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May 22, 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 to Strike Exceptions of A. Edward Schwartz, and, in the Alternative, Reply to Exceptions of A. Edward Schwartz. 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.)

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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	:	

**NORFOLK SOUTHERN RAILWAY COMPANY’S
MOTION TO STRIKE EXCEPTIONS OF A. EDWARD SCHWARTZ, AND,
IN THE ALTERNATIVE, REPLY TO EXCEPTIONS OF A. EDWARD SCHWARTZ**

Norfolk Southern Railway Company (“Norfolk Southern”), by and through its counsel Nauman, Smith, Shissler & Hall, LLP, hereby files this Motion to Strike and, in the alternative, Reply to Exceptions of A. Edward Schwartz (“Exceptions”) pursuant to 52 Pa. Code §5.535(a) as follows:

I. MOTION TO STRIKE

1. Norfolk Southern incorporates the procedural history and Findings of Fact set forth in the Recommended Decision filed on April 21, 2017 (“Recommended Decision”).
2. Applicant filed his Exceptions with the Public Utility Commission (“Commission”) on May 8, 2017.
3. 52 Pa. Code §5.533 describes the procedure for filing exceptions to initial, tentative and recommended decisions.

4. 52 Pa. Code §5.533(b) states that “[e]ach 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 to the exception shall follow each specific exception.”

5. Paragraphs 1, 2, 6, 7, 8, 10, and 11 of Applicant’s Exceptions fail to comply with 52 Pa. Code §5.533(b) by failing to identify the findings of fact, conclusions of law and/or specific pages of the Recommended Decision from which Applicant’s Exceptions are taken.

6. Applicant is represented by counsel in this matter and therefore the Commission should not hesitate to rule against Applicant on technical grounds. See Hodak v. Pennsylvania Electric Company, Docket No. C-2011-2274277 (Opinion and Order entered January 24, 2013) (“Traditionally, we have been hesitant to rule unfavorably against *pro se* litigants based on technical grounds.”).

7. Given that Applicant’s Exceptions fail to comply with the Commission’s regulations, and primarily feature repetitions of the same arguments advanced unsuccessfully in filings prior to the filing of the Recommended Decision, the Commission should strike Applicant’s Exceptions in their entirety.

II. REPLY TO EXCEPTIONS

8. In Paragraph 1 of his Exceptions, Applicant asserts that the demolition of the crossing resulted in the “Commission’s abolition of the only means of crossing the railroad from one portion of his farm to the other,” and that the Recommended Decision “marginalized” this fact by stating that the demolition had the effect of “impeding [Applicant’s] ability to travel between two portions of this property.” While Applicant may be dissatisfied with the Commission’s choice of language, Applicant’s assertion that the former crossing was the “only

means” of accessing both portions of his property is incorrect. Additionally, even if Applicant were correct in stating that the former crossing was the only means of accessing both portions of the property, Applicant failed to identify why or provide any authority for the notion that this would result in a “peculiarly legally significant injury” or a situation that is unique for jurisdictional purposes.

9. Applicant identifies Huss v. Dept. of Transp., 512 A.2d 1356 (Pa. Cmwlth. 1986) and CSX Transp. v. Dept. of Transp., 641 A.2d 705 (Pa. Cmwlth. 1994) and the reason for which these decisions were cited in the Recommended Decision in Paragraph 3 of his Exceptions. These cases discuss the procedure for an application for damages before the Commission pursuant to 66 Pa. C.S. §2704(a) where property is condemned by the Commission, and they explain that the Commission may, on its own determination, submit the matter to the Common Pleas Court for a determination of the amount of damages. The fact that this procedure is discussed in the context of cases where the Commission formally condemns property detracts from, rather than supports, Applicant’s position that the Commission has jurisdiction pursuant to Section 2704(a).

10. Section 2704(a) applies when property is condemned “under the provisions of this part;” the only relevant provision of the Public Utility Code (“Code”) which provides for the condemnation of property for rail crossing projects is Section 2702(b).

11. Section 2702 sets out a detailed procedure that the Commission must follow to condemn property. Here, and unlike in Huss and CSX Transp., the Commission did not issue an order condemning property. Therefore, Section 2704(a) does not apply to vest the Commission with jurisdiction to determine damages in this case.

12. Applicant contends in Paragraph 3, 4, and 5 of his Exceptions that the Commission exercised “poor statutory construction” in reading Sections 2704(a) and 2704(b) together. Applicant ignores that the provisions of Section 2704(b) (governing the Commission’s ability to refer the determination of damages to the applicable Court of Common Pleas) relates directly to the Commission’s ability to determine damages when property is taken pursuant to the Code under Section 2704(a).

13. Moreover, the Statutory Construction Act of 1972, 1 Pa. C.S. §1501 et seq., states that “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa. C.S. §1921.

14. Applicant’s position, far from giving effect to all provisions of Section 2704, would require an abrogation of the express language of Section 2704(a). Section 2704(a) authorizes the Commission to ascertain and determine compensation for damages sustained “under the provisions” of the Code. However, the Recommended Decision noted that the Commission lacks any procedure for appropriating property in rail crossing cases other than that described in Section 2702(d). See Recommended Decision, p. 12. Given that no condemnation occurred pursuant to Section 2702(d), the express language of Section 2704(a) does not grant the Commission jurisdiction to determine the measure of damages, if any, in this matter.

15. Applicant also argues that it is illogical for the Commission “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).” Exceptions, ¶3. However, Section 2704(a) does not even apply until there has been a formal appropriation pursuant to Section 2702; therefore, the Commission may not ascertain and determine the amount of damages in a case where the Commission did not appropriate property for a rail crossing

pursuant to the Code under Section 2702. Far from being illogical, this interpretation of the Code gives meaning to all its provisions and limits the Commission's jurisdiction to those matters where the Commission appropriates property for rail crossing projects. Applicant's contention that this case is unique from reported and unreported Pennsylvania case law does not affect the extent of the Commission's jurisdiction under the Code and is not relevant to whether the Commission has jurisdiction in this matter.

16. Applicant is correct that the Court of Common Pleas' jurisdiction over a claim under 66 Pa. C.S. Section 2704 arises only after an application is first made to the Commission insofar as the claimed damages arise from the Commission's condemnation of property pursuant to the Code. See Exceptions, ¶6. However, as the case cited by Applicant, Huss, and other cases demonstrate, this only applies in cases where property is formally appropriated by the Commission. Here, because no property was formally condemned by the Commission, the Court of Common Pleas is the proper forum for hearing this de facto taking case; the Commission does not have jurisdiction over an alleged condemnation conducted outside the procedure articulated in Section 2702. The fact that Applicant incorrectly filed an Application pursuant to Section 2704 does not deprive the Court of Common Pleas of jurisdiction over this matter.

17. The Code sections cited in the preceding paragraphs, when read together, clearly show that the Commission lacks jurisdiction to determine if a de facto taking occurred and to assess damages for alleged de facto takings related to the abolition of a rail crossing. However, Cramer is persuasive given the similar facts at issue in that case and for the Commonwealth Court's unequivocal finding that "the PUC does not have jurisdiction to handle de facto taking matters." Cramer v. Dept. of Transp., No. 1232 C.D. 2005 (Feb. 28, 2006), n. 15. This shows that Applicant's assertion in Paragraph 8 of his Exceptions -- that the Commission "has primary

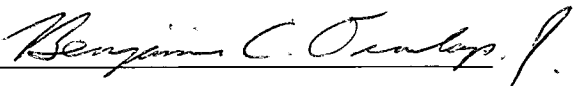
jurisdiction over the instant Section 2704 Application” -- is incorrect and that the Recommended Decision correctly stated that the Commission lacked jurisdiction over this matter.

18. In Paragraph 9 of his Exceptions, Applicant argues that, for the same reasons the Commission erred in finding that the Commission lacked jurisdiction to ascertain and determine damages for de facto takings, the Commission erred in finding that the Commission lacked jurisdiction to determine whether its prior orders constituted a de facto taking. However, nothing in Sections 2702 or 2704, or in any other section of the Code, authorizes the Commission to review its own orders to determine if the order resulted in a de facto taking. Further, even if the Commission were authorized to review its orders to find that a de facto taking had occurred, it would still lack jurisdiction to determine the amount of damages under Section 2704(a). Section 2704(a) only permits the Commission to ascertain and determine the measure of damages where property is condemned pursuant to the provisions of the Code, and the Code does not authorize the Commission to appropriate property for rail crossing projects unless the appropriation follows the procedure outlined in Section 2702(d). Once again, the allegedly unique nature of this crossing and the Applicant’s alleged injury are not relevant to the issue of whether the Commission has jurisdiction to determine that a de facto taking occurred.

WHEREFORE, Norfolk Southern respectfully requests that Applicant's Exceptions be stricken for failure to comply with the Commission's regulations, and, in the alternative, if the Commission denies Norfolk Southern's Motion to Strike, Norfolk Southern submits its Reply to Exceptions and requests that the relief sought by Applicant be denied.

Respectfully Submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

By: 

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Date: May 22, 2017

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TOWNSHIP, AND COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT OF :
TRANSPORTATION, :
Respondents :

CERTIFICATE OF SERVICE

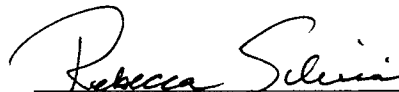
I hereby certify that I served one (1) copy of the Norfolk Southern Railway Company's Motion to Strike Exceptions of A. Edward Schwartz, and, in the Alternative, Reply to Exceptions of A. Edward Schwartz in the above-referenced matter, this day, by electronic mail and depositing the same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania to:

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

Dated: May 22, 2017