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May 8, 2017

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

MAY - 9 2017

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

In Re: Schwartz v. Norfolk Southern Railway Company, PennDOT et al
PUC Docket No.: C-2016-2570929

Dear Secretary Chiavetta:

Please find enclosed for filing "Exceptions of A. Edward Schwartz – Complainant". I hereby certify that a copy of these Exceptions has been sent to all parties of record as indicated on the Certificate of Service attached thereto. I will also email a courtesy copy to the Commission's Office of Special Assistants.

Should you have any questions or wish to discuss anything regarding this matter, please contact me at your convenience.

Thank you.

Very truly yours,



Lawrence M. Ludwig

cc: Gina M D'Alfonso, Senior Counsel
Benjamin C. Dunlap, Jr., Esq.
Donald J. Frederickson, Jr., Esquire
David J. Gromelski, Esquire
Office of Special Assistants

PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. EDWARD SCHWARTZ,

v.

C-2016-2570929

NORFOLK SOUTHERN RAILWAY COMPANY,
PENNSYLVANIA DEPARTMENT OF
TRANSPORTATION, LACKAWANNA COUNTY
and LAPLUME TOWNSHIP

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

EXCEPTIONS OF A. EDWARD SCHWARTZ – COMPLAINANT

A. Edward Schwartz (“Complainant”), by and through his attorney, Lawrence M. Ludwig, Esquire, respectfully files Exceptions to the Recommended Decision of the Honorable David A. Salapa, ALJ dated April 17, 2017 (“Recommended Decision”) dismissing for lack of jurisdiction Complainant's “Application for Determinations as to Compensation for Damages Sustained due to Abolition of Railroad Crossing” pursuant to 66 Pa.C.S. Section 2704(a), and in support thereof sets forth the following:

1. On September 21, 2016, Complainant filed his verified “Application for Determinations as to Compensation for Damages Sustained due to Abolition of Railroad Crossing” pursuant to inter alia 66 Pa.C.S. Section 2704(a) for “compensation for damages which (as) owners of adjacent property... injured (he) sustain(ed) in the... abolition of (the) crossing” “carrying S.R. 4009 over the facilities of the Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad located in LaPlume Township, Lackawanna County”, per P.U.C. Order. Therein, and in his later sworn 'Affidavit of Edward Schwartz in Support of P.U.C. Jurisdiction over “Application for Determinations as to Compensation for Damages Sustained due to Abolition of Railroad Crossing”', Complainant emphasized the unique-for-

jurisdictional-purposes, and peculiarly legally significant, injury to his railroad-bisected Raintree Farm sustained as a result of the Commission's abolition of the only means of crossing the railroad from one portion of his farm to the other (as opposed to merely "impeding his ability to travel between two portions of his property", as such injury was marginalized at page 14 of the Recommended Decision)

2. In due course, per Order, the parties filed motions of summary judgment regarding the Commission's subject matter jurisdiction over the Application, and by letter dated April 21, 2017, the Recommended Decision was served upon the parties.
3. The Recommended Decision at page 12 cites the Huss and CSX cases as authority for the proposition that "(r)ead[ing] these two provisions [66 Pa.C.S. Section 2704(a) and 66 Pa.C.S. Section 2704(b)] together, the Commission's authority to either determine 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. (Section) 2702(b)." However, both Huss and CSX merely held that original jurisdiction over Section 2704 claims exclusively vested in the Commission rather than Courts of Common Pleas in instances where the Commission happened to have appropriated property. Neither Huss nor CSX held that, in the absence of appropriation, the Commission had no jurisdiction over a Section 2704 "injury" claim resulting from abolition of the only crossing uniting a railroad-bisected farm. Moreover, "reading these (same) two provisions together", the Commission has throughout its tenure exercised its jurisdiction to determine and allocate costs relating to the abolition of a crossing REGARDLESS of whether or not there was any appropriation whatsoever. Indeed, upon the recommendation of ALJ Salapa, the Commission did just that in the underlying proceeding at C-2011-2237486. It is submitted that it is not only poor statutory construction ("reading these two provisions together") to establish different jurisdictional rules as to

determination of costs and determination of damages (unless there is some other, distinct statutory provision that supports such differentiation), it is illogical, given the lack of basis for such dramatic differentiation, for the Commission to exercise exclusive universal jurisdiction to determine and allocate costs REGARDLESS of whether there has been any appropriation whatsoever. and to deny that it possesses any jurisdiction whatsoever regarding determination of damages because there happens to be no formal appropriation pursuant to Section 2702(b) (even though, as further discussed in Paragraph 6 below, the Commission has exclusive original jurisdiction regarding damages when there happens to be some sort of such formal appropriation).

Moreover, such jurisprudence also ignores the particularly unique-for-jurisdictional-purposes injury inflicted upon Complainant's adjacent property, which distinguishes this matter not only from the cases cited in the Recommended Decision, but all reported (and, it is believed, all unreported) Pennsylvania cases addressing jurisdiction over Section 2704 claims. i.e., the Commission's abolition of the *only* crossing *within a railroad-bisected farm, the sole adjacent property*. Indeed, the Commission's underlying Order significantly injured Raintree Farm in a very public-utility-enmeshed context by taking Complainant's legally-ordained "sacred right" to the only railroad crossing between the two portions of his railroad-bisected farm; the Commission now should not shirk its exercise of power to determine damages for its abolition of the only crossing within Complainant's railroad-divided farm.

4. The Recommended Decision at page 13 then states a nuanced variation on the foregoing theme without citing any further authority whatsoever for the the following similarly illogical conclusion: "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. (Section) 2704(a) or (b), the Commission must first have issued an order appropriating property,

pursuant to its authority at 66 Pa.C.S. (Section) 2702(b)....” Complainant incorporates by reference the averments in Paragraph 3 above as though fully set forth herein.

5. The Recommended Decision at page 13 then re-asserts the foregoing proposition in terms of its ultimate conclusion, again without any further authority, as follows: “... 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. (Section) 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.” Complainant incorporates by reference the averments in Paragraph 3 above as though fully set forth herein.
6. Furthermore, the jurisdiction of a Court of Common Pleas over a claim under 66 Pa.C.S. Section 2704 has been held to be only derivative or secondary (albeit in cases where there happened to be formal “appropriation”), as follows:

“It is apparent that Section 2704(a) contemplates an application first be made to the Commission for a determination of the amount of compensation for damages... An application must instead be filed with the Commission, which has the authority to determine the amount in question or to refer it to a court of common pleas for the appointment of a Board of View. The jurisdiction of a common pleas court to appoint a Board of View to determine damages in these matters is, therefore, derivative, being dependent solely upon the Commission's action.”

Huss v. Department of Transportation, 99 Pa.Cmwlth. 386, 390, 512 A.2d 1356, 1358 (Pa.Cmwlth. 1986) appeal dismissed 544 A.2d 446 (Pa.1988) which was cited by

Pennsylvania Supreme Court as the authority for per curiam reversal of the Commonwealth Court in Barron v. Department of Transportation, 526 Pa. 539, 587 A.2d 727 (1991). See

also CSX, supra at 708 [“Thus, the trial court, under section 2704(b), has no jurisdiction to appoint a board of view without the commission relinquishing its jurisdiction to the trial court to do so.”]

7. The 2005 Cramer decision (cited by Respondent Defendants) is an unreported, non-precedential decision without published opinion (that, I believe, is subject to 210 Pa. Code Section 67.55, Pa. Rules of Court, I.O.P. Chapter 4, Section 414), which stems from procedurally convoluted litigation, and does not bar the Commission's exercise of its primary jurisdiction over a Section 2704 application regarding injury sustained by the owner of a railroad-bisected farm as a result of abolition of the only crossing between the bisected portions of his farm.
8. Thus, the Commission has primary jurisdiction over the instant Section 2704 Application.
9. The same illogical proposition raised to support purported lack of jurisdiction over Complainant's Section 2704 claim taints the Recommended Decision's ruling regarding Complainant's de facto claim. Thus, at pages 14-15, the Recommended Decision states:

“The statute at 66 Pa.C.S. (Section) 2702(b0) vests the Commission with the power to appropriate property in conjunction with rail highway crossing projects. The statute at 66 Pa.C.S. (Section) 2704(a) and (b) also authorizes the Commission to make factual determinations of the amount of damages for property appropriated pursuant to 66 Pa.C.S. (Section) 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, 3013 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

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... 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. (Section) 2704, does not imply that it has separate authority to make a legal determination that one of its orders constitutes de facto taking.”

Complainant incorporates by reference the averments in Paragraph 3 above as though fully set forth herein.

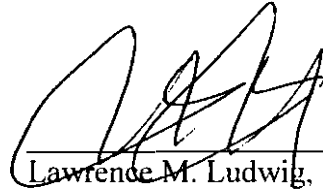
Such jurisprudence also ignores the particularly unique-for-jurisdictional-purposes injury inflicted upon Complainant's adjacent property, which distinguishes not only the cases cited in the Recommended Decision, but all reported (and, it is believed, all unreported) Pennsylvania cases addressing jurisdiction over Section 2704 claims. i.e., the Commission's abolition of the *only* crossing *within a railroad-bisected farm, the sole adjacent property*. Indeed, the Commission's underlying Order significantly injured Raintree Farm in a very public-utility-enmeshed context by taking Complainant's legally-ordained “sacred right” to the only railroad crossing between the two portions of his railroad-bisected farm; the Commission now should not shirk its exercise of power to determine damages for its abolition of the only crossing within Complainant's railroad-divided farm.

10. Alternatively, Complainant re-states his offer to withdraw any de facto claim without prejudice in order to accommodate the Commission's exercise of jurisdiction over Complainant's Section 2704 claim.
11. If Complainant is not permitted to withdraw any de facto claim without prejudice in order to

accommodate the Commission's exercise of that primary jurisdiction under section 2704,
Complainant respectfully requests that Commission exercise ancillary jurisdiction over his
de facto taking claim and/or refer the whole matter to the Lackawanna County Court of
Common Pleas.

WHEREFORE, Complainant respectfully takes exception to the Recommended Decision that
the Commission lacks jurisdiction over his Application and asks that the Recommended Decision be
amended accordingly.

Respectfully submitted,



Lawrence M. Ludwig, Esquire

PA Attorney I.D. # 21599

238 Vassar Avenue

Clarks Green, PA 18411

(570) 586-6817

ATTORNEY FOR COMPLAINANT

Dated: May 9, 2017

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

A. EDWARD SCHWARTZ,

v.

C-2016-2570929

NORFOLK SOUTHERN RAILWAY COMPANY,

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF TRANSPORTATION ET AL

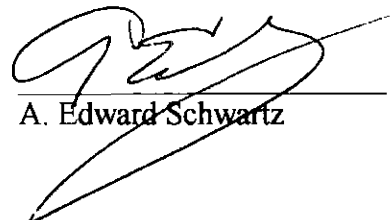
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VERIFICATION

I, A. Edward Schwartz, do hereby swear that the facts in the foregoing **Exceptions of A. Edward Schwartz - Complainant** are true and correct to the best of my information, knowledge and belief. I understand that false statements herein are made subject to the Rules of 18 Pa C.S. §4904 relating to unsworn falsification to authorities.


A. Edward Schwartz

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

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NORFOLK SOUTHERN RAILWAY COMPANY,
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION ET AL

CERTIFICATE OF SERVICE

I, Lawrence M. Ludwig Esquire, attorney for Complainant, hereby certify that on May 9, 2017 I serve the foregoing **Exceptions of A. Edward Schwartz - Complainant** by depositing duplicate copies thereof in the U.S. Mail, first-class postage prepaid, addressed to counsel of record, as follows:

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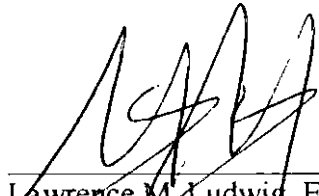
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