine issue of material fact exists. Nicastro v. Cuyler, 467 A.2d 1218 (Pa.Cmwlth. 1983); Pennsylvania Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330 (Pa.Super. 1983); Geriot v. Council of Borough of Darby, 457 A.2d 202 (Pa.Cmwlth. 1983).

The provision at 52 Pa.Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa.Super.1954).

I will provide a brief discussion the Commission's jurisdiction over rail highway crossings. The Commission has the authority, pursuant to 66 Pa.C.S. § 2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of a rail highway crossing, as well as the authority to determine and order which parties shall perform such work at the crossing and which parties shall maintain the crossing in the future in order to prevent accidents and promote the safety of the public. Southeastern Pennsylvania Trans. Auth. v. Pa. Pub. Util. Comm'n, 592 A.2d 797 (Pa.Cmwlth. 1991), alloc. denied, 611 A.2d 714 (Pa. 1992). The Commission is empowered, pursuant to 66 Pa.C.S. § 2702(b), to determine and prescribe the manner in which such a crossing may be constructed, altered, relocated, suspended, abolished, maintained, operated or protected.

The Commission is also empowered, pursuant to 66 Pa.C.S. § 2702(c) to order the relocation, alteration, suspension or abolition of a crossing upon such reasonable terms and conditions as the Commission prescribes. Pennsylvania Game Comm'n v. Pa. Pub. Util. Comm'n, 651 A.2d 596 (Pa.Cmwlth. 1994), alloc. denied, 664 A.2d 977 (Pa. 1995). The Commission's jurisdiction over a rail-highway crossing includes the highway approaches to the crossing. Dept. of Trans. v. Pa. Pub. Util. Comm'n, 440 A.2d 657 (Pa.Cmwlth., 1982); Springettsbury Twp. v. Pa. Pub. Util. Comm'n, 289 A.2d 762 (Pa.Cmwlth., 1972). Pittsburgh

and L.E.R. Co. v. Pa. Pub. Util. Comm'n., 445 A.2d 851 (Pa.Cmwlth 1982); Pittsburgh and Shawmut R. Co v. Pa. Pub. Util. Comm'n., 14 A.2d 903 (Pa.Super. 1940).

In a rail-highway crossing proceeding, the Commission determines what parties are concerned within the meaning of 66 Pa.C.S. § 2704 (a) and § 2702 (c). County of Chester v. Pa. Pub. Util. Comm'n., 408 A.2d 552 (Pa.Cmwlth. 1979); Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n., 671 A.2d 24 (Pa.Cmwlth. 1995). The Commission has the authority to assess the costs of any work it orders performed upon the concerned public utilities, municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2704(a). In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration; the only requirement being that its order is just and reasonable. Wheeling and L. E. Rwy. Co. v. Pa. Pub. Util. Comm'n., 778 A.2d 785 (Pa.Cmwlth. 2001), alloc. denied, 790 A.2d 1021 (Pa. 2001); AT&T v. Pa. Pub. Util. Comm'n., 737 A.2d 201 (Pa. 1999); East Rockhill Twp. v. Pa. Pub. Util. Comm'n., 540 A.2d 600 (Pa.Cmwlth., 1988); Municipality of Monroeville v. Pa. Pub. Util. Comm'n., 600 A.2d 655 (Pa.Cmwlth., 1991); Greene Twp. Bd. Of Supervisors v. Pa. Pub. Util. Comm'n., 668 A.2d 615 (Pa.Cmwlth., 1995); Dept. of Trans. v. Pa. Pub. Util. Comm'n., 464 A.2d 645 (Pa.Cmwlth., 1983). See also, Consolidated Rail Corp. v. Pa. Pub. Util. Comm'n., 423 A.2d 1108 (Pa.Cmwlth., 1980); D & H Corp. v. Pa. Pub. Util. Comm'n., 613 A.2d 622 (Pa. Cmwlth., 1992), alloc. denied, 626 A.2d 1160 (Pa., 1993).

Among the factors that Commonwealth Court noted in Greene Twp. v. Pa. Pub. Util. Comm'n., 668 A.2d 615 (Pa.Cmwlth. 1995) as relevant are the following: (1) which party built the crossing; Pennsylvania Dept. of Trans. v. Pa. Pub. Util. Comm'n., 464 A.2d 645 (Pa.Cmwlth. 1983); (2) whether the roadway existed before or after the construction of the crossing; Pennsylvania Dept. of Trans. v. Pa. Pub. Util. Comm'n., 464 A.2d 645 (Pa.Cmwlth. 1983); (3) relative benefit conferred on each party with the construction of the crossing; Pennsylvania Dept. of Trans. v. Pa. Pub. Util. Comm'n., 346 A. 2d 371 (Pa.Cmwlth. 1975); (4) whether a party is responsible for the deterioration of the crossing which has led to the need for its repair, replacement or removal; Pennsylvania Dept. of Trans. v. Pa. Pub. Util. Comm'n., 469 A.2d 1149 (Pa.Cmwlth. 1983); and (5) the relative benefit that each party will receive from the

repair, replacement or removal of the crossing; Pittsburgh and L. E. R. Co. v. Pa. Pub. Util. Comm'n., 556 A.2d 944 (Pa.Cmwlt. 1989). While the Commission has considered these factors to be relevant in the past, this in no way limits the factors that the Commission can consider. Bell Atlantic-Pa, Inc., v. Pa. Pub. Util. Comm'n., 672 A.2d 352 (Pa. Cmwlt. 1996); AT&T v. Pa. Pub. Util. Comm'n., 737 A.2d 201(Pa. 1999); PECO Energy Co. v. Pa. Pub. Util. Comm'n., 791 A.2d 1155 (Pa. 2002); Norfolk Southern Rwy Co. v Pa. Pub. Util. Comm'n., 971 A.2d 545 (Pa.Cmwlt. 2009).

In the proceeding at C-2011-2237486, the Commission exercised its authority cited above and determined that the crossing where the highway bridge carried S.R. 4009 over the facilities of D&H should be abolished and the bridge should be removed. The Commission directed parties to perform work to accomplish the abolition and allocated the costs of that work.

In this proceeding, Schwartz contends that he has been injured and sustained damages from the removal of the S.R. 4009 bridge. Schwartz requests that the Commission determine compensation for his damages, pursuant to 66 Pa.C.S. § 2704(a). Schwartz also alleges that he is entitled to compensation for the damages he has suffered due to the de facto taking of his property.

Turning first to Schwartz's request that the Commission award him damages, the Commission generally lacks authority to award monetary damages. Terminato v. Pa. National Insurance Co., 645 A.2d 1287 (Pa. 1994); Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977); Ostrov v. I.F.T., Inc., 586 A.2d 409 (Pa.Super. 1991); Poorbaugh v. Pa. Pub. Util. Comm'n., 666 A.2d 744 (Pa.Cmwlt. 1995). The Commission's specific authority to determine and award damages must be either contained in the express words of the statute or by strong and necessary implication from those words. PECO Energy Co. v. Pa. Pub.Util.Comm'n., 791 A.2d 1155 (Pa. 2002); Feingold v Bell Atlantic, 383 A.2d 791 (Pa. 1977). The power to act in any particular case must be clear. Delaware River Port Authority v. Pa. P.U.C., 145 A.2d 172 (Pa. 1958).

Schwartz contends that the Commission has the authority, pursuant to 66 Pa.C.S. § 2704(a) to award him damages in this proceeding. 66 Pa.C.S. § 2704(a) states in part:

The compensation for damages which the owners of the adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the [C]ommission...

The Commission also has the authority, pursuant to 66 Pa.C.S. § 2704(b), to refer the determination of damages to the court of common pleas where the property taken, injured or destroyed is located, as follows:

The [C]ommission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation...

Reading these two provisions together, the Commission's authority to either determine damages itself or refer the determination of damages to the court of common pleas arises from its authority to appropriate property for the construction, alteration, relocation, suspension or abolition of rail highway crossings found at 66 Pa.C.S. § 2702(b). Huss v. Department of Transportation, 512 A.2d 1356 (Pa.Cmwlt. 1986); CSX Transportation, Inc. v. Department of Transportation, 641 A. 2d 705 (Pa.Cmwlt. 1994).

The statute at 66 Pa.C.S. § 2702(b) vests the Commission with the exclusive power to appropriate property for a rail highway crossing. The procedure the Commission must use to appropriate property is set forth in the statute at 66 Pa.C.S. § 2702(d). The Commission has no other procedure for appropriating property in rail highway crossing cases other than that set forth in 66 Pa.C.S. § 2702(d) which states in part:

When any real property is appropriated by the [C]ommission 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...

In order for the Commission to determine damages or refer determination of damages to the court of common pleas, pursuant to 66 Pa.C.S. §§ 2704(a) or (b), the Commission must first have issued an order appropriating property, pursuant to its authority at 66 Pa.C.S. § 2702(b). The order appropriating property must contain the information set forth in 66 Pa.C.S. § 2702(d). The order appropriating the property must contain a metes and bounds description of the property appropriated and indicate the owner of the property.

In some cases, the Commission appropriates property when ordering a rail highway crossing reconstructed, relocated, altered or abolished. However, the Commission's December 5, 2013 order at C-2011-2237486 did not state that it was appropriating Schwartz's property. The December 5, 2013 order at C-2011-2237486 also failed to set forth a metes and bounds description of Schwartz's property or indicate that Schwartz was the owner of the property. In fact, the December 5, 2013 order at C-2011-2237486 did not appropriate the property of any entity. The December 5, 2013 order at C-2011-2237486 only directed D&H to remove the S.R. 4009 bridge.

Because the December 5, 2013 order at C-2011-2237486 did not contain the information required by 66 Pa. C.S. §2702(d), the order did not appropriate any property pursuant to the statute at 66 Pa. C.S. §2702(b). Since the December 5, 2013 order at C-2011-2237486 did not appropriate any property, the Commission has no jurisdiction to determine if Schwartz has suffered any damages or refer the determination of damages to the court of common pleas, pursuant to 66 Pa. C.S. §2704(a) and (b) since that procedure is only available where the Commission has appropriated property. The Commission therefore lacks jurisdiction to address Schwartz's request for damages.

Turning now to Schwartz's de facto condemnation claim, I will start with a brief discussion of what constitutes a de facto taking. A de facto taking is a situation where an entity with eminent domain power substantially deprives a property owner of the use and enjoyment of his or her property. Elser v. Department of Transportation, 651 A.2d 567 (Pa.Cmwlt. 1994). A de facto taking is an interference with the right of ownership that substantially deprives the

owner of the beneficial use of his or her property. Visco v. Department of Transportation, 498 A.2d 984 (Pa. Cmwlt. 1985).

In this case, Schwartz claims that the Commission's December 5, 2013 order at C-2011-2237486 has deprived him of the use and enjoyment of his property by ordering the removal of the S.R. 4009 bridge and impeding his ability to travel between the two portions of his property which are bisected by the NS rail line. By impeding his ability to travel between the two portions of his property, Schwartz argues that the Commission's December 5, 2013 order at C-2011-2237486 has caused a decline in the value of his property. The complaint alleges that Schwartz is entitled to compensation for the damages he has suffered due to the de facto taking of his property. The complaint asserts that the Commission can determine that a de facto condemnation has occurred and award him compensation for his damages, pursuant to 66 Pa.C.S. § 2704(a).

However, Schwartz cites no Commission or Pennsylvania appellate court decisions supporting this assertion. As set forth above, the Commission's authority is statutory and its authority to act in a particular matter must be contained in the express words of the statute or by strong or necessary implication. PECO Energy Co. v. Pa. P.U.C., 791 A.2d 1155 (Pa. 2002). The statute at 66 Pa. C.S. §2702(b) vests the Commission with the power to appropriate property in conjunction with rail highway crossing projects. The statute at 66 Pa. C.S. §2704(a) and (b) also authorizes the Commission to make a factual determination of the amount of damages for property appropriated pursuant to 66 Pa. C.S. §2702(b) or to refer that factual determination of damages to the court of common pleas. However, the statutes do not explicitly authorize the Commission to make the legal determination that its December 5, 2013 order at C-2011-2237486 constitutes a de facto taking.

Furthermore, the Commission cannot infer that it has the authority to make such a legal determination from the Commission's authority to make the factual determination of damages where it appropriates property. The Commonwealth Court of Pennsylvania has held, in cases governed by the Eminent Domain Code, that the court of common pleas must first resolve the legal question of whether a de facto taking has taken place before it can appoint a board of

view to make a factual determination of the amount of damages. Monaco v. Department of Transportation, 363 A.2d 857 (Pa. Cmwlth. 1976). Accordingly, the Commission's authority to make a factual determination regarding the amount of damages or to refer that determination to the court of common pleas, pursuant to 66 Pa. C.S. §2704, does not imply that it has separate authority to make a legal determination that one of its orders constitutes a de facto taking.

In addition, the Commission lacks jurisdiction over actions sounding in de facto condemnation due to its lack of statutory authority, pursuant to the Eminent Domain Code. In Lerro v. Department of Transportation, 379 A.2d 652 (Pa.Cmwlth. 1977), the Commonwealth Court of Pennsylvania observed that the statutory provisions at 26 P.S. §1-303 and §1-502(e) of the Eminent Domain Code contained the exclusive procedure for de facto condemnation cases.

In 2006, the General Assembly repealed the Eminent Domain Code of 1964, 26 P.S. §§ 1-101- 1-903 and enacted the Act of May 4, 2006, P.L. 112, No. 34, the current Eminent Domain Code. The current Eminent Domain Code at 26 Pa.C.S. § 102, contains similar language to that found in the prior Eminent Domain Code at 26 P.S. § 1-303. The current Eminent Domain Code at 26 Pa.C.S. § 502(c)(1) contains similar language to that found in the prior Eminent Domain Code at 26 P.S. § 1-502(e). Since these provisions in the current Eminent Domain Code are similar to the provisions in the prior Eminent Domain Code, decisions interpreting the provisions that existed prior to 2006 continue to be applicable.

The provision in the current Eminent Domain Code at 26 Pa.C.S. § 501(c) provides as follows:

**(c) Condemnation where no declaration of taking has been filed.--**

(1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

(2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

(4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

Since the provision at 26 Pa.C.S. § 501(c) in the Eminent Domain Code is the exclusive procedure for such cases, the Commission lacks jurisdiction over de facto condemnation cases.

The Eminent Domain Code at 26 Pa.C.S. § 102 states that the Eminent Domain Code does not modify the powers of the Commission. The provision in the current Eminent Domain Code at 26 Pa.C.S. § 102 provides as follows:

**§ 102. Application of title.**

**(a) General rule.**--This title provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages.

**(b) Construction.**--Nothing in this title 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 benefited.

(2) To enlarge or diminish the power of condemnation given by law to any condemnor.

This provision simply reaffirms the Commission's existing power set forth in 66 Pa.C.S. § 2702 to condemn or appropriate property in rail highway crossing cases. This provision does not enlarge the Commission's authority beyond what is set forth in the Public Utility Code to include jurisdiction over de facto condemnation claims.

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348 (Pa.Super. 1945). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa.Cmwlth. 1992) alloc.

denied 637 A.2d 293 (Pa. 1993). Here the Commission simply lacks jurisdiction over Schwartz's de facto condemnation claims. Schwartz must raise his claims to another forum.

The Public Utility Code at 66 Pa. C.S. §103(c) states that its provisions shall not abridge or alter any existing rights of action. The Commonwealth Court of Pennsylvania has held that the remedy set forth in the provisions of the Public Utility Code at 66 Pa.C.S. § 2702 for owners of adjacent property taken, injured or destroyed is not exclusive where the owner's property alleged to have been damaged was not appropriated by the Commission. Gray's Ferry Warehousing and Leasing Co. v. City of Philadelphia, 341 A.2d 548 (Pa.Cmwlt. 1975).

Where the Public Utility Code does not explicitly grant the Commission authority to determine whether its December 5, 2013 order at C-2011-2237486 constitutes a de facto taking, that determination must be made under the provisions of the Eminent Domain Code by the court of common pleas where the property is located. 26 PaC.S. § 301. In this case, the Court of Common Pleas of Lackawanna County should determine whether the Commission's December 5, 2013 order at C-2011-2237486 constitutes a de facto taking. The Commission lacks jurisdiction to address Schwartz's request that the Commission determine that its December 5, 2013 order at C-2011-2237486 constitutes a de facto taking.

### CONCLUSION

In summary, the Commission lacks jurisdiction to address Schwartz's request for damages and lacks jurisdiction to address Schwartz's request that the Commission determine that its December 5, 2013 order at C-2011-2237486 constitutes a de facto taking. I will therefore grant DOT's and NS' motions for summary judgment and dismiss Schwartz's complaint.

### CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction over the subject matter of this proceeding. 66 Pa.C.S. §§2702 and 2704.

2. A party may move for summary judgment after the pleadings are closed, but within such time so as not to delay a hearing. 52 Pa.Code § 5.102(a).

3. The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa.Code § 5.102(d)(1).

4. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, as well as the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa. C.S. §§2702, 2704.

5. In apportioning costs in railroad crossing cases, the Commission is not limited to any fixed rule but takes into consideration all relevant facts, the only requirement being that its order be just and reasonable. Bell Atlantic-Pa, Inc. v. Pa. Public Utility Commission, 672 A.2d 352 (Pa. Cmwlt., 1996), Greene Twp. Board of Supervisors v. Pennsylvania Pub. Util. Comm'n, 668 A.2d 615 (Pa. Cmwlt., 1995).

6. The Pennsylvania Department of Transportation, Norfolk Southern Railway Company, LaPlume Township and Lackawanna County are all concerned parties to this proceeding. 66 Pa. C.S. §2702 & 2704.

7. The Commission lacks the authority to determine damages for property taken, injured or destroyed unless it has condemned or appropriated property. 66 Pa.C.S. §§ 2702 and 2704.

8. The Commission's authority to either determine damages or refer the determination of damages arises from its authority to appropriate property for the construction, alteration, relocation, suspension or abolition of rail highway crossings. 66 Pa.C.S. § 2702(b), Huss v. Department of Transportation, 512 A.2d 1356 (Pa.Cmwlt. 1986); CSX Transportation, Inc. v. Department of Transportation, 641 A. 2d 705 (Pa.Cmwlt. 1994).

9. A de facto taking is an interference with the right of ownership that substantially deprives the owner of the beneficial use of his or her property. Visco v. Department of Transportation, 498 A.2d 984 (Pa. Cmwlth. 1985).

10. The Commission lacks jurisdiction to address Schwartz's request for damages because the December 5, 2013 order at C-2011-2237486 did not appropriate any property. 66 Pa. C.S. §2704(a) and (b).

11. The Commission lacks jurisdiction to address Schwartz's request that the Commission determine that its December 5, 2013 order at C-2011-2237486 constitutes a de facto taking because that determination must be made under the provisions of the Eminent Domain Code by the court of common pleas where the property is located. 26 Pa.C.S. § 301.

### ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the motions of Norfolk Southern Railway Company and the Pennsylvania Department of Transportation for summary judgment at Docket No. C-2016-2570929 are granted.
2. That the motion of A. Edward Schwartz for summary judgment is denied.
3. That the complaint of A. Edward Schwartz is dismissed.

Date: April 17, 2017

\_\_\_\_\_/s/  
David A. Salapa  
Administrative Law Judge