



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 18, 2017

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

RE: C-2016-2570929

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Motion to Strike the Exceptions of A. Edward Schwartz and in the Alternative, Reply to Exceptions of A. Edward Schwartz* in the above captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jennifer Brown-Sweeney".

Jennifer Brown-Sweeney
Assistant Counsel

Enclosure

220/JBS:igl

cc: Administrative Law Judge David A. Salapa
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Sarah Fenton, District Grade Crossing Engineer, District 10-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MOTION TO STRIKE EXCEPTIONS OF A. EDWARD SCHWARTZ AND IN THE
ALTERNATIVE, REPLY TO EXCEPTIONS OF A. EDWARD SCHWARTZ**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (PennDOT), by and through its counsel, Jennifer Brown-Sweeney, Assistant Counsel, and files this Motion to Strike Exceptions of A. Edward Schwartz in their entirety for failure to comply with the Public Utility Code, 52 Pa. Code § 5.533. In the alternative, should the Commission elect not to strike the Exceptions of A. Edward Schultz in their entirety, PennDOT moves to strike specific portions of A. Edward Schultz’s Exceptions. Furthermore, a Reply to Exceptions is included in the event that a Motion to Strike is not granted.

PennDOT hereby incorporates the procedural history set forth in the Recommended Decision of Judge David A. Salapa filed on April 21, 2017.

I. MOTION TO STRIKE

A. Edward Schwartz’s Exceptions are Procedurally Deficient in that they Disregard the Rules for Exceptions under 52 Pa. Code § 5.533 and Should be Stricken in its Entirety.

1. A. Edward Schwartz filed his “Exceptions of A. Edward Schwartz – Complainant” (“Schwartz Exceptions”) on May 8, 2017. Exceptions are properly filed as to “initial, tentative or recommended decisions” pursuant to 52 Pa. Code § 5.533.

2. A. Edward Schwartz failed to comply with the Rules for Exceptions under 52 Pa.

Code § 5.533(b), which states:

(b) Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception. 52 Pa. Code § 5.533(b).

3. The Schwartz Exceptions contains multiple numbered paragraphs where no findings of fact or conclusions of law are identified as being excepted and/or no relevant pages are cited. Schwartz Exceptions, ¶ 1, ¶ 2, ¶ 6, ¶ 7, ¶ 8, ¶ 10, ¶ 11.

4. A. Edward Schwartz failed to comply with the Rules for Exceptions under 52 Pa.

Code § 5.533(c), which states:

(c) The exceptions must be concise. The exceptions and supporting reasons must be limited to 40 pages in length. Statements of reasons supporting exceptions must, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs. A separate brief in support of or in reply to exceptions may not be filed with the Secretary under § 1.4 (relating to filing generally). 52 Pa. Code § 5.533(c).

5. The Schwartz Exceptions also failed to incorporate by reference and citation previously stated reasons supporting his exceptions. Schwartz Exceptions, ¶ 1, ¶ 3, ¶ 6, ¶ 7, ¶ 8, ¶ 9, ¶ 10.

6. Based upon the failure of Schwartz Exceptions to comply with 52 Pa. Code § 5.533, PennDOT contends that the procedural defects are sufficient to warrant striking the Schwartz Exceptions in its entirety.

B. In the Alternative, if not Stricken in its Entirety, Portions of the Schultz Exceptions Should be Stricken for Disregarding the Commission's Regulations at 52 Pa. Code § 5.533 by Seeking Relief Not Appropriate for Exceptions.

7. Under Pa. Code § 5.533(c), as discussed above in Paragraph 8, Exceptions must “incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs.” Pa. Code § 5.533(c).

8. In the Schwartz Exceptions, Paragraphs 10 and 11 Complainant continues to seek to amend his complaint by requesting permission to withdraw “any de facto claim” or alternatively to request the “Commission exercise ancillary jurisdiction over his de facto taking claim and/or refer the whole matter to the Lackawanna County Court of Common Pleas.” Schwartz Exceptions, ¶ 10, ¶ 11.

9. This is the first instance of Schwartz requesting that the matter be transferred to Lackawanna County Court of Common Pleas. As such, it is not an appropriate request for Exceptions, since Exceptions are to relate back to issues previously raised.

10. The request in Paragraphs 10 is improperly included as well. Schwartz’s continued attempt to withdraw his de facto claim is a disguised attempt to amend his complaint. Exceptions is not an appropriate place to amend a complaint.

11. Therefore, Paragraphs 10 and 11 of the Schwartz Exceptions are improper and should be stricken.

II. REPLY TO EXCEPTIONS

12. In the interest of judicial economy, PennDOT will simultaneously file a Reply to the Exceptions in the event that its Motion to Strike is not granted.

13. In Schwartz Exceptions Paragraph 3, Schwartz disagrees with the Recommended Decision at page 12. Schwartz claims that it is illogical to read 66 Pa.C.S 2704(a) and 66

Pa.C.S 2704(b) together when the outcome produces Commission jurisdiction for cost allocation where property has not been allocated but does not provide jurisdiction for when property allocation has occurred. He also claims that both the Huss and CSX case only address whether the Commission has original jurisdiction where there has been a formal appropriation.

14. Schwartz is simply mistaken in his interpretation. In statutory construction, it is favorable to read statutory provisions holistically, with each provision read in reference to the whole act. *See* 1 Pa.C.S §1921(a). It is presumed “[t]hat the General Assembly intends the entire statute to be effective and certain.” 1 Pa. C.S. § 1922(2). “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a).

15. Here, reading 66 Pa.C.S. 2702(b), 66 Pa.C.S. 2702(d), 66 Pa.C.S. 2704(a), and 66 Pa.C.S. 2704(b) together is undoubtedly what the legislature intended. You would first read Section 2702(b) which vests the Commission with the power to appropriate property at crossings. Section 2702(d) then clarifies the procedure by which the Commission must appropriate all property. Next, Section 2704(a) discusses the compensation for property “...taken...” (*emphasis added*). In order to have had property *taken* for purposes of damages under Section 2704(a), there first must have been an appropriation by the Commission under Section 2702(b) following the rules set forth in Section 2702(d). Section 2704(b) only comes into play if the Commission “of its own motion, or application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located.” 66 Pa.C.S. 2704(b); *see* PennDOT’s Answer to Motion for Summary Judgment Page 3; *see also* Recommended Decision Pages 12-13.

16. Therefore, Schwartz's interpretation in Paragraph 3 of the Huss and CSX holding that the Commission has original jurisdiction over Section 2704 claims is correct. However, as the statute makes clear, it does not follow that the Commission would have to have jurisdiction over claims that are not Section 2704, such as those where the property has not been *taken*.

17. Furthermore, the fact that 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" has no bearing on the instant issue. Schwartz Exceptions ¶3. The Commission is empowered under Section 2704 to allocate costs of construction or for damages where there has been construction, relocation, or abolition of a crossing. This entails allocating costs among the parties benefitting from the change in the crossing as well as those negatively impacted by it. Oftentimes this results in utilities being made to pay to relocate their existing facilities even though the crossing is being changed due to no fault of their own. It is not incongruent that this section allows jurisdiction over property taken, but not over property that is not.

18. In response to Schwartz Exceptions Paragraphs 4 and 5, PennDOT incorporates by reference the averments in Paragraphs 17-19 above, as if fully set forth herein.

19. In Schwartz Exceptions Paragraph 6, Schwartz claims that jurisdiction of a court of common pleas under a Section 2704 claim is derivative whether a formal appropriation was made by the Commission or not. He then goes on to state that all of the cases claiming Section 2704 is derivative just happened to be in cases where a formal appropriation occurred. As discussed above in Paragraph 17, the jurisdiction of the court of common pleas *is* derivative where there has been a formal appropriation, since only in those cases

has the Commission chosen to defer their determination to the court. The fact that all of the cases just “happened to be [a] formal ‘appropriation’” is not coincidental, since only cases where a formal appropriation has occurred is the jurisdiction derivative. *See generally* Recommended Decision Page 12.

20. In Paragraphs 7 and 9 of the Schwartz Exceptions, Schwartz claims that Cramer does not apply and that the Commission has the legal authority to determine whether one of its orders constitutes a *de facto* taking. As discussed in Paragraphs 17-19 above, the Public Utility Code only gives the Commission the power to determine damages where it has formally appropriated property, subject to the rules of 66 Pa.C.S. 2702(d). Since no formal appropriation occurred and no Section 2702(d) rules were followed, the Commission simply does not have jurisdiction and cannot determine damages for a *de facto* claim. This point is reaffirmed in the unreported decision of Cramer at Footnote 15 where the court states that “the PUC does not have jurisdiction to handle *de facto* taking matters.” *Cramer v. Dep’t of Transp.*, (Cmwlth. Ct. No. 1232 C.D. 2005, filed Feb. 28, 2006). *See* PennDOT’s Motion for Summary Judgment ¶ 11-13.

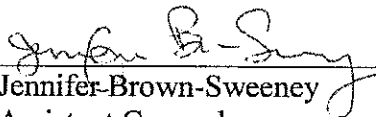
21. In Paragraph 10 of his Exceptions Schwartz requests that his *de facto* claim be withdrawn; a request that was also included in his motion for summary judgment. As discussed in Consolidated Rail Corp. v. Pa. PUC, “[i]t is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993). The Commonwealth Court relied upon the case of Paxtowne v. Pennsylvania Public Utility Commission, in stating that “it is not necessary that each and every issue raised by the parties be discussed.” Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth.

1993) citing Paxtowne v. Pa. PUC, 398 A.2d 254 (Pa. Cmwlth. 1979). Since the Commission is not required to address every issue raised, the Schwartz Exceptions improperly included this request as it is an inappropriate basis for an exception.

WHEREFORE, the PennDOT respectfully requests the Schwartz Exceptions be stricken for failure to comply with the Rules of Administrative Practice and Procedure, and in the alternative, PennDOT moves to strike specific portions of A. Edward Schwartz's Exceptions. Furthermore, if Schwartz's Exceptions are entertained, then the PennDOT submits its Reply to Exceptions for review and requests that the relief sought be granted.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: May 18, 2017

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CERTIFICATE OF SERVICE

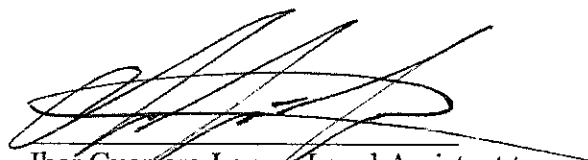
I hereby certify that a true and correct copy of the **Motion to Strike the Exceptions of A. Edward Schwartz and in the Alternative, Reply to Exceptions of A. Edward Schwartz** was served upon the parties below by electronic mail, followed by first-class mail, postage prepaid this 18th day of May 2017:

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