



Burns White Center
48 26th Street
Pittsburgh, PA 15222

t: 412.995.3000

f: 412.995.3300

w: www.burnswhite.com

John M. Steidle
Attorney at Law

(412) 995-3106

jmsteidle@burnswhite.com

April 14, 2022

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
400 North Street, 2nd Fl.
Harrisburg, PA 17105-3265

Re: Investigation upon the Commission's motion into matters pertaining to the Proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer And Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County, Docket No. I-2019-3012769

Dear Secretary Chiavetta:

On behalf of the Bessemer & Lake Erie Railroad Company in the above referenced matter, enclosed please find for electronic filing with the Commission, the B&LE's Main Brief pursuant to the March 2, 2022 Briefing Order. Copies of the Main Brief are being served in accordance with the attached Certificate of Service.

Thank you for your assistance and attention to this matter. If you have any questions or concerns regarding the enclosed, please do not hesitate to contact me.

Very truly yours,

John M. Steidle

JMS/krc
Enclosures

cc: All Interested Parties of Record (per attached service list)
Administrative Law Judge Mary D. Long

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO.: I-2019-3012769

Investigation upon the Commission's motion into matters pertaining to the proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 formally crosses, below grade, the track of Bessemer and Lake Erie Railroad in Brady's Bend Township, Armstrong County

MAIN BRIEF FOR BESSEMER AND LAKE ERIE RAILROAD COMPANY ("B&LE")

Respectfully submitted pursuant to March 2, 2022 Briefing Order

John M. Steidle, Esquire
Pa. I.D. #84404
jmsteidle@burnswhite.com

BURNS WHITE LLC
Burns White Center
48 26th Street
Pittsburgh, PA 15222
Tel: 412-995-3235
Fax: 412-995-3300

Edwin B. Palmer, Esquire
Pa. I.D. #80110
ebpalmer@burnswhite.com

BURNS WHITE LLC
Burns White Center
48 26th Street
Pittsburgh, PA 15222
Tel: 412-995-3282
Fax: 412-995-3300

Counsel for The Bessemer & Lake Erie Railroad Company

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion :
into matters pertaining to the proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by : Docket No.: I-2019-3012769
Bessemer and Lake Erie Railroad in Fairview :
Township, Butler County and where State :
Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake Erie :
Railroad in Bradys Bend Township, :
Armstrong County :

AND NOW, here comes BESSEMER AND LAKE ERIE RAILROAD COMPANY (“B&LE”), by and through its counsel, BURNS WHITE LLC and files the within Main Brief pursuant to the Administrative Law Judge’s Briefing Order dated March 2, 2022 as follows:

I. History of the Proceeding

By order entered October 3, 2019, the Pennsylvania Public Utility Commission (“PAPUC” or the “Commission”) instituted an investigation for the purpose of determining all matters relating to the abolition and safety of two crossings on an abandoned line of the B&LE. One crossing is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by State Route 0268 (“SR0268”). The other crossing is located in Brady’s Bend Township, Armstrong County, where SR0068 crosses, below grade, the track. The other crossings along this track were abolished by Secretarial Letter dated April 30, 2002, Docket A-00117858.

The parties, by way of a Joint Stipulation submitted to the Commission on or about November 12, 2021, amicably resolved all issues related to the Brady’s Bend Township crossing at SR0068. Accordingly, *only* the SR0268 crossing located in Fairview Township, Butler County remains at issue in this proceeding.

B&LE filed a motion for summary judgment and brief in support thereof on or about January 3, 2022.¹ B&LE moves for summary judgment, because it is not a “concerned” party as the term is defined under Pennsylvania’s Public Utility Code. *See* 66 Pa.C.S. § 2704(a). Accordingly, the Commission may not – as a matter of law – assess any liability for the costs of “construction, relocation, alteration, protection, or abolition” of the SR0268 crossing to B&LE. *Id.*

Alternatively, B&LE moves for summary judgment, because this state law proceeding is preempted by the federal Interstate Commerce Commission Termination Act (“ICCTA”), which provides “exclusive” jurisdiction to the Surface Transportation Board (“STB”) to decide such issues. *See* 49 U.S.C. § 10501(b). The Commission has no jurisdiction and/or authority to assess any liability against B&LE for the costs related to *inter alia* the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing. *Id.*

With B&LE’s motion for summary judgment still pending, an evidentiary hearing was held in this investigation on January 18, 2022. The parties presented witness testimony in addition to documentary evidence relevant to the abolition and safety issues before the Commission and involving the SR0268 crossing. At the conclusion of the hearing, Administrative Law Judge Mary D. Long waived Section 5.102(b) of the regulations pertaining to answering motions for summary judgment and ordered the Bureau of Investigation and Enforcement (“BIE”) and PennDot (“DOT”) to include their responses to B&LE’s motion for summary judgment in their main briefs. *See* March 2, 2022 Briefing Order.

B&LE now submits its main brief pursuant to the March 2, 2022 Briefing Order. B&LE reasserts the same legal arguments it raised on summary judgment now bolstered by evidence

¹ B&LE incorporates herein by reference its motion for summary judgment and brief in support thereof as if the same were set forth fully and at length.

adduced of record at the January 18, 2022 hearing. *See* B&LE’s Proposed Findings of Fact; *see also* Jan. 18, 2022 H.T.², appended hereto as Exhibit “A”. B&LE further addresses a new legal issue raised during the January 18, 2022 hearing by counsel for BIE, *see id.* at pp. 101-06 (discussing Section 2709 of Pennsylvania’s Public Utility Code related to notice and disposition of real property), as it is nothing more than a red herring designed to distract the Commission from the inescapable conclusion that B&LE is not a “concerned” party to whom any costs may be assessed.

II. Discussion

The instant matter arises out of B&LE’s attempt to abandon, discontinue and abolish a certain railroad crossing located in Fairview Township, Butler County, Pennsylvania. The Commission seeks to regulate the disposition of this crossing in addition to potentially allocating the costs of, *inter alia*, abolition, repair and/or future maintenance of the same to B&LE. As will be demonstrated *infra*, no such costs may be allocated to B&LE, because B&LE is not a “concerned party” under state law. In the alternative, the Commission’s attempt to regulate the crossing at issue is preempted by federal law, which provides exclusive jurisdiction to the Surface Transportation Board (“STB”) to decide such matters.

A. B&LE is not a concerned party liable for any costs related to the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing.

Under Pennsylvania law, the Commission has the authority “after due notice and hearing” to determine the “compensation for damages” related to the “abolition of any crossing”. *See* 66 Pa.C.S. § 2704(a). Furthermore:

Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities

² H.T. means Hearing Transcript.

at or adjacent to such crossing which are *used* in any kind of public utility service, shall be borne and paid . . . by the public utilities, municipal corporations, municipal authority or nonprofit organization . . . *concerned*, or by the Commonwealth, in such proper proportions as the commission may . . . determine

Id. (emphasis added).

Historically, the longstanding rule in Pennsylvania was that a railroad must own property or facilities at a crossing in order to be considered a “concerned party” to whom the Commission has authority to allocate any costs associated with the crossing. *See City of Chester v. Pennsylvania Public Utility Comm’n*, 798 A.2d 288, 294 (Pa. Commw. 2002) (citing *Consolidated Rail Corp. v. Pennsylvania Public Utility Comm’n*, 55 Pa.Cmwlth. 576, 423 A.2d 1108 (1980); *Pennsylvania Public Utility Comm’n v. Southeastern Pa. Transp. Auth.*, 21 Pa.Cmwlth. 106, 343 A.2d 371 (1975); and *Lehigh Valley R.R. v. Pennsylvania Public Utility Comm’n*, 161 A. 422 (Pa. Super. Ct. 1932)).

In *City of Chester*, the Commonwealth Court held that, “*it is the ownership interest at the crossing*, not mere usage that gives the Commission the authority to allocate costs” associated with a crossing, including repairs, removal, reconstruction or maintenance, to a railroad. *Id.* (emphasis added). In fact, the Pennsylvania courts have uniformly held since 1932 that “it is the *presence and ownership* of the track involved . . . which places the liability on the railroad. *Id.* at 292, n.6 (quoting *Lehigh Valley*, 161 A. at 424)(emphasis added). The Pennsylvania Public Utility Commission has likewise consistently followed this rule in numerous proceedings. *See, e.g., Re Pennsylvania Department of Transportation*, 76 Pa.PUC 155 (1992); *Re City of Philadelphia*, 75 Pa.PUC 73 (1991); *Re Consolidated Rail Corporation*, 70 Pa.PUC 321 (1989); *see also National Railroad Passenger Corp. v. Pa. Public Utility Comm’n*, 665 F.Supp. 402, 404 (E.D. Pa. 1987), *aff’d*, 848 F.2d 436 (3d. Cir. 1988), *cert. denied*, 488 U.S. 893; and *City of Philadelphia v. Pa. Public Utility Commission*, 676 A.2d 1298, 1300 n. 1 (Pa. Cmwlth. 1996).

More recently, in *Norfolk Southern Railway Company v. Public Utility Commission*, the Supreme Court of Pennsylvania expanded the definition of a concerned party for purposes of the Commission's cost-allocation jurisdiction and authority:

We hold that a transportation utility need not own facilities at a rail-highway crossing to be a *concerned party* for purposes of the PUC's cost-allocation jurisdiction and authority, *at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way.*

See 77 A.3d 619, 633 (Pa. 2013) (emphasis added).

Although the *Norfolk Southern* court expanded the class of entities (*i.e.*, beyond owners of rail-highway crossing facilities) that can be considered "concerned parties"; it remains the case that there must be *at least* (*i.e.*, in the absence of any ownership) a substantial, ongoing use of the crossing by the railroad in order for it to be a "concerned party". Stated differently – a railroad must still be an owner of the relevant facilities at issue to be a "concerned party" where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way. The *Norfolk Southern* court's holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities that "***are used*** in any kind of public utility service." (emphasis added).

In so holding, the *Norfolk Southern* court considered the prior decisions of the Supreme and Superior Courts in *Pittsburgh Railways v. Pennsylvania Pub. Util. Comm'n* and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.* *See* 77 A.3d at 630 (citing *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967) and *Lehigh Valley R. Co. v. Pub. Serv. Comm'n of Pa.*, 161 A. 422, 424 (Pa. Super. Ct. 1932)). The *Norfolk Southern* court observed that the *Pittsburgh Railways* and *Lehigh Valley* holdings "lend substantial support to Norfolk's

position” that it is not a concerned party who can be allocated costs where Norfolk did not own any real property or facilities at the crossing site. *Id.*

However, the *Norfolk Southern* court did not stop its analysis there. *Norfolk Southern* went on to distinguish the holdings of the *Pittsburgh Railways* court and the *Lehigh Valley* court stating, “neither of those cases involved a nonowner transportation utility possessing a right of way through a deteriorated rail-highway crossing and regularly conducting operations there.” *Id.* Accordingly, the *Norfolk Southern* court considered the facts before it as presenting “an issue of first impression”. *Id.*

It logically follows then that *Norfolk Southern’s* holding that “a transportation utility need not own facilities at a rail-highway crossing to be a concerned party for purposes of the PUC’s cost-allocation jurisdiction and authority, at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way” does not abrogate the prior holdings of *Pittsburgh Railways* or *Lehigh Valley*. See, e.g., *Six L's Packing Co. v. W.C.A.B. (Williamson)*, 44 A.3d 1148, 1157-58 (Pa. 2012) (explaining that the holding of a judicial decision is to be “read against the facts” presented to the reviewing court when evaluating the precedential effect of the same) (citing *Oliver v. City of Pittsburgh*, 11 A.3d 960, 966 (Pa. 2011)). Therefore, the holdings of *Pittsburgh Railways* and *Lehigh Valley* are still binding upon the Commission to the extent the facts in those cases mirror the facts presented here.

Indeed, the facts in *Pittsburgh Railways* are highly analogous to (if not on all fours with) the facts presented here.³ In *Pittsburgh Railways*, the Commission attempted to allocate the costs

³ By way of contrast, the facts in *Lehigh Valley* were different in two critical respects. The railroad company in *Lehigh Valley*: (1) still owned the relevant facilities at the subject crossings (*i.e.*, one being abolished and a new crossing being constructed to build a bridge over the existing tracks of the railroad company), and (2) operated public utility services over the crossing to be abolished. See 161 A. 422, 424 (holding that, “It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad”). Here, B&LE has no such ownership interest or right of way interest and does not operate any public utility service on the SR0268 crossing.

of replacing and maintaining a rail-highway crossing known as “Black’s Bridge” to the Port Authority of Allegheny County. *See* 237 A.2d at 604. However, the evidence was clear that the Port Authority enjoyed no ownership interest and/or right of way interest in either the crossing or its related facilities, nor was the Port Authority operating any transportation utility services over the relevant railroad line, which had been previously abandoned by a railroad company. *Id.* at 605.

Pittsburgh Railways stated that Section 2704 of the Public Utility Code (formerly known as “Section 411”) “empowering the Commission to allocate costs in a highway-rail crossing situation, must be read in connection with Section [2702]” (i.e., formerly known as Section 409). *See* 237 A.2d at 606. “Section [2702](a) defines the crossings with respect to which the Commission can assess certain costs under Section [2704]. Such crossings are those which involve the facilities of ‘a public utility engaged in the transportation of passengers or property’”. *Id.* (emphasis added); *see also* 66 Pa.C.S. § 2702(a). Therefore, “[t]he transportation utilities [c]oncerned for purposes of assessment under Section [2704] are those whose facilities are constructed or located at such crossing.” *See* 237 A.2d at 606.

Pittsburgh Railways ultimately held that, “the law has been firmly established in this Commonwealth that a transportation utility has no concern with any crossing for purposes of assessment . . . where it does not have a rail facility situated at such crossing”. *Id.* Applying this rule to the facts before it, the *Pittsburgh Railways* court determined that the Port Authority was not a concerned party and, therefore, the Commission lacked the statutory authority to assess costs to the Port Authority for the replacement and maintenance of the Black’s Bridge crossing – *i.e.*, a railway facility that the Port Authority: (1) did not own, (2) did not have a right of way interest in, and (3) over which the Port Authority did not operate any transportation utility services. *Id.* at 608.

Here, there is no factual dispute that the real property, rail line and any rail facilities at the SR0268 grade crossing were conveyed to WALA on October 24, 2002. *See* B&LE Ex. 5. It is likewise undisputed that B&LE has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing. *See* Direct Testimony of Michael Barron at pg 5. Indeed, B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002; has not conducted any operations at the SR0268 crossing since 1999; and has no easement-based right of way to the SR0268 crossing. *See* Direct Testimony of Michael Barron at pgs. 3 - 5.

In light of these undisputed facts, the holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation calculus of the instant Investigation relative to B&LE. These cases collectively require a finding that B&LE is not a “concerned party” as the term is defined under the Public Utility Code, because B&LE: (1) has no ownership interest in the SR0268 crossing, (2) has no right of way interest in the SR0268 crossing, and (3) does not conduct transportation utility operations at the SR0268 crossing.

Accordingly, the Commission has no statutory authority to allocate any costs for the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing. A ruling to the contrary would not only be in opposition to the precedential authority of the *Norfolk Southern* Court and the *Pittsburgh Railways* court, but it would also eviscerate the plain language meaning of Section 2704(a) of the Public Utility Code. *See* 66 Pa.C.S. § 2704(a) (expressly limiting the Commission’s cost allocation authority to only those facilities which “*are used* in any kind of public utility service”) (emphasis added).

Section 2704(a) reflects the common-sense judgment of the General Assembly that an entity that abandoned all ownership and usage rights of a rail crossing should not be charged with

responsibility for repairs to the crossing. Therefore, B&LE respectfully requests that judgment be entered in its favor as a matter of law.

B. The Assertion of the notice requirements found under Section 2709 of the Public Utility Code is a red herring designed to distract the Commission from the inescapable conclusion that B&LE is not a concerned party to whom costs may be assessed

1. DOT, County and local officials received actual notice of B&LE's intent to convey its property interest in the SR0268 crossing

During the January 18, 2022 hearing, counsel for BIE (citing to section 2709 of the Public Utility Code) asked questions of B&LE's witness, Michael J. Barron, Esquire ("Mr. Barron"), on cross-examination related to whether notice was provided to various state agencies of B&LE's intent to dispose of the SR0268 property and all facilities related thereto in advance of its ultimate disposition. *See* Jan. 18, 2022 H.T. at pp. 101-06. Section 2709 states:

Before a public utility engaged in a railroad business disposes of real property previously used as a roadbed right-of-way, it must notify the county, city, borough, incorporated town or township in which the real property is located, and it must notify the Department of Transportation, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission and the Department of Environmental Resources. Notifications shall be in writing.

66 Pa.C.S. § 2709(a).

The "procedure after notice" is clear that, even if one of the local authorities identified in subsection (a) makes an offer to purchase the real property "previously used as a roadbed right-of-way", the public utility has unilateral discretion to "accept or reject the offer". *Id.* at § 2709(b)(1). After a rejection or if no offer is made by a local authority, the state "administrative agencies" specified in subsection (a) have "60 days to decide on making an offer for the real property". *Id.* at § 2709(b)(2). "***If*** an administrative agency makes an offer . . . , the public utility ***shall consider the offer and make a decision on the offer*** before making other disposition of the property." *Id.*

(emphasis added).⁴ Any disposition that does not comply with this statutory procedure is “voidable” not void. *Id.* at § 2709(c); *see also Buffalo Twp. v. Jones*, 778 A.2d 1269, 1274 (Pa. Commw. Ct. 2001) (“Section 2709 of the Public Utilities Code does not conclusively bar a railroad from abandoning its right-of-way but it merely provides that a transfer of property is voidable. Therefore, *it does not invalidate the transaction automatically*”) (emphasis added), *aff’d*, 813 A.2d 659 (Pa. 2002).

A plain language reading of Section 2709 reveals that the statute has some “bark” to it but no real “bite”. Where proper notice is provided to local authorities and state agencies in advance of a disposition, the ultimate decision making authority to transfer the real property at issue to one of the enumerated state agencies versus a private party at all times rests with the public utility. *Arguendo*, even if one or more of these state actors (or the Commission) had timely⁵ initiated a proceeding to enforce Section 2709’s notice requirement⁶ and successfully voided the October 24, 2002 conveyance to WALA, the exercise would be a futile gesture. The net result of such efforts is that B&LE would have subsequently: (1) taken curative action to perfect notice under Section 2709, (2) rejected any purchase offers received from a state actor(s), and (3) redone the conveyance to WALA as originally intended.

Indeed, Section 2709’s notice requirement as written appears to be a mere formality designed to provide local authorities and/or state administrative agencies with an opportunity to make an offer for purchase but with no guarantee that the public utility will accept the same – nothing more and nothing less. Section 2709 cannot be fairly read to stand for the proposition that

4 If more than one administrative agency makes an offer, Section 2709(b)(2) further provides for the order in which such offers shall be considered.

5 Any such proceeding is subject to a three (3) year statute of limitations. 66 Pa.C.S. § 3314.

6 B&LE is merely arguing a hypothetical scenario here based upon the assumption that no notice was given. It is B&LE’s position that notice was provided to the relevant local authorities and state agencies.

the Commission or one of the enumerated state actors thereunder has authority to completely prohibit alienation of real property to a private party or attempt to void such a transaction decades later.⁷

Here, counsel for BIE raises the mere possibility that notice under Section 2709 *may* not have been provided but did not adduce sufficient record evidence to prove the same. *See* Jan. 18, 2022 H.T. at pp. 101-06 (Mr. Barron testified repeatedly that, “I have no direct knowledge” of or “I am not aware” if Section 2709 notice was provided “only that it would have been required of the STB proceeding”); *see also id.* at pg. 202 (Mr. Keilman, i.e., a DOT civil engineer, testified that, “to the best of my knowledge, we were not [provided with notice of the STB proceedings]”). It appears that counsel is hoping that the mere appearance of a procedural impropriety related to disposition of the SR0268 crossing might persuade the Commission to void an approximately twenty-year-old conveyance and multiple conveyances thereafter within the same chain of title in the desperate attempt to have costs assessed to B&LE as the purported “owner” of the SR0268 crossing. The Commission should not take the bait.

Contrary to any implications arising from counsel’s entirely speculative line of questioning, the documentary evidence of record demonstrates that DOT, Butler County and Fairview Township⁸ received notice of B&LE’s intent to dispose of the real property inclusive of the SR0268 crossing approximately six months prior to B&LE’s October 24, 2002 conveyance to

⁷ If Section 2709 contained such language, it would arguably constitute an unconstitutional or illegal restraint on alienation. *See e.g., B & P Dev. v. Walker*, 420 F. Supp. 704, 705-706 (W.D. Pa. 1976) (upholding the “constitutionality of the Pennsylvania Mechanics Lien Law” and noting that other courts have “concluded that . . . a total prohibition on alienation of property may be unconstitutional”); and *Lauderbaugh v. Williams*, 186 A.2d 39, 41 (Pa. 1962) (“an absolute restraint is against public policy and, therefore, of no legal effect”).

⁸ The April 30, 2002 Secretarial Letter found at Docket A-00117858 is addressed to “ALL PARTIES”. The record found at Docket A-00117858 reveals that Butler County, Fairview Township, and DOT (among others) were parties to the proceeding and, therefore, received notice of B&LE’s Application for Abolishment in addition to a copy of the April 30, 2002 Secretarial Letter.

the Western Allegheny Landowners' Association ("WALA"). *See* B&LE Ex. 3 (i.e., April 30, 2002 Secretarial Letter). Indeed, the April 30, 2002 Secretarial Letter states in relevant part:

This matter is before us upon application, filed May 31, 2001, by Bessemer and Lake Erie Railroad Company (B&LE) requesting Commission approval to abolish 29 at grade and separated grade crossings at various locations in Armstrong and Butler Counties.

A field conference, arranged by a Commission staff engineer and held at the site of the crossings *was attended by representatives of B&LE, PennDOT, Concord Township, Fairview Township and Brady's Bend Township.*

B&LE avers that it no longer needs a portion of its Hilliard's Branch and Western Allegheny Branch. The railroad states that at Docket No. Ab-88 (Sub No. 10X) the Surface Transportation Board granted approval to abandon and discontinue service on the subject rail line.

* * *

At crossing No. 27(a)⁹, *B&LE and PennDOT presently are negotiating the disposition of the tunnel.*

Id. at pp. 1, 4 (emphasis added).

The April 30, 2002 Secretarial Letter, which is addressed to "ALL PARTIES" in the Commission proceeding at Docket A-00117858, indicates (with much greater certainty than the speculative testimony elicited by counsel for BIE) that B&LE did provide notice to local authorities and the relevant state agencies in compliance with Section 2709. The April 30, 2002 Secretarial Letter is evidence that B&LE engaged at least one state agency in substantive negotiations pertaining to the disposition of the SR0268 crossing that would naturally flow from receipt of Section 2709 notice. This is all Section 2709 requires – *i.e.*, notice and an opportunity for local authorities and/or state agencies to negotiate a possible deal for the conveyance of the

⁹ "Crossing No. 27(a)" as referenced in the April 30, 2002 Secretarial Letter is the SR0268 crossing at issue in this investigation. B&LE Ex. 3 at pg. 3.

real property at issue before disposition to a private party. Section 2709 does not mandate that B&LE accept the offer of and convey the SR0268 crossing to a state actor.

The negotiations between B&LE and DOT did not result in an agreement. However, failed negotiations is not a proper basis under Section 2709 to set aside B&LE's conveyance of its real property to WALA. *See* B&LE Ex. 5. The ultimate authority to accept or reject any offers received belonged to B&LE at all relevant times. Therefore, B&LE did not violate Section 2709.

Counsel for BIE elicited testimony based upon pure speculation and conjecture as to whether statutory notice was provided. Such speculative testimony reliant upon independent recollections of events occurring approximately twenty-years ago is belied by more concrete written evidence that local and state authorities received notice of B&LE's intent to convey its property interests in the SR0268 crossing. For this reason alone, any attempt to void the October 24, 2002 conveyance to WALA or any of the subsequent conveyances within the same chain of title should be denied. *See* B&LE Ex. 5 (i.e., the October 24, 2002 Quitclaim Deed from B&LE to WALA) and B&LE Ex. 6-9 (i.e., May 21, 2003 conveyances from WALA to private parties thereby subdividing the relevant 394 acres of property).

2. *Alternatively, the doctrine of laches and/or the applicable statute of limitations bars any attempt to set aside a conveyance of real property approximately twenty (20) years after the fact where: (1) B&LE changed its position in reliance upon the validity of the October 24, 2002 conveyance to WALA, and (2) the parties with statutory standing who would attempt to void the transaction "knew or should have known" about the conveyance back in 2002*

a.) **Doctrine of Laches**

"Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." *Peden v. Gambone Bros. Dev. Co.*, 798 A.2d 305, 312 (Pa. Commw. Ct. 2002) (*citing Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290 (Pa. 1998)). "[I]n order to prevail on an assertion of laches, [the asserting

party] must establish a delay arising from the [opposing party's] failure to exercise due diligence and prejudice resulting from the delay.” *Peden*, 798 A.2d at 312 (citing *Commonwealth ex. rel. Baldwin v. Richard*, 751 A.2d 647 (Pa. 2000)).

“[P]rejudice is established where, for example, witnesses die or become unavailable, records are lost or destroyed, and changes in position occur due to the anticipation that a party will not pursue a particular claim.” *Del-Val Elec. Inspection Serv., Inc. v. Stroudsburg-E. Stroudsburg Zoning & Codes Off.*, 515 A.2d 75, 76 (Pa. Cmwlth. 1986) (citing *Class of 200 Administrative Faculty Members v. Scanlon*, 466 A.2d 103 (Pa. 1983)). “It is well-settled law that the doctrine of laches is *applicable peculiarly where the difficulty of doing justice arises . . . by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible.*” *Kern v. Kern*, 892 A.2d 1, 10 (Pa. Super. Ct. 2005) (emphasis added) (citing *In re Wallace's Estate*, 149 A. 473, 475 (Pa. 1930)).

“The doctrine of laches is an equitable bar to the prosecution of stale claims and is the practical application of the maxim that those who sleep on their rights must awaken to the consequence that they have disappeared.” *Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. Ct. 2014) (citations and quotations omitted). “Unlike the application of the statute of limitations, exercise of the doctrine of laches does not depend on a mechanical passage of time.” *Id.* “[T]he doctrine of laches may bar a suit in equity where a comparable suit at law would not be barred by an analogous statute of limitations”. *Id.*

The question of whether a party acts with due diligence is answered with a “focus not upon what the plaintiff knows, but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him[.]” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (quoting *Taylor v. Coggins*, 90 A. 633, 634 (Pa. 1914)). The “law requires . . .

discover[y of] those facts which were discoverable through the exercise of reasonable diligence.”
Sprague, 550 A.2d at 188 (citing *Turtzo v. Boyer*, 370 Pa. 526, 88 A.2d 884 (1952)).

In *Fulton* for example, the administratrix of an estate brought an action to set aside conveyances of real property to the decedent’s children and the imposition of a constructive trust upon the conveyed properties. 106 A.3d at 129-30. The Superior Court of Pennsylvania (“*Fulton* court”) affirmed the trial court’s decision that the administratrix’s complaint was barred by the doctrine of laches. *Id.* at 135-36. In so deciding, the *Fulton* court found that: (1) a nine-to-eleven-year passage of time from the date of the conveyances until the administratrix instituted the suit constituted a “sufficient delay” for purposes of the doctrine of laches, (2) prejudice was demonstrated where two material fact witnesses died, and (3) prejudice was further evident due to the sums expended by the appellees on the upkeep and maintenance of the properties. *Id.* at 134-36.

Here, “ALL PARTIES” to the Commission proceeding docketed at A-00117858 (including Fairview Township and Butler County officials in addition to the Commission and DOT) knew of B&LE’s intent to dispose of the SR0268 crossing approximately six months before B&LE conveyed the same to WALA. *See* B&LE Ex. 3 at pp. 1, 4 (i.e., the April 30, 2002 Secretarial Letter addressed “TO ALL PARTIES” and stating that B&LE and DOT were “presently” negotiating the disposition of the SR0268 crossing). Moreover, there is no factual dispute amongst the parties that the Commission, local authorities and state agencies enumerated in Section 2709 were all put on record notice as of November 8, 2002 that B&LE conveyed the SR0268 crossing to WALA. *See* B&LE Ex. 5 (i.e., the October 24, 2002 Quitclaim Deed conveying the SR0268 crossing to WALA as recorded in Butler County, Pennsylvania). Accordingly, the only parties with standing under Section 2709 who could attempt to void the relevant transfer knew or should

have known through the exercise of reasonable diligence that B&LE conveyed the property to WALA almost twenty (20) years ago. If nine-to-eleven years constituted a sufficient time period for the doctrine of laches to apply in *Fulton*, then certainly twice that period of time (20 years) should be sufficient for the doctrine of laches to apply in the instant matter.

Furthermore, reasonable minds would agree that setting aside B&LE's conveyance to WALA twenty-years after the fact would be highly prejudicial to all parties involved in the October 24, 2002 transaction not to mention the prejudice to subsequent grantees that would result from setting aside the May 21, 2003 conveyances within the same chain of title. *See* B&LE Ex. 5-9. Neither Mr. Barron nor Mr. Keilman could testify with any certainty as to whether Section 2709 notice was given to the applicable state agencies and local authorities due to the passage of time. *See supra*. The only concrete evidence adduced of record is the April 30, 2002 Secretarial Letter, which proves that local authorities, the Commission and DOT all had actual notice of B&LE's intent to dispose of the SR0268 crossing. Without question, the Commission would have substantial difficulty doing justice in this matter where the original transaction is so obscured by the passage of time as to render the ascertainment of whether proper Section 2709 notice was given very challenging if not impossible.

Further prejudice is evident by B&LE's change of its position in reliance upon the validity of the October 24, 2002 conveyance to WALA. B&LE has had no possessory interest in or right of access to the SR0268 crossing since 2002. Accordingly, B&LE has not been in a position to properly maintain and/or prevent the SR0268 crossing from deteriorating over time such that at least a portion of the tunnel at this crossing has collapsed. It would be unjust and inequitable to assess any costs of abolishment, repair or maintenance to B&LE inclusive of any affirmative or ameliorative waste, which WALA or any subsequent property owners undoubtedly caused.

For all of the foregoing reasons, the doctrine of laches applies as an equitable bar blocking any attempt to set aside B&LE's conveyance of the SR0268 crossing to WALA.

b.) Three-Year Statute of Limitations

No action "for the recovery of any penalties or forfeitures incurred under the provisions of" and no prosecutions related to "any matter or thing mentioned in" the Public Utility Code "shall be maintained unless brought within three years from the date at which the liability therefor arose". 66 Pa.C.S. § 3314(a). Pennsylvania law favors strict application of the statute of limitations. *Kingston Coal Co. v. Felton Min. Co.*, 690 A.2d 284, 288 (Pa. Super. Ct. 1997) (*citing E.J.M. v. Archdiocese of Philadelphia*, 622 A.2d 1388, 1393 (Pa. Super Ct. 1993)).

Here, as argued *supra*, it is B&LE's position that Section 2709 notice was provided to the relevant state agencies prior to its disposition of the SR0268 crossing to WALA. To the extent the Commission disagrees, it is B&LE's further position that any attempt to set aside the October 24, 2002 conveyance to WALA is time-barred by the applicable three-year statute of limitations.

There is no factual dispute that the Commission, DOT and "ALL PARTIES" (including Butler County and Fairview Township) to the proceeding at Docket A-00117858 had actual notice of B&LE's intent to dispose of the SR0268 crossing on or about April 30, 2002 as evidenced by the Secretarial Letter of the same date. *See* B&LE Ex. 3 at pp. 1, 4. The April 30, 2002 Secretarial Letter specifically informed the Commission, DOT and the parties that B&LE was in negotiations for the disposition of the SR0268 crossing with DOT. Additionally, all parties, DOT and the Commission were subsequently put on record notice of the conveyance of the SR0268 crossing to WALA when the same was publicly recorded in the Butler County, Pennsylvania Recorder of Deeds Office on November 8, 2002. *See* B&LE Ex. 5.

Consequently, the three-year statute of limitations began to run no later than November 8, 2002. No actions by DOT (or any other party) nor any enforcement proceedings related to Section 2709 have been commenced by the Commission to date, yet the statute of limitations expired for such purposes on November 8, 2005. Therefore, any attempt to pursue such a proceeding now is time-barred as a matter of law.

3. *Summary of Argument regarding Section 2709*

In sum, B&LE is not a “concerned” party as the term is defined under the Public Utility Code, because it has no ownership interest or easement interest in the SR0268 crossing or any related facilities and has not conducted any operations there in over twenty years. Counsel for BIE is attempting to persuade the Commission to disregard these irrefutable facts and violate principles of stare decisis by assessing the costs of abolition, repair and/or maintenance of the SR0268 crossing to B&LE under the guise of a procedural impropriety.

Counsel’s argument is solely based upon speculative testimony belied by the only concrete written evidence adduced of record on this issue. The weight of the evidence in this case favors a finding that B&LE complied with the notice requirements of Section 2709. Alternatively, to the extent that the Commission finds BIE’s evidence more persuasive, the doctrine of laches and/or the applicable statute of limitations collectively bar any attempt (at law or in equity) by the Commission or the parties¹⁰ to this proceeding to void the October 24, 2002 conveyance of the SR0268 crossing to WALA.

¹⁰ To B&LE’s knowledge, no formal claim has been asserted by any party to this investigatory proceeding, nor has any enforcement proceeding been initiated by the Commission asserting a failure on B&LE’s part to provide statutory notice under Section 2709 prior to the October 24, 2002 conveyance to WALA. B&LE only raises this argument out of an abundance of caution and in direct response to the line of questioning from BIE’s counsel during the January 18, 2022 hearing.

C. Alternatively, this proceeding is preempted by Federal Law such that the Commission has no jurisdiction and/or authority to assess any liability against B&LE for the costs related to the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing

The Interstate Commerce Commission Termination Act (“ICCTA”) preempts Pennsylvania law relative to the “abandonment, or discontinuance of . . . [railroad] facilities”, because ICCTA provides “exclusive” jurisdiction to the Surface Transportation Board (“STB”) to decide such issues. *See* 49 U.S.C. § 10501(b). Indeed, the “remedies” provided for under ICCTA with respect to “regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* The term “transportation” includes “a . . . property, facility, instrumentality, or *equipment of any kind related to the movement of passengers or property*, or both by rail, *regardless of ownership* or an agreement concerning use” *Id.* at § 10102(9)(A) (emphasis added).

Federal courts have held that, “Under the ICCTA, the STB has exclusive jurisdiction over ‘transportation by rail carrier’ and its regulation of rail carriers preempts state regulation with respect to rail transportation.” *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (*citing* 49 U.S.C. § 10501(b)).

Here, the relevant issue relates to BL&E’s abandonment, discontinuance and attempted abolishment of a railroad crossing involving an underground tunnel, which travels beneath State Route 268. Without question, the tunnel underneath SR0268 constitutes property related to the movement of passengers or property by rail and, therefore, is within ICCTA’s definition of “rail transportation”. Furthermore, ICCTA expressly preempts any state law, which would attempt to regulate the abandonment and/or discontinuance of railroad facilities. Accordingly, the Commission’s attempt to regulate the disposition of SR0268 and allocation of repair/maintenance

costs for SR0268 against B&LE is improper, because the Commission lacks jurisdiction to do so as Pennsylvania's Public Utility Code (i.e., 66 Pa.C.S. §§ 101 *et seq.*) is expressly preempted by federal law.

For all of the foregoing reasons, B&LE respectfully requests that judgment be entered in its favor and that no costs of any kind be assessed to B&LE relative to the tunnel located at the SR0268 grade crossing.

III. Proposed Findings of Fact

1. B&LE ceased operations on the former Western Allegheny Branch Line (hereinafter "Western Allegheny Branch") located in Fairview Township, Butler County Pennsylvania on or about 1998. *See* Direct Testimony of Michael Barron at pp. 2-3¹¹; *see also* Jan. 18, 2022 H.T. at pg. 167-69 (Commission employee Mr. Daniel R. Helfrich, agreed that B&LE has not conducted operations on the Western Allegheny Branch "for over 20 years").

2. In January 2001, B&LE received approval from the STB to abandon and discontinue service on a portion of its Western Allegheny Branch spanning approximately 20.1 miles in Butler County and Armstrong County, Pennsylvania. *See* Direct Testimony of Michael Barron at pp. 3-4 and at B&LE Ex. 2.

3. On May 31, 2001, B&LE requested Commission approval to abolish 29 at grade and separated crossings that were located on the previously abandoned service line. *See* Direct Testimony of Michael Barron at pg. 4 and at B&LE Ex. 4.

¹¹ Mr. Barron's Direct Testimony was previously marked and admitted into evidence as B&LE's Statement Number One including its corresponding exhibits (i.e., B&LE Exhibits 1-12 and 16) as attachments thereto. *See* Jan. 18, 2022 H.T. at pp. 122-27.

4. Pursuant to the Secretarial letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of the 29 requested crossings. *See* Direct Testimony of Michael Barron at pg. 4 and at B&LE Ex. 3.

5. The remaining two crossings – where Pennsylvania State Route 268 (“SR0268”) crosses over a railroad tunnel formally used by the B&LE in Fairview Township, Butler County and where Pennsylvania State Route 68 (“SR0068”) formally crosses, below grade, the B&LE track in Bradys Bend Township, Armstrong County – were not abolished at that time (i.e., April 30, 2002). *Id.*

6. By way of a Joint Stipulation submitted to the Commission on or about November 12, 2021, all issues related to the Bradys Bend crossing at SR0068 were amicably resolved by the parties. *See* Nov. 12, 2021 Stipulation, appended hereto as Exhibit “B”.

7. Accordingly, only the SR0268 crossing remains at issue. *Id.*

8. On October 24, 2002, B&LE sold a tract of land (consisting of approximately 394 acres) situated in Clay, Fairview and Concord Townships in Butler County and Bradys Bend Township in Armstrong County to the Western Allegheny Landowners Association (“WALA”) via quit claim deed. *See* Direct Testimony of Michael Barron at pp. 5-9 and at B&LE Ex. 5.

9. WALA was represented by counsel of its own choosing relative to this conveyance. *See* Jan. 18, 2022 H.T. at pg. 228; *see also* B&LE Ex. 5.

10. Crossing SR0268 is situated in the 394 acre parcel of land that was sold to WALA. *See* Direct Testimony of Michael Barron at pp. 5-9 and at B&LE Ex. 5.

11. The October 24, 2002 conveyance to WALA was recorded in the Butler County, Pennsylvania Recorder of Deeds Office on November 8, 2002. *See* B&LE Ex. 5.

12. Since the time of this sale, B&LE has owned no property at the SR0268 crossing. *Id.*; *see also* Jan. 18, 2022 H.T. at pg. 168-69 (Commission employee Mr. Daniel R. Helfrich, agreed that B&LE has not held any property interest in the SR0268 crossing since 2002 testifying, “the information . . . that’s submitted by Mr. Barron shows [B&LE] transferred the property out of their possession of the railroad”).

13. The Commission further agrees that B&LE has not received any benefit from the SR0268 crossing since 2002. *See* Jan. 18, 2022 H.T. at pg. 169.

14. B&LE does not have any right of access to the SR0268 crossing. *See* Direct Testimony of Michael Barron at pg. 9.

15. B&LE does not have any easement rights in the SR0268 crossing. *Id.* at pg. 5 and at B&LE Ex. 5.

16. WALA subsequently subdivided the 394-acre parcel and over time, sold the subdivided parcels to a number of individuals including William G. and Kay D. Barnhart (22.84 acres), Dean M. and Patricia A. Tascarella (4.23 Acres), Thomas H. and Anna Marie Sherwin (4.47 acres) and Ronald E and Madeline E. Stitt (2.48 acres). *See* Direct Testimony of Michael Barron at pp. 5-9 and at B&LE Ex. 6-9 (i.e., May 21, 2003 Deeds of Conveyance for the subdivided parcels).

17. As a result of the foregoing, the following facts are undisputed:

- a) B&LE does not own any facilities at the SR0268 crossing;
- b) B&LE has not had any ownership interest in any facilities at the SR0268 crossing since October 24, 2002;
- c) B&LE does not have an easement-based right of way at the SR0268 crossing;
- d) B&LE does not conduct any regular operations at the SR0268 crossing; and

- e) B&LE has not conducted any regular operations at the SR0268 crossing since 1998.

See B&LE's Proposed Findings of Fact ¶¶1-16.

18. Approximately six months prior to the disposition of the SR0268 crossing, the Commission, DOT, Butler County and Fairview Township had actual knowledge of and/or received written notice of B&LE's intent to dispose of the SR0268 crossing. See B&LE Ex. 3.

19. The April 30, 2002 Secretarial Letter is addressed to "ALL PARTIES" in the Commission proceeding at Docket A-00117858. *Id.*

20. The April 30, 2002 Secretarial Letter states in part:

This matter is before us upon application, filed May 31, 2001, by Bessemer and Lake Erie Railroad Company (B&LE) requesting Commission approval to abolish 29 at grade and separated grade crossings at various locations in Armstrong and Butler Counties.

A field conference, arranged by a Commission staff engineer and held at the site of the crossings *was attended by representatives of B&LE, PennDOT, Concord Township, Fairview Township and Brady's Bend Township.*

B&LE avers that it no longer needs a portion of its Hilliard's Branch and Western Allegheny Branch. The railroad states that at Docket No. Ab-88 (Sub No. 10X) the Surface Transportation Board granted approval to abandon and discontinue service on the subject rail line.

* * *

At crossing No. 27(a), *B&LE and PennDOT presently are negotiating the disposition of the tunnel.*

Id. at pp. 1, 4 (emphasis added).

21. "Crossing No. 27(a)" as referenced in the April 30, 2002 Secretarial Letter is the SR0268 crossing at issue in this investigation. *Id.* at pg. 3.

22. DOT had a full and fair opportunity to negotiate for the disposition of the SR0268 crossing prior to the October 24, 2002 conveyance to WALA. *Id.* at pg. 4.

23. The negotiations between DOT and B&LE did not result in an agreement for the conveyance of the SR0268 crossing to DOT. *Id.*; *see also* B&LE Ex. 5.

24. The Commission and all parties to the instant proceeding were put on record notice of B&LE's conveyance of the SR0268 crossing (including all facilities related thereto) to WALA as of November 8, 2002 when the October 24, 2002 Quitclaim Deed was recorded. *See* B&LE Ex. 5.

IV. Proposed Conclusions of Law

1. Sections 2702 and 2704 of Pennsylvania's Public Utility Code must be read together. *See Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967).

2. Section 2702(a) defines the crossings with respect to which the Commission can assess certain costs under Section 2704. Such crossings are those, which involve the facilities of a public utility “*engaged in the transportation of passengers or property*”. *Id.*; *see also* 66 Pa.C.S. § 2702(a) (emphasis added).

3. The Public Utility Code expressly limits any cost allocation relative to the abolition of a crossing to only those facilities that “*are used* in any kind of public utility service.” *See* 66 Pa.C.S. § 2704(a) (emphasis added).

4. The Pennsylvania Supreme Court has held that, where a public utility: (1) no longer has any ownership interest in, (2) does not have any right of access to or easement interest in, and (3) no longer conducts operations at a rail-highway crossing then the public utility is not a “concerned” party to whom the costs of abolishment, repair and/or future maintenance may be assessed by the Commission. *See Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013); *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967).

5. B&LE is not a “concerned” party as the term is defined under Pennsylvania’s Public Utility Code. *See* 66 Pa.C.S. §§ 2702(a), 2704(a); *see also Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013); *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967).

6. As a matter of law, no costs of any kind (including but not limited to costs of abolishment, repair, or future maintenance) related to the SR0268 crossing may be assessed to B&LE by the Commission. *Id.*

7. B&LE complied with the notice requirements of Section 2709 prior to its disposition of the SR0268 crossing to WALA. *See* 66 Pa.C.S. § 2709.

8. B&LE did not violate Section 2709 where its negotiations with DOT for the disposition of the SR0268 crossing failed to result in an agreement of sale. *Id.* at § 2709(b).

9. In the alternative, failure to provide proper notice under Section 2709 prior to disposition of real property previously used as a roadbed right-of-way renders such a disposition voidable not void. *Id.* at § 2709(c); *see also Buffalo Twp. v. Jones*, 778 A.2d 1269, 1274 (Pa. Commw. Ct. 2001).

10. It would be inequitable for the Commission or any party to initiate a proceeding twenty years later in an attempt to void B&LE’s October 24, 2002 conveyance of the SR0268 crossing to WALA as any such equitable proceeding is barred by the doctrine of laches. *See Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. Ct. 2014); *Peden v. Gambone Bros. Dev. Co.*, 798 A.2d 305, 312 (Pa. Commw. Ct. 2002) (*citing Commonwealth ex. rel. Baldwin v. Richard*, 751 A.2d 647 (Pa. 2000) and *Stilp v. Hafer*, 553 Pa. 128, 718 A.2d 290 (Pa. 1998)); *see also Del-Val Elec. Inspection Serv., Inc. v. Stroudsburg-E. Stroudsburg Zoning & Codes Off.*, 515 A.2d 75, 76 (Pa.

Cmwlth. 1986) (*citing Class of 200 Administrative Faculty Members v. Scanlon*, 466 A.2d 103 (Pa. 1983)).

11. No proceeding at law could be initiated on or after November 8, 2005 by the Commission or any party in an attempt to void B&LE's October 24, 2002 conveyance of the SR0268 crossing to WALA, because the same would be time-barred by the three-year statute of limitations. *See* 66 Pa.C.S. § 3314.

12. The Commission lacks jurisdiction to regulate the disposition of the SR0268 crossing and allocate abolishment, repair and/or future maintenance costs for the SR0268 crossing against B&LE, since Pennsylvania's Public Utility Code is expressly preempted by federal law. *See* 49 U.S.C. §§ 10102(9)(A), 10501(b); *see also Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (*citing* 49 U.S.C. § 10501(b)).

V. Proposed Ordering Paragraphs Identifying Relief Sought

1. The Commission finds that B&LE is not a concerned party to this proceeding and, therefore, it is hereby ORDERED, ADJUDGED and DECREED that B&LE is dismissed with prejudice as a party from this Investigation.

2. Summary Judgment is hereby entered in B&LE's favor finding that no costs related to the SR0268 crossing are to be assessed to B&LE.

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Respectfully submitted,

BURNS WHITE LLC

A handwritten signature in blue ink, appearing to be 'J.M. Steidle', written over a horizontal line.

By: _____

John M. Steidle, Esquire
Edwin B. Palmer, Esquire
Burns White Center
48 26th Street
Pittsburgh, PA 15222
(412) 995-3000
jmsteidle@burnswhite.com
ebpalmer@burnswhite.com

Attorneys for The Bessemer & Lake Erie
Railroad Company

APPENDIX A: RESPONSE TO THE QUESTIONS AND PROCEDURES OF THE COMMISSION'S BUREAU OF TECHNICAL UTILITY SERVICES, RAIL SAFETY DIVISION INCLUDED IN INTERIM ORDER DATED JANUARY 4, 2021

Bessemer and Lake Erie Railroad (B&LE) Tunnel/SR0268 Fairview Township, Butler County

1. Bessemer and Lake Erie Railroad (B&LE) submit testimony as to the exact corporate name of the owner and operator of the former line of railroad at the subject tunnel/railroad crossing.

See Direct testimony of Michael J. Barron, Esquire, Page 2, Line 15.

2. B&LE submit testimony as to the location of the tunnel.

See Direct Testimony of Daniel Paul Radle, P.E., Page 3, Lines 1-15.

3. B&LE submit testimony as to when the tunnel was constructed.

See Direct Testimony of Daniel Paul Radle, P.E., Page 3, Lines 19.

4. B&LE submit testimony as to any application to the Surface Transportation Board to abandon and/or discontinue service on the rail line on which the subject tunnel is located; include any Docket Numbers as well as the outcome of any such applications.

See Direct testimony of Michael J. Barron, Esquire, Page 3, Lines 10-14 and B&LE Exhibits 1 and 2.

5. B&LE submit any PUC orders, secretarial letters regarding the tunnel.

See B&LE Exhibits 3, 4 and 16.

6. B&LE submit testimony as to the date of any abandonment/discontinuation of service or the rail line on which the subject tunnel is located.

See Direct testimony of Michael J. Barron, Esquire, Page 4, Lines 4-6 and B&LE Exhibits 1 and 2.

7. B&LE submit testimony as to the physical description of the tunnel, include design details and construction materials.

See Direct Testimony of Daniel Paul Radle, P.E., Page 4, Lines 1-3.

8. B&LE submit testimony as to any inspection reports of said tunnel in its possession. Submit latest inspection of the tunnel; provide date of inspection, entity performing the inspection and the results of the inspection, any defects or hazards identified in the inspection, and any corrective action performed.

See Direct testimony of Michael J. Barron, Esquire, Page 5, Lines 3-7.

9. B&LE submit testimony as to any defects, hazards and/or dangerous situations currently present at the tunnel.

See Direct Testimony of Daniel Paul Radle, P.E., Page 4, Lines 4-22; Page 5, Lines 1-13; and B&LE Exhibits 14 and 15.

10. B&LE submit testimony as to the accessibility of the tunnel from either entrance. Is the tunnel accessible to enter either by pedestrian or vehicle? If not, describe how the entrance is prohibited.

See Direct Testimony of Daniel Paul Radle, P.E., Page 4, Lines 4-22; Page 5, Lines 1-13; and B&LE Exhibit 14 – AECOM Engineering Report.

11. B&LE submit testimony as to drainage in and near the tunnel. Provide testimony as to entrance and exit points as well as the means and volume if known.

See Direct Testimony of Daniel Paul Radle, P.E., Page 4, Lines 4-22; Page 5, Lines 1-13; and B&LE Exhibit 14 – AECOM Engineering Report.

12. B&LE submit testimony as to its property interest at the location of the subject tunnel, include any property interest previously conveyed to others.

See Direct testimony of Michael J. Barron, Esquire, Page 5, Lines 8-22 and Page 6, Lines 1-23, Page 7, Lines 1-22, Page 8, 1-23, Page 9, Lines 1-19. See Also B&LE Exhibits 5 thru 12.

13. B&LE submit testimony indicating what portion of future maintenance and inspection that it will agree to bear, and the portions, if any, of said work or cost thereof which should be performed and borne by each of the other parties hereto. Responses should be specific as to percentage of allocations suggested and should include the reasons for such allocations.

See Direct testimony of Michael J. Barron, Esquire, Page 9, Lines 22-23 and Page 10, Lines 1-20.

14. B&LE submit testimony as to its recommendation for final disposition of the tunnel.

See Direct testimony of Michael J. Barron, Esquire, Page 10, Lines 21-23 and Page 11, Lines 1-4.

15. B&LE submit testimony describing in detail the conditions, if any, presently existing at the crossing structure and in the vicinity thereof, which, in its opinion, render the crossing dangerous or inadequate for the safety, accommodation or convenience of the highway, pedestrian or rail users currently traversing the crossing area.

See Direct Testimony of Daniel Paul Radle, P.E., Page 7, Lines 2-23 and B&LE Exhibit 14 – AECOM Engineering Report.

16. Pennsylvania Department of Transportation submit testimony as to name, description and the approximate class and volume of vehicular and pedestrian traffic traversing the crossing.

N/A

17. Pennsylvania Department of Transportation submit testimony as to the nature of any failures and or collapse of the tunnel.

N/A

18. Pennsylvania Department of Transportation answer questions 5, 8, 9, 10, 12, 13, 14 and 15 as if same were posed to it.

N/A

19. Fairview Township answer questions 13, 14 and 15 as if same were posed to it.

N/A

20. Butler County answer questions 13, 14 and 15 as if same were posed to it.

N/A

21. Query whether any party in interest, or any other party, has any additional relevant testimony to offer.

Unknown

22. Query whether any party is aware of the involvement of any non-carrier public utility company other than those listed as parties in interest to this proceeding.

No

Bessemer and Lake Erie Railroad (B&LE)/SR0068 Brady's Bend Township, Armstrong County

The parties entered into a Joint Stipulation on November 12, 2021, addressing the abolishment of the above-referenced crossing.

1. Bessemer and Lake Erie Railroad (B&LE) submit testimony as to the exact corporate name of the owner and former operator of the line of railroad at the subject crossing, located in Brady's Bend Township, Armstrong County, where SR0068 crossed below grade, the rail line, (DOT 051 730 N).

See Joint Stipulation dated November 12, 2021.

2. B&LE submit testimony as to the location of the subject Brady's Bend Township, Armstrong County crossing.

See Joint Stipulation dated November 12, 2021.

3. B&LE submit testimony as to any application to the Surface Transportation Board to abandon and/or discontinue service on the rail line on which the subject Brady's Bend Township, Armstrong County crossing is located; include any Docket Numbers as well as the outcome of any such applications.

See Joint Stipulation dated November 12, 2021.

4. B&LE submit any PUC orders, secretarial letters regarding the Brady's Bend grade-separated crossing (DOT 051 730 N).

See Joint Stipulation dated November 12, 2021.

5. B&LE submit testimony as to the date the railroad facilities were removed at the Brady's Bend Township, Armstrong County crossing, detailing the work performed, the materials used and the current condition of the crossing.

See Joint Stipulation dated November 12, 2021.

6. B&LE submit testimony describing in detail the conditions, if any, presently existing at the crossing structure and in the vicinity thereof, which, in its opinion, render the crossing dangerous or inadequate for the safety, accommodation or convenience of the highway, pedestrian or rail users currently traversing the crossing area.

See Joint Stipulation dated November 12, 2021.

7. B&LE submit testimony indicating what portion of future maintenance and inspection that it will agree to bear, and the portions, if any, of said work or cost thereof which should be performed and borne by each of the other parties hereto. Responses should be specific as to percentage of allocations suggested and should include the reasons for such allocations.

See Joint Stipulation dated November 12, 2021.

8. Pennsylvania Department of Transportation answer questions 4, 5, 6 and 7 as if same were posed to it.

N/A

9. Brady's Bend Township answer questions 6 and 7 as if same were posed to it.

N/A

10. Armstrong County answer questions 6 and 7 as if same were posed to it.

N/A

11. Query whether any party in interest, or any other party, has any additional relevant testimony to offer.

N/A

12. Query whether any party is aware of the involvement of any non-carrier public utility company other than those listed as parties in interest to this proceeding.

N/A

APPENDIX B: EXHIBITS

Exhibit A – January 18, 2022 Hearing Transcript

Exhibit B – November 12, 2021 Stipulation

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

Rail Crossings
Investigation State
Route SR0268 & SR0068

Docket No.: I-2019-
3012769

Evidentiary Hearing

Pages 83 - 246

Judge's Chambers
Piatt Place
301 5th Avenue
Pittsburgh, PA

January 18, 2022
Commencing at 10:01 a.m.

BEFORE:

MARY D. LONG, Administrative Law Judge

APPEARANCES:

KAYLA ROST, ESQUIRE
Public Utility Commission
Bureau of Investigation & Enforcement
400 North Street
Harrisburg, PA 17120
For the Bureau of Investigation and
Enforcement

MELISSA NOYES, ESQUIRE
Pennsylvania Department of Transportation
P.O. Box 8212
Harrisburg, PA 17105
For the PennDot

REPORTER: Amber Garbinski

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MATTHEW F. MARSHALL, ESQUIRE
Dillon McCandless King Coulter & Graham, LLP
600 Cranberry Woods Drive
Cranberry Township, PA 16066
For Fairview Township

JOHN M. STEIDLE, ESQUIRE
EDWIN B. PALMER, ESQUIRE
Burns White LLC
48 26th Street
Pittsburgh, PA 15222
For Bessemer and Lake Erie Railroad

ANN MARIE SHERWIN, PRO SE

ALSO PRESENT:

RONALD HALL
WILLIAM FINIC
MEGAN RULLI
TIMOTHY JABLUNOVSKY
JADE SALYARD, ESQUIRE
PAUL BRR

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 Rail Crossings
 Investigation State
 Route SR0268 & SR0068

Docket No.: I-2019-
 3012769

Evidentiary Hearing

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Judge's Chambers
 Piatt Place
 301 5th Avenue
 Pittsburgh, PA

January 18, 2022
 Commencing at 10:01 a.m

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Docket No. I-2019-3012769

Hearing Date: January 18, 2022

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JUDGE MARY D. LONG: This proceeding today is the date set by the Commission for the hearing on the Investigation upon the Commission's motion into matters pertaining to the proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 formally crosses, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County, docketed at Public Utility Commission Docket Number I-2019-3012769.

I am Administrative Law Judge Mary Long and I've been assigned to preside over this matter and render a recommended decision. Today is Tuesday, January 18th, 2022 and the time is 10:02 a.m. This hearing is being conducted remotely.

I would like to remind Counsel that while I may recognize your voice, the court reporter does not, so please be sure to identify yourself begin speaking - before you begin speaking. I'm also going to ask those who are not speaking, if you

1 would place yourself on mute, so that we can make
2 sure that we can hear everybody.

3 I'm now going to ask main Counsel for
4 each party to introduce themselves for the record.
5 I'm also going to ask them to introduce any
6 co-Counsel who is joining them and to introduce
7 their witnesses and observers who are on the line.

8 So I'd like to begin with the Bureau
9 of Investigation and Enforcement, Ms. Rost.

10 ATTORNEY ROST: Good morning, Your
11 Honor.

12 My name is Kayla Rost, with the Bureau
13 of Investigation and Enforcement. I have with me
14 today Mr. Daniel Helfrich, who is my witness. I
15 also have from the Rail Safety Section observing
16 this matter, Mr. Ronald Hall and Mr. William Finic.
17 And then later on today, around 11:30, our legal
18 intern for I & E, Megan Rulli - that's R-U-L-L-I,
19 may be calling in to observe as well. Thank you.

20 JUDGE: Thank you.

21 Next I would I like to call Counsel
22 for the railroad, Mr. Steidle.

23 ATTORNEY STEIDLE: Good morning, Your
24 Honor.

25 John Steidle on behalf of the -

1 Bessemer Lake Erie Railroad Company. I'm joined by
2 co-Counsel Edwin Palmer. I also have two witnesses,
3 Your Honor, Michael J. Barron, on behalf of the B
4 and LE and also an engineer, Mr. Daniel Radle.

5 JUDGE: Thank you.

6 Ms. Noyes?

7 ATTORNEY NOYES: Thank you Your Honor.

8 For the Department, I do have on the
9 call Charles Keilman, K-E-I-L-M-A-N, and Alicia
10 Kavulic, K-A-V-U-L-I-C. Also observing or listening
11 in, not going to be a witness is Timothy Jablunovsky
12 J-A-B-L-U-N-O-V-S-K-Y. And I believe also observing
13 from our office is Attorney Jade Salyard, J-A-D-E,
14 S-A-L-Y-A-R-D.

15 JUDGE: Thank you.

16 Mr. Marshall? Mr. Marshall?

17 All right.

18 Moving on.

19 ATTORNEY MARSHALL: I'm sorry, I had
20 it on mute.

21 JUDGE: All right.

22 That's okay. Continue now - go ahead.

23 ATTORNEY MARSHALL: I'm sorry.

24 My name is Attorney Matt Marshall.

25 I'm representing Fairview Township. My last name is

1 spelled M-A-R-S-H-A-L-L. Supervisor of the township
2 Paul Brr may be calling in. His last name is
3 spelled B-R-R. First name Paul.

4 JUDGE: Thank you.

5 And Ms. Sherwin?

6 MS. SHERWIN: Yes.

7 My name is Anna Marie Sherwin, A-N-N-
8 A, capital M-A-R-I-E, S-H-E-R-W-I-N. And I am the
9 landowner over the tunnel - one of the landowners
10 over the tunnel.

11 JUDGE: Okay.

12 Thank you. All right.

13 I'd like to start with a little bit of
14 housekeeping. I'll note for the record that this
15 investigation involves two crossings. On
16 November 12, 2021 the parties filed a joint
17 stipulation regarding the uncontested crossing, and
18 that stipulation will be resolved along with the
19 contested crossing in the recommended decision
20 regarding this investigation.

21 I reviewed the testimony presented by
22 PennDOT and the - Ms. Kavulic - it remains that the
23 AEAC - AECAN report should be protected. I note
24 that in a prehearing conference on August 16th, 2021
25 I did direct the parties to discuss this issue.

1 Mr. Steidle, is the railroad's
2 position that none of its proposed exhibits or
3 testimony is proprietary or confidential security
4 information?

5 ATTORNEY STEIDLE: We - we - John
6 Steidle. We don't object to - there's nothing in
7 the reports -.

8 ATTORNEY PALMER: The reports would be
9 proprietary potentially - but none of the other
10 exhibits. This is Edwin Palmer.

11 JUDGE: Okay.

12 The report is included in the present
13 testimony and is not marked as proprietary.

14 So are you asking the report to be
15 marked as proprietary?

16 ATTORNEY STEIDLE: No, it's not
17 necessary, Your Honor.

18 JUDGE: All right.

19 All right. Thank you.

20 All right.

21 The next order of business, I am in
22 receipt of your witness matrix. I want to thank you
23 all very much for working on that. It's very
24 helpful to me. I would like to call the witnesses
25 in the order that you have them listed on the - the

1 witness matrix. I'm going to ask the witness to -
2 you know, state and spell their name. I will ask
3 the Counsel then to introduce them, to walk through
4 the colloquy regarding their written testimony.

5 Once the written testimony is dealt
6 with, then we will open them to the Cross
7 Examination indicated on the Cross Examination
8 matrix. I wait until the witness has been
9 completely interrogated before the testimony or
10 exhibits are moved for admission into the record.

11 Does anybody have any questions about
12 the procedure we're going to be following today?

13 All right.

14 With that, I would like to call Mr.
15 Michael J. Barron.

16 ATTORNEY BARRON: I am present on the
17 phone, Your Honor. Good morning.

18 ---

19 MICHAEL J. BARRON, ESQUIRE,
20 CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
21 HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS
22 FOLLOWS:

23 ---

24 JUDGE: Thank you.

25 Could you please state and spell your

1 name and provide your business address for the court
2 reporter?

3 THE WITNESS: My name is Michael,
4 M-I-C-H-A-E-L, J., middle initial J., Barron, B-A or
5 B, as in boy, A-R-R-O-N. I am an attorney with the
6 firm of Fletcher, F-L-E-T-C-H-E-R, ampersand,
7 Sippel, S-I-P-P-E-L, a partner in that firm, located
8 at 29 North Wacker, W-A-C-K-E-R, Drive, Chicago,
9 Illinois, 60606.

10 JUDGE: Thank you, sir.

11 Mr. Steidle, you may begin.

12 ATTORNEY STEIDLE: Thank you, Your
13 Honor.

14 ---

15 DIRECT EXAMINATION

16 ---

17 BY ATTORNEY STEIDLE:

18 Q. Mr. Barron, what - what is - what is your
19 relationship with the Bessemer Lake Erie Railroad
20 Company?

21 A. I am a Counsel to the Bessemer Lake Erie
22 Railroad Company. The Bessemer Lake Erie Railroad
23 Company is headquartered in the suburbs of Chicago,
24 Illinois, specifically, Homewood, Illinois. And I
25 provide counsel to representatives of the Bessemer

1 Lake Erie Railroad Company from that location as
2 well as my downtown Chicago location.

3 Q. Are you authorized to testify in this
4 proceeding on behalf of the B AND LE?

5 A. Yes, I am.

6 Q. Now, Mr. Barron, we previous - previously
7 submitted Direct Testimony, some exhibits, and then
8 Rebuttal Testimony on your behalf. With respect to
9 those submissions, if you were asked all of those
10 questions today that you were asked in your written
11 testimony, would your answers be substantially the
12 same?

13 A. They would be substantially the same.

14 Q. With - with respect to those submissions,
15 is there anything you'd like to add or - or to
16 amend?

17 A. In the Rebuttal Testimony at line -
18 strike that.

19 On the Rebuttal Testimony, page 2 of line
20 19, I provided a date of October 24th, 2021. That
21 is a mistake. The date should read October 24th,
22 2002. Beyond that, I'd make no change.

23 Q. Other than that, is there anything else
24 that you'd like to add regarding your testimony that
25 was submitted?

1 A. I - I - we do have some supplemental
2 testimony that I would like to add.

3 Q. Okay.

4 With - with respect to that, can you -
5 can you - discuss the Rails to Trails condition that
6 was originally contemplated with regard to the
7 submission of the STB?

8 A. Yes.

9 ATTORNEY ROST: Attorney Rost, I have
10 an objection to the question.

11 JUDGE: Hold on.

12 What's the basis for your objection,
13 Ms. Rost?

14 ATTORNEY ROST: Relevancy.

15 JUDGE: Can you explain to me what you
16 mean by that?

17 ATTORNEY ROST: Sure.

18 I'm not sure what the relevance of the
19 submission of the Rails - Rails to Trails to STB
20 would have to do with the disposition of this
21 crossing for state jurisdiction.

22 JUDGE: All right.

23 Mr. Steidle, what's your response?

24 ATTORNEY STEIDLE: Your Honor, part of
25 the STB submission has to do with public use. And

1 there was some testimony - there's actually some
2 additional testimony that - some testimony regarding
3 it - the other witnesses that - that brought up the
4 Rails - the potential for future Rails to Trails
5 use. And I just wanted to get - Mr. - Mr. Barron is
6 very knowledgeable on the STB submission and the
7 determination made thereof regarding that.

8 And I just wanted to - I just want to
9 - we're all here today to make a clear record. And
10 his testimony, it's - it's a brief testimony
11 regarding that submission and I believe it's clearly
12 relevant at - to the proceeding.

13 JUDGE: Thank you.

14 All right.

15 I will permit limited testimony on
16 this issue, with the notion that this is an
17 investigation and is, therefore, a relatively broad
18 inquiry. But let's not spend a lot of time on it.

19 Go ahead, Mr. Steidle.

20 ATTORNEY STEIDLE: Understood, Your
21 Honor.

22 BY ATTORNEY STEIDLE:

23 Q. Mr. Barron, with respect to that STB
24 submission and the - the Rails to Trails' condition,
25 can you add any comment on that?

1 A. Yes.

2 With regard to the Rails to Trails'
3 condition, which was discussed in Exhibit 2, which
4 is an STB order, to my Direct Testimony, the STB
5 decision regarding - which is meant to be decision
6 regarding the abandonment of the Western Allegheny
7 branch, the STB discussed the fact that the
8 Pennsylvania Department of Conservation and Natural
9 Resources sought that imposition of a trail
10 condition so that they could seek to acquire the
11 rail line at our trail, subject to activation of the
12 rail Court Order, under the Federal Trails Act at
13 1616 U.S. Code 1247(b).

14 But the B and LE refused to agree to a
15 trail condition and, therefore, the STB denied the
16 request. And that means that once B and LE removed
17 all this track and material and consummated the
18 abandonment and sold the former rail property, that
19 there was no longer a rail interested on the line.
20 That - it was simply vacant land like any other
21 field or parcel that could be sold free and clear of
22 any liens or conditions.

23 Q. And - and finally, Mr. Barron, with
24 respect to your initial submission that contained 12
25 exhibits, do you have any additional exhibits as

1 part of your Direct Testimony?

2 A. Yes.

3 I do, but it would be identified as
4 Exhibit 16. And I will identify it as the
5 February 1st, 2012 secretarial letter in the prior
6 docket. And this should be included in our response
7 to the directive to provide past Orders of the
8 Commission or secretarial letters regarding the
9 tunnel. So it should be an additional disclosure to
10 our obligation to provide past orders or secretarial
11 letters.

12 ---

13 (Whereupon, Bessemer Lake Erie Railroad's Exhibit
14 16, 2/1/12 Secretarial Letter, was marked for
15 identification.)

16 ---

17 BY ATTORNEY STEIDLE:

18 Q. Mr. - does this conclude your Direct
19 Testimony?

20 A. It does.

21 ATTORNEY STEIDLE: Your Honor, I
22 tender the witness.

23 JUDGE: All right.

24 Ms. Rost, do you have some Cross
25 Examination for Mr. Barron?

1 ATTORNEY ROST: I do, Your Honor.

2 JUDGE: Go ahead.

3 ATTORNEY ROST: May I proceed?

4 Thank you.

5 JUDGE: Yes, please.

6 ---

7 CROSS EXAMINATION

8 ---

9 BY ATTORNEY ROST:

10 Q. Good morning, Attorney Barron.

11 Are you licensed to practice - practice
12 law in Pennsylvania?

13 A. I am not licensed to practice law in
14 Pennsylvania.

15 Q. So you testified that you provided legal
16 services to the Bessemer and Lake Erie Railroad
17 Company since 2004.

18 Is that correct?

19 A. Yes, that is correct.

20 Q. Are you familiar with the Pennsylvania
21 Public Utility Code?

22 A. I have reviewed it on occasion.

23 Q. Specifically, are you familiar with
24 Section 2709, the Disposition of Rural Property by
25 Public Utility Engaged in a Railroad Business?

1 A. And - I don't recall it by number. You
2 can read the statute, if it's not that long. That
3 might help me determine whether I'm familiar with
4 it.

5 Q. So - I mean Section 2709, the name of the
6 section is Disposition of Rural Property of Public
7 Utility Engaged in a Railroad Business.

8 Does that sound familiar?

9 A. I may have heard it before, but I could
10 not identify it by - by language or otherwise say
11 what it - what it means this morning.

12 Q. Okay.

13 So pursuant to 2709, did the railroad
14 provide notice of its intention to dispose a rural
15 property to PennDOT?

16 A. Bear with me for a second.

17 I wouldn't - sorry. I would - I have no
18 direct knowledge if they did. I would assume that
19 they would have had to comply with Orders if they
20 undertook a proceeding, or procedures if they
21 undertook a proceeding to file or require notice of
22 a docket in Pennsylvania governing - governing the
23 prior crossings, but I have no direct knowledge if
24 one was actually filed.

25 Q. You have no knowledge if the Bessemer and

1 Lake Erie Railroad provided its intention to dispose
2 of the property to PennDOT?

3 A. We have on record an implication to
4 abolish, B and LE Exhibit 4. And when we turned it
5 in, the document itself -.

6 Q. Mr. Barron, I apologize, but I'm not
7 talking about the application to abolish. I'm
8 talking about railroad's intention to sell the land.

9 A. I am not aware of any intention provided
10 to Pennsylvania DOT to sell the land. I know that
11 as part of the STB proceeding that I referred to,
12 there would have been a requirement to provide
13 notice of - of abandonment of the line to PennDOT.
14 So that would have been required in order for them
15 to get the Order to abandon, under the federal
16 proceeding.

17 But I have no direct knowledge that a
18 notice like that was sent, only that it would have
19 been required as part of the STB proceeding.

20 Q. Did the railroad provide notice of its
21 intention to sell the property to the Pennsylvania
22 Game Commission?

23 A. I'm sorry, the Pennsylvania what
24 Commission?

25 Q. Pennsylvania Game Commission.

1 A. I am not aware of any notice provided to
2 the Pennsylvania Game Commission.

3 Q. Are you aware of whether the intention to
4 sell was provided to the Pennsylvania Fish & Boat
5 Commission?

6 ATTORNEY STEIDLE: Objection, Your
7 Honor. Relevance.

8 JUDGE: What's your response, Ms.
9 Rost?

10 ATTORNEY ROST: Pursuant to Section
11 2709, if these intentions - I'm sorry, these notice
12 of intentions to these agencies are not provided,
13 the disposition of the railroad property could be
14 voided.

15 JUDGE: Objection is overruled.
16 Mr. Barron, you shall answer the
17 question.

18 THE WITNESS: I'm - I'm unaware of any
19 notice being sent specifically to the Pennsylvania -
20 I'm sorry, the agency again?

21 ATTORNEY ROST: Fish & Boat
22 Commission.

23 THE WITNESS: Pennsylvania Fish & Boat
24 Commission.

25 I do know it was part of the STB

1 proceeding, that there would have had to have been
2 an environmental review process conducted in order
3 for B and LE to get the ability to abandon the line,
4 I - I don't know if specific notice was provide to
5 the Fish & Boat Commission.

6 By ATTORNEY ROST:

7 Q. And Mr. Barron, was notice of the
8 intention to sell the land provided to the
9 Department of Environmental Resources or the
10 Department of Conservation and Natural Resources?

11 A. I don't know if specific notice was
12 provided to the first agency you mentioned. I know
13 the Pennsylvania Department of Conservation and
14 Natural Resources participated in the Surface
15 Transportation Board proceeding because they saw the
16 trail use condition and sought to acquire the line
17 for the trail use condition, but that was denied.

18 Q. Now Mr. Barron, you would agree with me
19 that the proceeding before the STB is different than
20 any proceeding before the PUC or any state
21 regulations.

22 Is that correct?

23 A. I would agree that the STB proceeding is
24 a separate proceeding from any state proceeding.

25 Q. So you would also agree with me that

1 you're not aware or have no knowledge on whether or
2 not the Bessemer and Lake Erie Railroad provided
3 written notice of its intention to sell the property
4 to the parties mentioned previously?

5 A. Outside of the STB process, I do not.

6 ATTORNEY ROST: That's all the Cross
7 Examination I have at this time, Your Honor.

8 JUDGE: Well, thank you.

9 Mr. Steidle, do you have any Redirect
10 based on Ms. Rost's questions?

11 ATTORNEY STEIDLE: Thank you, Your
12 Honor. Yes, I do.

13 ---

14 REDIRECT EXAMINATION

15 ---

16 BY ATTORNEY STEIDLE:

17 Q. Mr. Barron, what - what was - are you
18 familiar with the - the Surface Transportation
19 Board?

20 A. Yes, I am.

21 Q. Now, with respect to the railroad, and
22 their responsibilities in disposing of property, is
23 it your - what is your understanding regarding the
24 STB and their jurisdiction and their authority - and
25 their authority to grant you - to grant you - to

1 grant the railroad the permission?

2 A. The - my understanding is that the
3 Federal Surface Transportation Board, pursuant to
4 the Interstate Commerce Act, has exclusive and
5 plenary authority with regard to the abandonment and
6 disposition of rail lines and rail property. And
7 that it would - the exclusive remedy procedure for
8 abandoning rail property, and would preempt state or
9 local laws of - that seek to direct how railroads
10 abandon and dispose of their property.

11 Q. Therefore - therefore, Mr. Barron, do you
12 believe that the Bessemer Lake Erie Railroad
13 fulfilled their - all their legal responsibilities,
14 prior to disposing the property to the Western
15 Allegheny Landowners' Association?

16 A. I do.

17 ATTORNEY STEIDLE: I have no further
18 questions on this witness, Mr. Barron.

19 JUDGE: Thank you.

20 Ms. Rost, do you have anything
21 further?

22 ATTORNEY ROST: One second, please.
23 I have one follow-up question, Your
24 Honor.

25 JUDGE: Go ahead.

1

2

RECROSS EXAMINATION

3

4 BY ATTORNEY ROST:

5

6

7

8

Q. Mr. Barron, you would agree that once the STB approved Bessemer and Lake Erie's application to abandon and discontinue service at this location, its jurisdiction ended.

9

Is that correct?

10

11

A. No, I would not agree with that statement.

12

13

14

15

Q. So is your position that even though the STB granted your application to discontinue service on this line, they still retained jurisdiction moving forward?

16

17

ATTORNEY STEIDLE: Objection Your Honor, asked and answered.

18

JUDGE: Okay.

19

20

Let's go one at a time. Mr. Steidle, you have objected on the basis asked and answered?

21

ATTORNEY STEIDLE: Yes.

22

23

JUDGE: Ms. Rost, do you have a response to that objection?

24

25

ATTORNEY ROST: Your Honor, I was just clarifying the response to make sure I understood

1 his answer.

2 JUDGE: All right.

3 Could you ask the question one more
4 time, please, Ms. Rost?

5 ATTORNEY ROST: I will try.

6 BY ATTORNEY ROST:

7 Q. Mr. Barron, is it your position, then,
8 that after the STB granted the application to
9 discontinue service, their jurisdiction over the
10 rail property did not end? Is that what you're
11 saying?

12 A. I am saying that, correct. Once the STB
13 - the authority, their jurisdiction has not ended at
14 that point.

15 ATTORNEY ROST: Thank you, Your Honor.

16 JUDGE: Thank you, Ms. Rost.

17 All right.

18 Ms. Noyes, I understand you also have
19 some questions for Mr. Barron. You may proceed.

20 ATTORNEY NOYES: Thank you, Your
21 Honor.

22 For the record, this is Melissa Noyes.

23 ---

24 RE CROSS EXAMINATION

25 ---

1 BY ATTORNEY NOYES:

2 Q. Mr. Barron, I'm going to pick up where
3 Ms. Rost left off with that.

4 Is it your position that the Surface
5 Transportation Board's jurisdiction continued beyond
6 the granting of the abandonment - do they still have
7 jurisdiction today?

8 A. No, they don't.

9 Q. At what point is it your opinion that
10 their jurisdiction ended?

11 A. At the time that the B and LE fulfilled
12 all the conditions of the abandonment and disposed
13 of the property, therefore, taking it out of the
14 National Rail Network.

15 Q. And when was that?

16 A. I would have to go back to the time that
17 it was sold to the landowners. So rough - I think
18 the deed reflected sometime in the second half of
19 2002.

20 Q. So just to be clear, it's your position
21 that the Surface Transportation Board's jurisdiction
22 ended at the time the property was disposed or sold
23 in 2002?

24 A. Yes. At that point jurisdiction had
25 ended.

1 Q. So they do not have jurisdiction as we
2 sit here today.

3 Correct?

4 A. As we sit here today, no.

5 Q. Okay.

6 And sir, you indicated in your Direct
7 Testimony you're not licensed in Pennsylvania. You
8 weren't Counsel for the railroad at the time back in
9 2002, when the transfer occurred and when the
10 proceedings were before the STB.

11 Is that correct?

12 A. That is correct. I am not licensed in
13 Pennsylvania. I have not ever been licensed in
14 Pennsylvania, except for one matter not related to
15 this at all. And the - and at the time of the
16 abandonment proceeding and sale of the West
17 Allegheny Land - sale to the West Allegheny Land
18 Authority, I was not Counsel for B and LE in any of
19 that time period.

20 Q. Did your firm represent the railroad
21 during that time?

22 A. No, it did not.

23 I'm sorry. What time are you referring
24 to specifically?

25 Q. I'm sorry.

1 The same time the STB proceedings for the
2 railroad and the transfer of the land.

3 A. I believe it did not. At the time, I was
4 not a member of that firm but I have no reason to
5 think they were involved in the abandonment or
6 disposition of the property.

7 Q. And you indicated in your Direct
8 Testimony that you reviewed the records as a basis
9 for your testimony.

10 Is that records that were in possession
11 of the railroad?

12 A. Records in possession of the railroad and
13 also documents it would require for various
14 agencies, such as copies of recorded deeds and
15 copies of other STB Orders.

16 Q. And you would agree with me that the
17 railroad did, in fact, apply and invoke the
18 jurisdiction of the PUC for the purpose of the
19 abolishment of several railroad crossings.

20 Correct?

21 ATTORNEY STEIDLE: Objection, Your
22 Honor -.

23 JUDGE: Okay.

24 Hold on, hold on, hold on.

25 Mr. Steidle, go ahead.

1 ATTORNEY STEIDLE: Your Honor, thank
2 you.

3 I object to that question for two
4 reasons.

5 Number one, it's compound. And number
6 two, it's asking him to make a legal conclusion and
7 - and that - that's your job not - not the
8 witness's -.

9 JUDGE: Well, as I understand Mr.
10 Barron's testimony, there's an awful lot of legal
11 analysis and legal conclusions in it that I have
12 just kind of let go. So I will overrule that part
13 of your objection.

14 However, I will ask Ms. Noyes if she
15 could reframe the question to make it two single
16 questions instead of a compound question.

17 ATTORNEY NOYES: Thank you, Your
18 Honor. I apologize.

19 BY ATTORNEY NOYES:

20 Q. The - you'd agree with me, based upon
21 your review of records, that B - that the railroad
22 applied to abolish multiple crossings and applied to
23 the PUC to abolish multiple crossings.

24 Correct?

25 A. I do agree with that.

1 Q. One of the crossings that they put up to
2 the PUC to approve for abolishment, was, in fact,
3 the crossing that's at issue, Route 268.

4 Correct?

5 A. I would agree with that.

6 Q. And the PUC denied that request.

7 Correct?

8 ATTORNEY STEIDLE: Objection, Your
9 Honor. That is not an accurate statement of - of
10 it.

11 JUDGE: Well, Mr. Barron has said that
12 he has reviewed the records relative to this
13 crossing. If he knows the answer to that question,
14 I think he's qualified at this point to provide it.

15 Mr. Barron, if you don't know the
16 answer to the question, I don't know is completely
17 fine.

18 THE WITNESS: Okay.

19 My understanding was there was not a
20 decision on that crossing. But I would refer to
21 whatever records of decision or however the PUC
22 records that docket -. But I don't believe it was
23 denied, that direct crossing.

24 BY ATTORNEY NOYES:

25 Q. But nevertheless, the railroad had

1 acknowledged the jurisdiction of the PUC by filing
2 that document.

3 Correct?

4 A. I would argue it sought relief from the
5 PUC, as opposed to whether they sought the
6 jurisdiction - or whether jurisdiction was proper,
7 that which came under Pennsylvania law. But I - to
8 my prior testimony, I do believe that that was
9 standing that this procedure was followed, there is
10 still an argument for preemption by the Federal
11 Surface Transportation Board over Pennsylvania law.
12 Notwithstanding what the B and LE sought to do in
13 their application.

14 Q. Prior to submitting the testimony - your
15 Direct Testimony and Rebuttal Testimony, did you
16 review case law on the issue of preemption between
17 the STB and the PUC?

18 JUDGE: Okay. Okay.

19 ATTORNEY STEIDLE: Objection,
20 relevance.

21 JUDGE: Now - now I think - yes.
22 Wait, hold on.

23 Ms. Noyes, I think at this point we
24 are getting into the area that I would expect
25 argument from the parties in briefs regarding the

1 review of case law.

2 If I understood Mr. Barron's testimony
3 correctly, he did not begin representing the
4 railroad until 2004. So I think the events that
5 occurred in 2002 are probably not what - beyond the
6 scope of what he's talking about here.

7 ATTORNEY NOYES: I'm sorry, Your
8 Honor.

9 JUDGE: Do you have any other -?

10 ATTORNEY NOYES: I do. I was not
11 referring to the 2002. I was referring to the
12 testimony here -

13 JUDGE: Okay.

14 ATTORNEY NOYES: - exploring the basis
15 for these legal opinions, kind of testing his
16 opinions that he's proffered within his testimony,
17 what the basis for that is.

18 JUDGE: Well - I would like to make
19 clear that in my view, the purpose of Mr. Barron's
20 testimony is simply to lay out some procedural
21 history regarding the railroad's position in this
22 matter.

23 However, the ultimate decision
24 regarding jurisdiction, we do have a Motion for
25 summary judgment on that issue and I expect the

1 lawyers opposing that motion to make their legal
2 arguments on that basis. So if you want to test Mr.
3 Barron's knowledge and information about the
4 documentation that he sponsored as part of his
5 testimony, I'll - I'll allow that. But I'd really
6 prefer to have legal argument, written paperwork
7 after the hearing.

8 ATTORNEY NOYES: I understand, Your
9 Honor. I - I'll move on. I understand that the
10 direction of - and the concern would be testimony
11 other than the procedural history.

12 That's all I have for this witness.

13 JUDGE: All right.

14 Thank you.

15 Mr. Steidle, do you have any Redirect?

16 ATTORNEY STEIDLE: Briefly, Your
17 Honor.

18 ---

19 REDIRECT EXAMINATION

20 ---

21 BY ATTORNEY STEIDLE:

22 Q. Mr. Barron - Mr. Barron, do you have
23 Exhibit 3 in front of you?

24 A. I'm scrolling through. I - I do, I just
25 got to get to that page. And Exhibit 3, if I'm

1 reading it right, appears to be a notice from the
2 Pennsylvania PUC, dated April 30th, 2002.

3 Is that correct?

4 Q. That - that's correct.

5 Will you - will you go to page four of
6 that exhibit?

7 A. I'm on page four. Is that the one that
8 begins at crossing number 1018?

9 Q. Yes, sir. Yes, sir.

10 So one, two, three, four paragraphs down.
11 The attorney previously just asked you something
12 with respect to the B and LE's application to
13 abolish, and she said it was denied. If we read the
14 last - the last sentence of paragraph four, with
15 respect to the two crossings, it says these
16 crossings will be the subject of future secretarial
17 letters or formal hearing.

18 Is it your understanding that nowhere in
19 that document was the application to abolish this -
20 this current crossing was denied?

21 ATTORNEY ROST: Objection Your Honor,
22 Kayla Rost.

23 JUDGE: Yeah, go ahead, Ms. Rost.

24 ATTORNEY ROST: I object on the basis
25 that the pleading speaks for itself, and, you know,

1 any characterization or interpretation, you know,
2 therefore, is objected.

3 JUDGE: The objection -.

4 ATTORNEY STEIDLE: Your Honor, may I
5 respond?

6 JUDGE: Go ahead.

7 Go ahead.

8 ATTORNEY STEIDLE: I just want to
9 clear up the previous question that was posed to Mr.
10 Barron, when - when it was asked or stated that the
11 application to abolish was denied. And so with the
12 - I just wanted to make sure the record's clear with
13 respect to that.

14 JUDGE: All right.

15 I am - I have noted on my exhibits
16 that you have drawn Mr. Barron's attention to the
17 last sentence of the fourth paragraph, which says
18 these two crossings shall be the subject of future
19 secretarial letters or formal hearing. And note for
20 the record that that sentence does not include the
21 word denied.

22 Next question.

23 ATTORNEY STEIDLE: I have no further
24 questions, Your Honor.

25 JUDGE: Thank you.

1 Ms. Noyes, do you have any last
2 follow-up based on that limited Redirect of Mr.
3 Steidle?

4 ATTORNEY NOYES: Yes, I do, very
5 briefly.

6 ---

7 RECROSS EXAMINATION

8 ---

9 BY ATTORNEY NOYES:

10 Q. Mr. Barron, that same page of the
11 Railroad's Exhibit 3, -

12 A. Yes, ma'am.

13 Q. - I'm directing your attention to
14 paragraph one.

15 A. Is that the paragraph that says -?

16 Q. I'm sorry, paragraph number one, towards
17 the bottom of the page.

18 A. Oh, so item number one -?

19 Q. Correct.

20 Now, you would agree with me that
21 although it doesn't say expressly denied, the PUC
22 declined to abolish the crossing that we're here for
23 today.

24 Correct?

25 ATTORNEY STEIDLE: Objection, Your

1 Honor.

2 JUDGE: What's the basis of your
3 objection?

4 ATTORNEY STEIDLE: Number one, it's
5 beyond the scope of Recross. And again - and again,
6 the document speaks for itself. It reads what it
7 reads.

8 JUDGE: Okay.

9 Mr. Steidle's objection is sustained.
10 The document speaks for itself, and the
11 interpretation thereof is a - legal argument in the
12 parties' briefs.

13 Ms. Noyes, -

14 ATTORNEY NOYES: Thank you Your Honor.

15 JUDGE: - do you have anything further
16 for Mr. Barron?

17 ATTORNEY NOYES: I do not. Thank you.

18 JUDGE: Thank you.

19 All right.

20 Mr. Steidle, do you have anything
21 further you would like to present regarding Mr.
22 Barron?

23 ATTORNEY STEIDLE: Your Honor, yes.

24 Thank you.

25 At this time, I - I would move for the

1 admission of Mr. Barron's Direct Testimony and mark
2 it as B and LE's Statement Number One. That was
3 from November 15th, 2021.

4 ---

5 (Whereupon, Bessemer and Lake Erie Railroad's
6 Exhibit Statement 1, 11/15/21 Michael Barron
7 Direct Testimony, was marked for identification.)

8 ---

9 ATTORNEY STEIDLE: His December 15,
10 2021 Rebuttal Testimony, marked as B and LE's
11 Statement Number 2.

12 ---

13 (Whereupon, Bessemer and Lake Erie Railroad's
14 Exhibit Statement 2, 12/15/21 Michael Barron
15 Rebuttal Testimony, was marked for
16 identification.)

17 ---

18 ATTORNEY STEIDLE: And for the
19 admission of B and LE Exhibits 1 through 12 and 16.

20 ---

21 (Whereupon, Bessemer and Lake Erie Railroad's
22 Exhibit 1, Attachment for Statement 1, was marked
23 for identification.)

24 (Whereupon, Bessemer and Lake Erie Railroad's
25 Exhibit 2, Attachment for Statement 1, was marked

1 for identification.)

2 (Whereupon, Bessemer and Lake Erie Railroad's
3 Exhibit 3, Attachment for Statement 1, was marked
4 for identification.)

5 (Whereupon, Bessemer and Lake Erie Railroad's
6 Exhibit 4, Attachment for Statement 1, was marked
7 for identification.)

8 (Whereupon, Bessemer and Lake Erie Railroad's
9 Exhibit 5, Attachment for Statement 1, was marked
10 for identification.)

11 (Whereupon, Bessemer and Lake Erie Railroad's
12 Exhibit 6, Attachment for Statement 1, was marked
13 for identification.)

14 (Whereupon, Bessemer and Lake Erie Railroad's
15 Exhibit 7, Attachment for Statement 1, was marked
16 for identification.)

17 (Whereupon, Bessemer and Lake Erie Railroad's
18 Exhibit 8, Attachment for Statement 1, was marked
19 for identification.)

20 (Whereupon, Bessemer and Lake Erie Railroad's
21 Exhibit 9, Attachment for Statement 1, was marked
22 for identification.)

23 (Whereupon, Bessemer and Lake Erie Railroad's
24 Exhibit 10, Attachment for Statement 1, was
25 marked for identification.)

1 (Whereupon, Bessemer and Lake Erie Railroad's
2 Exhibit 11, Attachment for Statement 1, was
3 marked for identification.)

4 (Whereupon, Bessemer and Lake Erie Railroad's
5 Exhibit 12, Attachment for Statement 1, was
6 marked for identification.)

7 ---

8 JUDGE: All right.

9 I would like to ask if any other party
10 - all right. Mr. Barron identified supplemental
11 Exhibit 16 as the - I believe it was the secretarial
12 letter, dated February 1st, 2012.

13 Does any other party have that
14 document included in their proposed exhibits?

15 ATTORNEY STEIDLE: Your Honor, this is
16 John Steidle. I can speak to that.

17 JUDGE: Okay.

18 ATTORNEY STEIDLE: It - it was - it
19 was included in PennDOT Exhibit - PennDOT Exhibit E
20 - B.

21 JUDGE: B. All right.

22 So rather than killing another tree, I
23 will note that B and L RR's proposed Exhibit 16 is
24 the same as PennDOT's Exhibit B, as in boy.

25 Is there any objection to the

1 admission of B and L RR Exhibit 16 slash DOT Exhibit
2 B?

3 Hearing none, the exhibit is admitted
4 in -.

5 ATTORNEY ROST: Your Honor.

6 JUDGE: Oh, go ahead. I'm sorry.

7 ATTORNEY ROST: I just want to
8 clarify. You're talking just about Exhibit 16.

9 Right?

10 JUDGE: At this moment, just Exhibit
11 16.

12 ATTORNEY ROST: Thank you.

13 JUDGE: Do you have any objection to
14 its admission?

15 ATTORNEY ROST: I have no objection to
16 Exhibit 16. Thank you.

17 JUDGE: Okay.

18 ATTORNEY NOYES: No objection from our
19 Department, either. This is Melissa Noyes, sorry.

20 JUDGE: Thank you.

21 So Buffalo - B and L RR Exhibit 16 is
22 hereby admitted into the record.

23 ---

24 (Whereupon, Bessemer and Lake Erie Railroad's
25 Exhibit 16, 2/1/12 Secretarial Letter, was

1 admitted.)

2

3

JUDGE: Are there any objections to
4 Mr. Barron's Direct Testimony, Statement One,
5 including exhibits - attached Exhibits 1 through 12?

6

ATTORNEY ROST: Your Honor, this is
7 Kayla Rost. I apologize that this is kind of out of
8 turn and the timing's a little off. I & E would be
9 objecting to Bessemer and Lake Erie - Mr. Barron's
10 testimony in - in the sense that - Rebuttal
11 Testimony for sure, and then the Direct Testimony,
12 any legal conclusion or analysis which was provided
13 in that testimony.

14

ATTORNEY NOYES: And the Department
15 joins that objection, Your Honor. This is Melissa
16 Noyes.

17

JUDGE: Okay.

18

Is there any objection or - does - are
19 the parties willing to stipulate to the authenticity
20 of BL and E Exhibits 1 through 12 that were included
21 with Mr. Barron's Direct Testimony Statement One?

22

ATTORNEY ROST: I & E has no objection
23 to the authenticity of the exhibits.

24

JUDGE: Okay.

25

And Ms. Noyes?

1 ATTORNEY NOYES: For the - I'm sorry.
2 Same for the Department. Thank you.

3 JUDGE: All right.

4 I will admit Mr. Barron's Direct
5 Testimony, identified as B and L RR Statement 1 for
6 admission into the record, with the understanding
7 that the legal analysis is left to the lawyers in
8 this case, and that no particular expert weight is
9 given to that portion of his testimony. So Bessemer
10 Lake Erie's Railroad Statement 1 is hereby admitted
11 into the record.

12 ---

13 (Whereupon, Bessemer Lake Erie Railroad's Exhibit
14 Statement 1, 11/15/21 Michael Barron Direct
15 Testimony, was admitted.)

16 ---

17 JUDGE: I'll also note there's an
18 objection to the admission of Rebuttal Testimony of
19 Mr. Baron identified as Bessemer and Lake Erie
20 Statement Number 2. And I will grant the objection
21 to the admission of that testimony. It is not
22 admitted as it is exclusively legal argument.

23 ATTORNEY STEIDLE: If - if I may, Your
24 Honor.

25 JUDGE: Yeah.

1 ATTORNEY STEIDLE: Mr. - Mr. Barron -
2 if I may, Your Honor, this is John Steidle. Mr.
3 Barron is an attorney. And he was asked on Cross
4 Examination regarding - regarding the sale on behalf
5 of the railroad.

6 And number two, with respect to the
7 Rebuttal Testimony, it - he - Mr. Barron's Rebuttal
8 Testimony goes to the heart of the fact part of some
9 of the questions would be posed regarding the sale
10 and whether or not it's still - whether or not it is
11 currently a railroad facility.

12 So I - I understand the Court's
13 position regarding his testimony reaching legal
14 conclusions, but he was asked those questions. And
15 - and as an attorney, he should - he should be - his
16 testimony should be considered then part of the
17 record.

18 JUDGE: Well, except that he hasn't
19 entered an appearance as an attorney in this
20 particular matter, Mr. Steidle, and presumably you
21 and - have done similar legal research and can make
22 legal argument in your brief on this issue. And I
23 believe you have made much of the legal argument in
24 your Motion for Summary Judgment. Unless you can
25 point me to some factual questioning in the Rebuttal

1 that - that requires admission into the record, I'm
2 not inclined to revisit my ruling.

3 ATTORNEY STEIDLE: Understood, Your
4 Honor. I'll bring it up later on. Thank you.

5 JUDGE: All right. All right.

6 Is there anything further we need from
7 Mr. Barron?

8 Mr. Barron, you may step down and I
9 thank you very much for your time today.

10 ATTORNEY BARRON: Thank you, Your
11 Honor.

12 As information, I will remain on the
13 line just as a representative of B and LE, but I
14 won't be saying anything.

15 JUDGE: That's fine. Thank you.

16 All right.

17 Mr. Steidle, you may call your next
18 witness.

19 ATTORNEY PALMER: Your Honor, this is
20 Edwin Palmer, on behalf of Bessemer and Lake Erie.
21 At this time, we would call Daniel Paul Radle.

22 ---

23 DANIEL PAUL RADLE,
24 CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
25 HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS

1 FOLLOWS:

2

3 JUDGE: Can you please state and spell
4 your name and provide your business address for the
5 court reporter?

6 THE WITNESS: My name is Daniel Paul
7 Radle, Jr. D-A-N-I-E-L, P-A-U-L, R-A-D-L-E, Jr.
8 And I'm employed by AECOM, and my address is 100
9 Sterling Parkway, Suite 205, Mechanicsburg,
10 Pennsylvania, 17050.

11 JUDGE: Thank you, sir.

12 Mr. Palmer, you may proceed.

13 ATTORNEY PALMER: Thank you, Your
14 Honor.

15

16

DIRECT EXAMINATION

17

18 BY ATTORNEY PALMER:

19 Q. Mr. Radle, you have previously offered
20 testimony that was submitted to the Court on
21 November 15th, 2021.

22 Correct?

23 A. Yes.

24 Q. And that testimony included a
25 verification.

1 Correct?

2 A. Yes, that's correct.

3 Q. And did you sign that verification?

4 A. Yes, I did.

5 Q. And sir, did you also submit Rebuttal
6 Testimony on this matter on December 15, 2021?

7 A. Yes, I did.

8 Q. And did you submit your signed
9 verification with that testimony as well?

10 A. Yes.

11 Q. And if you were asked all the questions
12 today that you were asked in your prior submitted
13 written testimony, and I'm referring to both your
14 Direct Testimony and your Rebuttal Testimony, would
15 your answers be substantially the same?

16 A. Yes, they would.

17 Q. And Mr. Radle, I just want to follow up
18 with you on one additional area. Since you
19 submitted your Rebuttal Testimony on December 15,
20 2021, did you have the opportunity to review the
21 Rebuttal Testimony of Mr. Helfrich from the Bureau
22 of Investigation?

23 A. Yes, I did.

24 Q. And in his Rebuttal Testimony, Mr.
25 Helfrich testified about the - whether or not the

1 strip mining in the area, the Kincaid mine and the
2 Upper Freeport coal seam have any impact on the
3 structural integrity of the tunnel.

4 Do you have any response to Mr.
5 Helfrich's testimony?

6 A. Yeah, I do. And what I would like to
7 state for the record is even if - you know, there
8 was no mining necessarily above the tunnel or
9 potentially directly below the tunnel, I just wanted
10 to point out that we brought that document to light
11 because of the fact of activities and stuff, mining
12 in that area and the way that it may have been done
13 in the time of that Kincaid Mine operation.

14 There may have been some disturbance of
15 the soil above and in the space - you know, between
16 the roadway and the top of the structure. So simply
17 wanted to point out that there could have been
18 disturbance to virgin materials or deposition of
19 spoils or other raw materials or other site proper
20 mining activities. I - I recognize - you know, that
21 that was the - we have the one piece of this that
22 was probably important to point out.

23 Q. Other than that testimony, Mr. Radle, do
24 you have any other additions or corrections that you
25 need to make to your previously-submitted testimony?

1 of material that you and other civil engineers would
2 normally rely on and give opinions concerning the
3 structural integrity of a structure such as the
4 tunnel under Route 268?

5 A. It is. It is a document that we - we
6 would rely on for identification of mining in the
7 vicinity of a structure. It may or may not have
8 direct implications on the integrity of the
9 structure.

10 ---

11 (Whereupon, Bessemer and Lake Erie Railroad's
12 Exhibit 15, Coal Status Report, was marked for
13 identification.)

14 ---

15 BY ATTORNEY PALMER.

16 Q. But that's part of your analysis,
17 Correct?

18 A. Correct.

19 Q. And did you, in fact, rely on that
20 document as part of your analysis in this case?

21 A. Yes, we did reference it.

22 ATTORNEY PALMER: Your Honor, at this
23 time I would tender the witness for Cross.

24 JUDGE: All right.

25 Thank you.

1 Ms. Rost?

2 ATTORNEY ROST: Yes, Your Honor, may I
3 proceed? Thank you.

4 ---

5 CROSS EXAMINATION

6 ---

7 BY ATTORNEY ROST:

8 Q. Good morning Mr. Radle.

9 Did you physically visit the tunnel to
10 complete the study or did you send other individuals
11 from AECOM to complete the study?

12 A. I sent a team of other individuals to the
13 site.

14 Q. Your report labeled as Exhibit 14, is it
15 true that it's based purely on a visual review of
16 the tunnel?

17 A. A visual review of the tunnel, and review
18 of the documents that we received from BL - you
19 know, the B and LE record for the structure itself,
20 its original construction drawings and subsequent
21 modifications.

22 Q. So based upon the visual review of the
23 tunnel, you - or I should say your team was unable
24 to determine if any other collapses were present
25 inside the tunnel other than the obvious collapse

1 near the east portal?

2 A. That is correct. We did not enter the
3 tunnel due to the fact that there was a collapse
4 from a - a risk perspective. We were able to
5 observe that there were other areas in the liner
6 that were suspicious and, therefore, a reason not to
7 enter at that time.

8 Q. Did your team complete any other studies
9 to determine the - I guess the structural integrity
10 of the inside of the tunnel, whether it be a bore
11 drilling or other type of procedure?

12 A. I'm not sure necessarily what a
13 geotechnical boring would tell me with respect to
14 the structural integrity of the - the tunnel
15 structure itself. As noted in the original
16 documents, it was a rock cut with an actual timber
17 roof structure and vents. The timber vents on the
18 timber roof structure were - from what we could
19 observe from the outside were in very poor
20 condition.

21 Q. Thank you.

22 And is it safe to assume that the
23 significant ponding showcased in the pictures
24 attached to your report were not present when the
25 railroad was active on this line?

1 A. I would agree with that.

2 I would -.

3 Q. Are you aware -.

4 A. I -.

5 JUDGE: Hold on one second.

6 Mr. Radle, you can finish your answer.

7 THE WITNESS: Yeah.

8 Thank you, Your Honor.

9 I would simply like to offer that the
10 tunnel is in a depressed area, so it is a location
11 that will collect the water. With respect to the
12 collection, I expect that there was potentially some
13 ponding, but there should have been drainage through
14 the tunnel, assuming that it - and again, this is an
15 assumption, but it had a freely draining or profile
16 appropriate for water.

17 BY ATTORNEY ROST:

18 Q. Thank you.

19 And are you aware of whether the railroad
20 regraded the tunnel after it removed the track and
21 ties?

22 A. I am not.

23 Q. Are you aware if the railroad removed any
24 of the ballast in or near the tunnel?

25 A. I am not. The evidence there at the site

1 did indicate that there was some remnants of the old
2 track there. However, I did not see any railroad
3 ties from the further evidence.

4 ATTORNEY ROST: Thank you, Mr. Radle.
5 That's all I have.

6 JUDGE: Right.

7 I'm going to depart from how I handled
8 Mr. Barron and I'm going to move on to allow PennDOT
9 to cross examine and then, Mr. Palmer, I'll come
10 back to you to do an omnibus Redirect if you wish to
11 do so.

12 ATTORNEY PALMER: That's fine, Your
13 Honor.

14 JUDGE: So with that - thank you. Ms.
15 Noyes, do you have any questions for Mr. Radle?

16 ATTORNEY NOYES: I do, Your Honor,
17 yes. Thank you.

18 ---

19 CROSS EXAMINATION

20 ---

21 BY ATTORNEY NOYES:

22 Q. Mr. Radle, if I understand correctly, you
23 never personally have been out to the site of this
24 particular crossing?

25 A. That is correct.

1 Q. Okay.

2 I'd like you - directing your attention
3 to page two, line 12 of your Rebuttal Testimony, my
4 site investigation allowed me to observe the
5 condition of the tunnel. So that's not quite
6 accurate.

7 Correct?

8 A. I'm sorry. Let me - let me take a look
9 at this. Which reference Rebuttal Testimony
10 document?

11 Q. Page two, line 12.

12 A. I would like to correct that to state our
13 - our teams' site investigation. That's correct, I
14 was not at the site, I've stated twice now.

15 Q. And along those lines, the condition of
16 the tunnel, wouldn't it be more accurate to say that
17 you observed the condition of the ends of the
18 tunnel?

19 A. That - that would be a fair statement.

20 Q. Fair or more accurate?

21 A. I would consider it an accurate statement
22 then. We cannot see the actual rock cut behind the
23 tunnel liner, regardless of whether that's at the
24 end of the tunnel or within the limits of the
25 tunnel.

1 Q. Okay.

2 Am I correct that the process of - of
3 boring would have allowed you to have more insight
4 into the interior aspects of the tunnel that were
5 unreachable because of the collapse and safety
6 concerns?

7 A. Again, I'm not certain that a
8 geotechnical boring completed with a small-diameter
9 hole would offer much specifics to the integrity of
10 the actual roof - timber roof structure, the vents
11 that are concealed by the liner or - or the actual
12 liner itself other than the visual evidence from the
13 outside or within the tunnel looking up at the
14 liner, where - where accessible.

15 Q. But that's not something that your team
16 tried to do, regardless.

17 Correct?

18 A. We - we did not.

19 Q. Now you indicated in your Direct
20 Testimony, I believe on page five, that when your
21 team went to the site, it was wooded and
22 snow-covered.

23 Correct?

24 A. Yes, that's correct.

25 Q. Okay.

1 And for this - what you deemed a site
2 investigation, you put - you were offering testimony
3 on Rebuttal that you did not see a sinkhole.

4 Is that accurate as well?

5 A. My team utilized an inspection probe and
6 scoured the surface of the roadway, around the
7 roadway, and the grade above and did not make notice
8 or take notice - although snow-covered, of any
9 subsidence that was observable.

10 Q. And you're just referring to the roadbed.

11 Is that correct?

12 A. The roadbed and the areas above the
13 tunnel in - within the wooded section on either
14 side.

15 Q. So you did go through the snow-covered
16 wooded section above the tunnel?

17 A. I believe the photo evidence demonstrates
18 that, yes.

19 Q. Okay.

20 So just to be clear, you didn't observe a
21 sinkhole, but you're not saying that there wasn't
22 one.

23 Correct?

24 A. Correct.

25 Q. And you would agree with me that the

1 presence of water - standing water within the tunnel
2 would impact the durability of the structural - that
3 you have proposed.

4 Correct?

5 A. When you say impact the - I did not hear
6 the last part. Could you restate or rephrase your
7 question?

8 Q. Sure.

9 The - the presence of standing water
10 would have an impact on the structural sands that
11 you have proposed.

12 Correct?

13 A. I - I would disagree with that statement.
14 From conversations with a number of providers of
15 these materials similar to grout, they could be
16 placed as another material. The firm sand would
17 actually disperse the water from that space. It is
18 intended to displace and fill all voids. So
19 displacing the water from that space.

20 Q. If there's an issue, however, with water
21 coming in from an unknown source, over time you
22 would agree that that would impact the flow of sand.

23 Correct?

24 A. Well, again, I - I don't believe that it
25 would. I think it would be consistent with just a

1 saturated embankment. And with respect to the
2 material, the foam sand, the foam acts as an agent
3 to move the material. You're left with a sand,
4 essentially, a small, aggregate material, filling
5 that void.

6 Q. And it's your testimony that it wouldn't
7 be impacted by additional water coming in?

8 A. It is - it is unclear if it would be. I
9 don't know how - again, I'm not sure quite - which
10 water you're referring to, water from infiltration
11 from above at the roadway surface or water that was
12 in the track that - lying there, you know, that's
13 collected that you had mentioned earlier in the
14 question.

15 Q. Am I correct that you don't - the water
16 in the tunnel is coming from the standing water that
17 was there at the time of your team's site visit?

18 A. I can't specifically point to all of the
19 sources, but noting that - the low area expect that
20 it would be a location that collects water from the
21 adjacent slopes.

22 Q. So if that were to continue -?

23 A. It's not -.

24 Q. Okay.

25 So if that were to continue over time,

1 and this foam sand that you have proposed, would you
2 then feel, am I correct that that ongoing water
3 drainage would impact the sand?

4 A. If properly placed - again, ponding of
5 water in the vicinity of the tunnel portal, I
6 believe that the water could infiltrate the
7 embankment. I don't have specific evidence that it
8 would necessarily transport the material. Further
9 investigations would need to be performed, if that
10 was the option that was suggested or chosen in the
11 final disposition of the structure.

12 Q. Now you indicated also in your Rebuttal
13 Testimony, referring to page three, bottom of the
14 page -. Now you indicate, from page three onto page
15 four, that the railroad would not be able to enter
16 private property to barricade the portals.

17 Has the railroad, to your knowledge -?

18 A. The - sorry.

19 Q. Has the railroad, to your knowledge,
20 approached the property owners to ask if it's okay
21 to enter to barricade the portals?

22 A. Not to my knowledge.

23 Q. And am I correct, sir, that you mentioned
24 several times in - throughout your testimony that
25 the site visit conducted by your team was, in your

1 words, cursory, limited, it was a site investigation
2 and not an inspection? Am I correct that a
3 structural inspection would be necessary, including
4 borings and everything possible to figure out what
5 is going on underneath the tunnel before any sort of
6 formal recommendation could be made?

7 I know that was a long question. If you
8 need me to rephrase, I will.

9 A. No, I - I understood your question. And
10 you know, again, I'm not certain that I would
11 believe a full structural investigation or
12 inspection, as you termed it, would be necessary.
13 Specifically, in that there's already been a failure
14 of the tunnel liner. And the tunnel liner is only
15 one component of the overall structure.

16 Again, there are the timber vents, the
17 timber roof structure, and then ultimately the rock
18 and the other subsurface elements or levels above
19 between the tunnel and the roadway surface. As it
20 relates to the final disposition of the structure, a
21 decision - you know, associated with what other
22 geotechnical investigations I think would be more
23 prudent to be determined based on that - that
24 anticipated decision, not just for the purpose of a
25 - a general investigation.

1 Because I think more information would
2 likely be required after just poking holes in the
3 ground.

4 I don't - I guess to answer again, you
5 don't - I don't know that an initial site
6 geotechnical investigation would be fully
7 encompassing what is necessary.

8 Q. And you indicate in your - in your
9 Rebuttal Testimony that further investigation would
10 be necessary as it relates to the cost implications
11 to render this tunnel safe.

12 Correct?

13 A. I - I agree with that, yes. That's
14 correct.

15 Q. Okay.

16 And you also stated, as far as the cost
17 goes - am I correct, sir, based on your experience
18 that during - one alternative as a - as a bridge, am
19 I correct, based on your experience, that doing
20 shafts, the cost if upwards of \$800,000 just for the
21 shaft?

22 A. I haven't completed calculations for
23 drill checks specifically, unless you're referring
24 to the preliminary estimate for that bridge option.

25 Q. That's what I'm referring to.

1 What is that based on?

2 A. Sorry, I'm trying to get to that exhibit.

3 ATTORNEY PALMER: Sorry. Can you
4 rephrase the question? This is Edwin Palmer. It's
5 not clear to me what she's asking.

6 BY ATTORNEY NOYES:

7 Q. What is the cost estimate - and I'm - I'm
8 grabbing the exhibit - what is the cost estimate
9 based upon that you generated as it relates to the
10 potential cost of the bridge?

11 A. We developed a list of items that we
12 would expect specific to those bridge elements and
13 reference the PennDOT ECMS for recent pricing to
14 develop a preliminary cost estimate. The cost
15 estimate is not all-encompassing and would require
16 further discussion as to the elements to be
17 included.

18 Q. And you - you testified also in your
19 Direct about the - the potential impact of mining.
20 But again, that's not something that you can say
21 with any degree of certainty as far as this impact
22 on the current structure ceilings of the tunnel.

23 Is that correct?

24 A. Yeah, that's correct. We simply noted
25 the presence of the existing mining activities

1 nearby and what could happen.

2 Q. And is that mining activity ongoing?

3 A. It is not. That has been completed and I
4 believe the document indicates it closed in the
5 1930s.

6 Q. All right.

7 But it's your testimony that that could
8 still have an impact on the tunnel or no?

9 A. Just - just that the activities could
10 have an impact on the - the material above the
11 tunnel. So any geotechnical investigation may find
12 that there are other issues to contend with that
13 we're not currently aware of.

14 ATTORNEY NOYES: Thank you.

15 That's all I have.

16 JUDGE: Thank you.

17 You questioned Mr. Barron - I'm going
18 to invite Mr. Marshall -.

19 Do you have any questions for the
20 witness?

21 ATTORNEY MARSHALL: None, Your Honor.

22 JUDGE: Thank you.

23 And Ms. Sherwin, do you have any
24 questions for Mr. Radle?

25 MS. SHERWIN: No, Your Honor.

1 JUDGE: All right.

2 Thank you.

3 All right.

4 Mr. Palmer, do you have any Redirect
5 for Mr. Radle?

6 ATTORNEY PALMER: Briefly, Your Honor.

7 JUDGE: Go ahead.

8 ---

9 REDIRECT EXAMINATION

10 ---

11 BY ATTORNEY PALMER:

12 Q. Mr. Radle, you - as you told us, you sent
13 a couple folks out to - to do the site inspection.

14 Correct?

15 A. Correct.

16 Q. And these are folks you've worked with
17 before?

18 A. Yes, they are.

19 Q. And are these folks - did you explain to
20 them what you wanted to do, what the purpose of
21 their investigation was?

22 A. I did.

23 Q. Okay.

24 And was the information that they
25 provided in the documentation that they acquired

1 through the - you know, the photographs and the
2 report they prepared and the other information you
3 told us about today sufficient for you to render an
4 opinion about the integrity of the structure and
5 recommend a disposition on the structure?

6 A. It was. It -.

7 Q. Sir, you were asked some questions about
8 the geotechnical - borings, if I used the right term
9 there?

10 A. Correct.

11 Q. And specifically, there's been some
12 suggestion in this case that that should have been
13 part of your initial analysis -.

14 ---

15 (WHEREUPON, A BRIEF INTERRUPTION IN THE PROCEEDINGS
16 WAS HELD.)

17 ---

18 BY ATTORNEY PALMER:

19 Q. Sorry, I don't know why there was that
20 feedback.

21 Okay.

22 So I'm going to repeat the question.

23 So there's been some suggestion in this
24 case that the geotechnical boring should have been
25 done as part of your initial analysis. And then as

1 I understood your testimony on Cross by Ms. Noyes,
2 it was your testimony that that wasn't necessary and
3 it would make more sense to do the geotechnical
4 borings once you decide on a disposition or a
5 potential disposition.

6 Did I understand your testimony
7 correctly?

8 A. Yes, that's correct.

9 Q. Okay.

10 Can you explain why that makes more sense
11 to do the geotechnical borings as the next step as
12 opposed to an initial step?

13 A. Yes. I - I believe, again, when you have
14 a determination as to how you will be addressing the
15 structure, then you can have a more concentrated,
16 focused and cost-effective geotechnical
17 investigation that's performed at one time that is
18 commensurate with how you intend to perform your
19 repairs.

20 You know, an initial investigation, you
21 could essentially go out and perform a number of
22 borings, gather a lot of data, but not necessarily
23 make any new determination, find that, okay, we
24 agree this is how we're going to proceed to address
25 the structure, and determine at a later date you

1 need additional data.

2 So one - you know, concerted, prudent
3 effort to perform the investigation as it relates to
4 the final - final determination I think is most
5 cost-effective.

6 Q. Sir, you were asked to do an
7 investigation and prepare your professional opinion
8 about the integrity of the structure and recommend a
9 disposition of the structure.

10 Did you have sufficient information to do
11 that?

12 A. Yes.

13 Q. And was it necessary for you, for
14 example, to enter the tunnel or do geotechnical
15 borings to determine whether or not that - you know,
16 the tunnel had structural issues that needed to be
17 addressed?

18 A. It - it - yeah. It was not required to
19 enter the tunnel to make that determination. It was
20 not required to have geotechnical investigations to
21 make that determination. The photo evidence speaks
22 for itself, in that there was already a prior
23 collapse while working on the tunnel. So an action
24 was required or will be required.

25 ATTORNEY PALMER: I have no further

1 question, Your Honor.

2 JUDGE: Thank you.

3 Ms. Rost, do you have any brief
4 follow-up, based on Mr. Palmer's questions?

5 ATTORNEY ROST: No, Your Honor, I & E
6 does not have any follow-up. Thank you.

7 JUDGE: Thank you.

8 And Ms. Noyes, do you have any brief
9 follow-up based on Mr. Palmer's questions?

10 ATTORNEY NOYES: I just - very
11 briefly. Thank you Your Honor.

12 ---

13 RE CROSS EXAMINATION

14 ---

15 BY ATTORNEY NOYES:

16 Q. Mr. Radle, as I understand it, your
17 report on - you were tasked with a recommended
18 disposition of the structure. So you were
19 comfortable enough with what your team saw to offer
20 a recommended disposition.

21 Correct?

22 A. Correct.

23 Q. And now you're testifying that - and you
24 indicated as much, I believe, in your testimony,
25 that despite that, before going forward further

1 information needs to be gathered before actually
2 coming up with a final recommendation for this
3 disposition.

4 Could you explain the - the disparity
5 there, please?

6 ATTORNEY PALMER: Objection,
7 argumentative.

8 JUDGE: Overruled.

9 Mr. Radle, you may answer the
10 question.

11 THE WITNESS: Okay.

12 With - with respect to making a
13 determination about the actual structure
14 disposition, it is my professional opinion that an
15 action needs to be taken. Who's responsible for it
16 and when certain investigations are performed,
17 again, it's my professional opinion that it is based
18 on the final determination as to the best solution
19 applied.

20 We were asked to perform an inspection
21 or investigation, I should clarify. And we have
22 done that. From - from the observations in the
23 field, it is clear that with the tunnel collapse,
24 there is an action that needs to be taken. And
25 again, I'm not certain that doing geotechnical

1 investigation now would provide other evidence that
2 substantiates a different position to be taken.

3 ATTORNEY NOYES: I have nothing
4 further. Thank you.

5 JUDGE: Mr. Radle, I just want to make
6 sure I - I understand what your - what your
7 testimony is. This is Judge Long.

8 So it's - is - is it fair to say that
9 the investigation that your team performed provided
10 you with sufficient information to recommend what's
11 called alternative A and alternative B as potential
12 resolutions to make the tunnel safe? Is that - is
13 that fair to say?

14 THE WITNESS: That - that is two
15 alternatives of a larger number of potential
16 alternatives that were intended to address the
17 traveling public safety, so the - the roadway safety
18 above.

19 JUDGE: Okay.

20 So then is - is it your position then
21 that once - for the sake of argument, let's say the
22 Commission directs alternative A as the solution to
23 make the tunnel safe to the traveling public, is it
24 your view that in order to come up with detailed
25 plans to execute alternative A, that would be the

1 purpose of the additional borings and things like
2 that that you were talking about?

3 THE WITNESS: Correct.

4 For the performance of an actual
5 design that would - that would take us to a level
6 where big documents are prepared, separate
7 geotechnical investigations and other adhering
8 services would be required.

9 JUDGE: Okay.

10 So you're not saying - I understand in
11 the world of engineers there's always, you know, 800
12 different ways to attack a widget. But you're not
13 saying - you're not saying that you need to do a
14 more detailed study to come up with alternative C,
15 D, E and F for making the tunnel safe for the
16 traveling public.

17 Is that fair?

18 THE WITNESS: I - I think we could
19 prepare a number of other alternatives and develop
20 some very conceptual cost estimates - preliminary
21 cost estimates without performing a significant
22 number of investigations. At that point, again,
23 they are conceptual, and they would be more for the
24 - the consumption of the various parties, the
25 determination as to which solution is preferred and

1 meets all parties' interests and needs was not in
2 our - AECOM's purview.

3 JUDGE: Okay. Okay.

4 So your - your - in your view, the
5 investigation you did was to come up with a concept
6 for resolving the problem, but you would have to do
7 further investigations to actually design and
8 execute the selected concept?

9 THE WITNESS: That is correct.

10 JUDGE: All right.

11 Thank you.

12 Ms. Rost and Ms. Noyes, do either of
13 you have any further questions based on what I just
14 asked Mr. Radle?

15 ATTORNEY ROST: Your Honor, this is
16 Kayla Rost. I have maybe one or two quick
17 questions.

18 JUDGE: Okay.

19 Go ahead.

20 ATTORNEY ROST: Thank you.

21 ---

22 RE CROSS EXAMINATION

23 ---

24 BY ATTORNEY ROST:

25 Q. Mr. Radle, so is it safe to say that your

1 recommendations focused solely on - I guess,
2 protecting the roadway.

3 Is that correct?

4 A. That - that is correct. That's what we
5 were tasked with looking at, protecting -

6 Q. So you -?

7 A. - that roadway surface above.

8 Q. So you didn't consider the - the
9 Public-at-Large in the sense from portal to portal
10 in your recommendation.

11 Is that correct?

12 A. I - I guess we would say we acknowledged
13 it as there is a private - private citizen concern,
14 right? Because there's access to the public portal
15 - portals and there was a collapse. But with
16 respect to the traveling public, and what we were
17 tasked with doing, I - you know, provided those two
18 alternatives.

19 Q. Would you agree that the Public-at-Large
20 could access the portals, not just the private
21 landowners?

22 A. I - I guess if they chose to trespass,
23 they could.

24 ATTORNEY ROST: Thank you.

25 That's all the questions I have.

1 JUDGE: Thank you.

2 Ms. Noyes, last call.

3 ATTORNEY NOYES: Nothing further, Your
4 Honor. Thank you.

5 JUDGE: Thank you.

6 All right.

7 Mr. Palmer, any sort of Redirect?

8 ATTORNEY PALMER: One question - one
9 line of questions, Your Honor.

10 ---

11 REDIRECT EXAMINATION

12 ---

13 BY ATTORNEY PALMER:

14 Q. Mr. Radle, just - you were asked some
15 questions by Counsel and the Judge about an
16 additional investigation, you know, depending on
17 what alternative you chose to implement.

18 Do you recall that testimony?

19 A. Yes.

20 Q. And would it be accurate to state that
21 what type of investigation, including what type of
22 geotechnical borings that you would have to perform
23 or whatever construction you would have to perform,
24 would differ based on what alternative was selected?

25 A. Yes.

1 Q. And so that's why you didn't do the - the
2 borings at the outset?

3 A. Correct.

4 ATTORNEY PALMER: Okay.

5 No further questions.

6 JUDGE: All right.

7 Mr. Radle, thank you very much. Mr.
8 Palmer, would you - I assume would like to - Mr.
9 Radle's written testimony for admission into the
10 record?

11 ATTORNEY PALMER: I would, Your Honor.
12 At this time I would move for the admission of Mr.
13 Radle's testimony of November 15th, 2021, as B and
14 LE Statement 3; his testimony from December 15th,
15 2021 as B and LE Statement 4.

16 And I would also move for the
17 admission of B and LE Exhibit 13, 14 and 15 as
18 identified in his written testimony and discussed
19 earlier today.

20 ---

21 (Whereupon, Bessemer and Lake Erie Railroad's
22 Exhibit Statement 3, 11/15/21 Daniel Radle Direct
23 Testimony, was marked for identification.)

24 (Whereupon, Bessemer and Lake Erie Railroad's
25 Exhibit Statement 4, 12/15/21 Daniel Radle

1 Rebuttal Testimony, was marked for
2 identification.)

3 ---

4 JUDGE: Is there any objection to the
5 admission of B and LE Statement Number 3, Statement
6 Number 4, or Exhibits 13 through 15 for admission
7 into the record?

8 Hearing none, the testimony - Exhibits
9 13 through 15 are hereby admitted into the record.

10 ---

11 (Whereupon, Bessemer and Lake Erie Railroad's
12 Exhibit Statement 3, 11/15/21 Daniel Radle Direct
13 Testimony, was admitted.)

14 (Whereupon, Bessemer and Lake Erie Railroad's
15 Exhibit Statement 4, 12/15/21 Daniel Radle
16 Rebuttal Testimony, was admitted.)

17 (Whereupon, Bessemer and Lake Erie Railroad's
18 Exhibit 13, Daniel Radle Curriculum Vitae, was
19 admitted.)

20 (Whereupon, Bessemer and Lake Erie Railroad's
21 Exhibit 14, Engineering Report, was admitted.)

22 (Whereupon, Bessemer and Lake Erie Railroad's
23 Exhibit 15, Coal Status Report, was admitted.)

24 ---

25 JUDGE: Mr. Palmer or Mr. Steidle, do

1 you have anything further you would like to put into
2 the record on behalf of Bessemer and Lake Erie?

3 ATTORNEY STEIDLE: Your Honor, I - no,
4 not at this time. Thank you.

5 JUDGE: Okay.

6 All right then. Let's move on.

7 Ms. Rost, you have a witness you would
8 like to present?

9 ATTORNEY ROST: I do, Your Honor.
10 Thank you.

11 I'd like to present Mr. Daniel
12 Helfrich.

13 JUDGE: Mr. Helfrich, are you with us?

14 MR. HELFRICH: Yes, Your Honor, I'm
15 here. This is Daniel Helfrich.

16 JUDGE: All right.

17 ---

18 DANIEL HELFRICH,
19 CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
20 HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS
21 FOLLOWS:

22 ---

23 JUDGE: Could you please state and
24 spell your name and provide your business address
25 for the court reporter?

1 Statement Number 1 and the preserved Rebuttal
2 Testimony of the Bureau of Investigation and
3 Enforcement labeled as I & E Statement Number 2?

4 A. That's correct.

5 ---

6 (Whereupon, Bureau of Investigation and
7 Enforcement's Exhibit Statement 1, Daniel
8 Helfrich Direct Testimony, was marked for
9 identification.)

10 (Whereupon, Bureau of Investigation and
11 Enforcement's Exhibit Statement 2, Daniel
12 Helfrich Rebuttal Testimony, was marked for
13 identification.)

14 ---

15 BY ATTORNEY ROST:

16 Q. Do you have I & E Statement Number 1 and
17 Statement Number 2 in front of you?

18 A. Yes, they're available to me.

19 Q. With regard to your testimony in I & E
20 Statement Number 1, do you have any corrections you
21 would like to identify today?

22 A. No, I do not.

23 Q. If you were asked all of the same
24 questions that were asked in your preserved
25 testimony, would your answers and information

1 substantially be the same or similar?

2 A. Yes, they would.

3 Q. With regard to all the information in
4 I & E Statement Number 1 and Statement Number 2, is
5 the information true and correct to the best of your
6 knowledge, information and belief?

7 A. Yes, it is.

8 Q. Is a verification signed by you attached
9 to Statement Number 1 and Statement Number 2?

10 A. Yes, they are.

11 Q. Mr. Helfrich, before I tender you for
12 Cross Examination, I have one quick question to ask
13 you based upon the parties' testimony today, if - if
14 that's okay.

15 So one of the issues raised by the
16 railroad is how to be expected to complete work to
17 the tunnel if the tunnel is on private property or
18 private property would need to be accessed to
19 complete the work.

20 Can you please address this issue?

21 A. Yes.

22 I mean, if - if - you know, normal
23 construction procedures, I believe the entity
24 responsible for the design and construction would
25 try to work with the property owners to secure means

1 of appropriate construction. If that would not take
2 place or is difficult and the Commission sees it as
3 a public safety interest issue, then the Commission
4 could temporarily appropriate a construction
5 easement, only during the time of construction to
6 ensure that the safety concerns are addressed. And
7 after the construction is complete, that easement
8 would expire, and the property would not be
9 accessible anymore by anybody but the property
10 owner.

11 Q. Are you aware of a situation like that
12 happening in the past, based upon your personal
13 experience?

14 A. Well, we had - we had granted numerous
15 times where we would appropriate property in a
16 temporary condition for construction only.
17 Typically, it's where the railroad property would be
18 the - where the railroad and the entity that's doing
19 the work could not agree to maybe a - a price or -
20 or a contribution for that effort. But we would
21 step in and appropriate temporarily to ensure that
22 the project goes forward.

23 ATTORNEY ROST: Thank you, Mr.
24 Helfrich.

25 At this time I tender the witness for

1 Cross Examination.

2 JUDGE: All right.

3 Mr. Steidle, will you or Mr. Palmer be
4 cross examining Mr. Helfrich?

5 ATTORNEY STEIDLE: Yes, we will, Your
6 Honor. Thank you. This is John Steidle.

7 JUDGE: Okay.

8 Go ahead.

9 ATTORNEY STEIDLE: Thank you.

10 ---

11 CROSS EXAMINATION

12 ---

13 BY ATTORNEY STEIDLE:

14 Q. Good morning, Mr. Helfrich.

15 A. Good morning, sir.

16 Q. Mr. Helfrich, just a few questions. I'm
17 going to refer - start off approaching the right
18 direction, page three of your Direct Testimony. You
19 were asked about who has inspection and maintenance
20 responsibility for the subject -. I'm paraphrasing
21 you, but it's always been Rail Safety's position
22 that the inspection and maintenance of the railroad
23 facilities and infrastructure is the responsibility
24 of the operating railroad.

25 Would you agree that the B and LE has not

1 had operations since - for over 20 years?

2 A. Yes, I would agree that that's true.

3 Q. Would you also agree that B and LE has
4 not had a property interest in that - in this tunnel
5 since 2002?

6 A. Yes.

7 ATTORNEY ROST: Your Honor, I would
8 object on the basis -.

9 JUDGE: Go ahead, Attorney Rost.

10 ATTORNEY ROST: I was going to say, I
11 would object on the basis that this may be a legal
12 or a question of - sorry.

13 JUDGE: I'll overrule the objection
14 and I think it - it involves Mr. Helfrich's
15 background for his point of view on the disposition
16 of the crossing. I'm not sure we got Mr. Helfrich's
17 answer there.

18 Mr. Steidle, would you mind re-asking
19 the question -

20 ATTORNEY STEIDLE: Yes, Your Honor.

21 JUDGE: - and -?

22 ATTORNEY STEIDLE: Thank you, Your
23 Honor.

24 BY ATTORNEY STEIDLE:

25 Q. Mr. Helfrich, isn't it true that the B -

1 B and LE has not had a property interest in - in the
2 tunnel since 2002?

3 A. I believe the - the information that -
4 that's submitted by Mr. Barron shows they
5 transferred the property out of their possession of
6 the railroad.

7 Q. And later on in that same statement, you
8 said that the railroad was the party that benefited
9 the most.

10 Can you - isn't it true that the railroad
11 has not benefited at all since 2002?

12 A. Well, that's true since 2002 it's not
13 benefited at all, but prior to that it was the
14 primary benefactor.

15 Q. So since the B and LE has not had a
16 property interest in 20 years, and they have not
17 benefited in 20 years, is it your testimony, on
18 behalf - excuse me? Is it your testimony the B and
19 LE should have maintained the property - excuse me,
20 maintained the tunnel that lies exclusively on
21 private property?

22 A. Yes, I believe they should have because
23 the disposition of the property had not been
24 determined at that time. And so, therefore, that
25 inspection, maintenance obligation should have

1 remained with who was doing it, which was the
2 railroad.

3 Q. Mr. Helfrich, are you familiar with the
4 secretarial letters that - that - that direct - that
5 are related to this - to this crossing?

6 A. Yes, I am.

7 Q. Okay.

8 I mean, they weren't your exhibits, but
9 they were - both the B and LE and - and PennDOT had
10 submitted those.

11 Are you familiar with the testimony of
12 Mr. Barron and of the PennDOT witness?

13 A. Yes, I'm familiar with that.

14 Q. With respect to the April 30th, 2002
15 letter, you - do you have that in front of you?

16 A. Just a moment, please.

17 Yes, sir, I have it.

18 Q. I'll be with you - I need to pull it up.
19 Hold on, please.

20 ATTORNEY ROST: Mr. Steidle, this is
21 Kayla Rost.

22 What exhibit number is that?

23 ATTORNEY STEIDLE: I'm getting to it.
24 Three, three. Mr. Barron's three. It's also part
25 of PennDOT's B. I probably think it's better if you

1 just use PennDOT B, because there's going to be
2 additional questions regarding those, even though
3 they're not his exhibits.

4 JUDGE: Okay.

5 We've all found PennDOT Exhibit B, as
6 in boy?

7 THE WITNESS: Yes, Your Honor, this is
8 Daniel Helfrich. I'm - I'm ready.

9 ATTORNEY STEIDLE: You're ready?

10 JUDGE: Thank you.

11 Go ahead, Mr. Steidle.

12 ATTORNEY STEIDLE: Thank you, Your
13 Honor.

14 BY ATTORNEY STEIDLE:

15 Q. Mr. Helfrich, if you look at - on page
16 four of PennDOT Exhibit B, the letter from
17 April 30th, 2002. Just for the record, PennDOT's
18 Exhibit B has multiple letters in it.

19 A. Yes, sir.

20 Q. The same question I asked Mr. Barron,
21 four paragraphs down, where it says the last
22 sentence, these two crossings will be the subject of
23 future secretarial letters or a formal hearing.

24 Are you familiar with that?

25 A. Yes, sir, I can see it.

1 Q. Well, with respect to the B and LE, isn't
2 it true that they did make application to the PUC to
3 abolish this crossing?

4 A. Yes, they originally did apply to abolish
5 numerous crossings, this being one of them.

6 Q. Thank you, sir.

7 And I'm going to fast-forward to the
8 February 1st, 2012 letter, which is part of PennDOT
9 Exhibit B.

10 A. Yes, sir, I'm there.

11 Q. Okay.

12 Now - now, this - this letter states that
13 it - speaks for itself - I don't know.

14 Can you - are you familiar with all these
15 - the letters that are contained in PennDOT Exhibit
16 B?

17 A. Yes, I have reviewed them.

18 Q. Okay.

19 Maybe you can clear this up, maybe you
20 can't. The April 30th letter - April 30th, 2002,
21 and then this letter, the February 1st, 2012, it
22 refers to an April 22nd, 2002 letter. And then the
23 two previous letters before this, the one dated
24 June 14th, 2006 references an April 5th, 2002
25 letter. The next letter, the March 25th, 2009,

1 references an April 22nd, 2002 letter. And then the
2 February 1st, 2012 letter references an
3 April 22nd, 2020 letter.

4 Now, we know that there's an April 30th,
5 2002 letter.

6 I mean, are you - do - is it your
7 understanding or - was there an April 5th letter and
8 was there an April 22nd letter or - or was that like
9 a typo?

10 A. I don't have any direct knowledge of
11 that, but my assumption would be that those are
12 administerial-type errors - typos, if you will.

13 Q. That's fine. I just wasn't -.

14 A. Yeah, I'm just - I'm just not aware
15 either way.

16 Q. All right.

17 That's fair.

18 So assuming that the February 1st, 2012
19 letter references an April 22nd letter, we can - we
20 can assume that it's really referencing the
21 April 30th letter, April 30th, 2002 letter.

22 Correct?

23 A. That would be my assumption, sir, yes.

24 Q. Okay.

25 So later on it says that - later - that

1 first paragraph it says - references the April 30th,
2 2002 letter - all work has been completed. And then
3 the next - the next paragraph states the Commission
4 issues this secretarial letter in accordance with
5 Section 2702 of the PA - Public Utility Code. All
6 work has been completed, this case can be closed.
7 That's what it says.

8 Correct?

9 A. Yes, sir, it states that clearly.

10 Q. So twice it says the case is closed.
11 Then it further states, in the last paragraph, if
12 you're dissatisfied with the resolution of this
13 matter, you may set forth a - 52 Pa, Code 5.44 -
14 file a petition.

15 To your knowledge, did anybody file a
16 petition or request for reconsideration of that
17 letter that closed this case?

18 A. Not to my knowledge.

19 Q. Now, on - on page five of your - of your
20 testimony, on the first question - and I'm going to
21 be paraphrasing your - your statement. According -
22 pursuant to 66 Pa.C.S.A. 2702, the subject tunnel is
23 a public crossing, isn't the Commission's
24 jurisdiction and the railroad's responsibility until
25 an application. So the - the B and LE did submit an

1 application.

2 Correct?

3 A. They did.

4 Q. Okay.

5 Further on it says here, requesting
6 approval to oppose the crossing, and a Commission
7 order or a secretarial letter directing the final
8 disposition of the subject tunnel.

9 Doesn't the February 1st, 2012 letter
10 direct most everyone that the case is closed?

11 A. It did not - it did not determine the
12 final disposition of the tunnel. That could be
13 coming under a separate application for an
14 investigation or a complaint. There are other
15 avenues to establish action that needs to be taken
16 to the final disposition of the - of the tunnel.

17 Q. All right. Okay.

18 Mr. - Mr. Helfrich, can we agree that
19 this crossing is a grade-separated crossing?

20 A. Yes, sir.

21 Q. And that the railroad track passed
22 through the tunnel on State Route 268 instead of at
23 grade?

24 A. Yes, sir.

25 Q. Would you agree that there are a number

1 of benefits and concerns by having a grade-separated
2 crossing as opposed to an on-grade crossing?

3 A. Primarily safety concerns, yes.

4 Q. So for instance, overpasses increase the
5 capacity of the roadway by allowing constant flow in
6 all directions. That's a benefit.

7 Correct?

8 A. Yes.

9 Q. And that traffic moves more freely - more
10 freely at a grade-separated crossing. That's a
11 benefit.

12 Correct?

13 A. Yes.

14 Q. And grade-separated crossings, they
15 eliminate the wait times for passing trains.

16 Is that correct?

17 A. You're referring to the wait time for the
18 motoring public or for the train traffic? I'm not
19 sure.

20 Q. Well is a grade-separated crossing and
21 this train traffic, the - the slower traffic -
22 there's slower traffic for the road, correct,
23 excuse me - traffic?

24 A. Could - could you please repeat that?

25 Q. Sure.

1 If you have an at-grade crossing, isn't
2 there wait times when there are passing trains?

3 A. Yes, sir, there would be wait times when
4 a train is moving through an at-grade crossing, for
5 the motoring public.

6 Q. And if you have a grade - if you have a
7 grade-separated crossing and there's a passing
8 train, it's not affected.

9 Correct?

10 A. That is correct.

11 Q. And even when there are no trains,
12 traffic moves slower over at-grade crossings as
13 opposed to separate grade crossings?

14 A. I would - I would assume that that's
15 correct, sir, but based on generally we - there's a
16 lot of things that go into that, that I would assume
17 that the traffic did not need to slow down as much
18 on a grade-separated situation. But I don't know if
19 that's truly the case in all situations.

20 Q. Well, isn't it true that school busses
21 have to stop at all grade-separated (sic) crossings?

22 A. They don't stop at grade-separated
23 crossings, sir.

24 Q. Excuse me. I misspoke.

25 Isn't it true that school busses have to

1 stop at at-grade crossings?

2 A. Unless there is a proper exempt sign up,
3 which would exempt school busses and other certain
4 commercial vehicles from stopping, then that would
5 be correct.

6 Q. Well, isn't it true that certain
7 commercial vehicles have to stop at at-grade
8 crossings?

9 A. Again, that's - that's a requirement,
10 unless there's an exempt sign in place which exempts
11 that crossing from those certain commercial vehicles
12 and school busses to stop at the crossing to verify
13 that there's not a train approaching.

14 Q. Is there - does this crossing have that
15 exemption?

16 A. No, sir. This is a grade-separated
17 crossing, therefore, it would not require an
18 exemption.

19 Q. When you have stop-and-go conditions, for
20 instance when a school bus or - certain commercial
21 vehicles have to stop, doesn't that increase the
22 risk of accidents among the traveling public?

23 A. I'm not a traffic-safety expert, but I
24 would assume that - that that could potentially
25 increase the - the - you know, the hazard index for

1 - for an intersection.

2 Q. And when you have grade-separated
3 crossings, fewer signals and signs are needed to
4 direct traffic.

5 Is that true?

6 A. Yes, sir.

7 Q. And if you had fewer signals and signs,
8 there's less upkeep and maintenance required to be
9 performed by PennDOT, the - the County, the local
10 municipalities.

11 Isn't that true?

12 A. I - there would be, as it refers to, any
13 kind of railroad warning devices that need to be
14 maintained, but not in terms of the roadway itself,
15 the approach roadway or any of the other features of
16 the road.

17 Q. Would you agree that if you have an
18 at-grade crossing, that's more - that's more
19 maintenance there than a road - road-separated cross
20 - grade-separated crossing?

21 A. No, sir. I would not - I would not agree
22 with that statement at all. In fact, the grade-
23 separated crossing might have more in terms of its
24 financial commitment to a bridge structure, with
25 inspection and maintenance and upkeep.

1 Q. How about with this particular crossing?
2 Would you agree that the road - the maintenance with
3 respect to this crossing is less than it would be -
4 than it would be if it was at grade?

5 A. I would not make that assumption. I
6 believe the tunnel would be a pretty high
7 maintenance facility that would require, you know,
8 regular comprehensive inspection and maintenance
9 associated with that.

10 Q. Would you agree that grade-separated
11 crossings increase safety for the traffic public?

12 A. Yes, sir, I would agree with that.

13 ATTORNEY STEIDLE: All right.

14 I don't have any further questions for
15 you, sir.

16 JUDGE: Thank - thank you, Mr.

17 Steidle.

18 Ms. Rost, do you have any - hold on.
19 Ms. Noyes, you have questions for Mr. Helfrich?

20 ATTORNEY NOYES: Very briefly, Your
21 Honor, thank you.

22 ---

23 CROSS EXAMINATION

24 ---

25 BY ATTORNEY NOYES:

1 Q. Mr. Helfrich, am I correct that the
2 at-grade crossing maintenance is the responsibility
3 of the railroad at the point of crossing plus two
4 feet.

5 Correct?

6 A. Specifically on the approach roadway, the
7 - the Commission will assign maintenance
8 responsibility to the approach roadway to the
9 roadway entity, the - the - either the DOT or the
10 township, if it's a township road. The limits of
11 that are up to two feet to the outside of each rail.

12 The railroad is responsible for that rail
13 crossing surface that is between the rails up to two
14 feet to the outside of each rail. But there are the
15 minimum costs associated with signage, pavement
16 markings and warning lights that may be present that
17 are divided amongst the parties appropriately.

18 Q. And in this particular - at this
19 particular crossing, the roadway - the Department's
20 roadway was there first before the railroad
21 constructed -.

22 Correct?

23 A. From everything I see on the record, yes.

24 Q. And Counsel has asked you about the
25 letter from February of 2012 as part of Department's

1 Exhibit B, a letter advising that the matter has
2 been closed.

3 Am I correct that the Commission does not
4 relinquish jurisdiction by closing the matter?

5 A. That's normally true. We would - we
6 would look at any kind of situation where we would
7 need to reopen the record if the public-safety
8 concern exists or if something was brought to our
9 attention that we were unaware of.

10 Q. And in fact, those letters can be amended
11 and often are, various secretarial letters are
12 amended to assign costs of - and future maintenance,
13 when warranted.

14 Correct?

15 ATTORNEY STEIDLE: Objection, Your
16 Honor.

17 JUDGE: What's the basis of the
18 objection?

19 ATTORNEY STEIDLE: Your Honor, I'm
20 going to object to this line of questioning, to the
21 extent that it calls for a legal conclusion.

22 JUDGE: Ms. Noyes, what's your
23 response?

24 ATTORNEY NOYES: I wasn't asking for a
25 legal conclusion, Your Honor. I was simply asking -

1 and this is based on the solicited testimony on
2 Cross Examination concerning the closed - word
3 closed appearing in the letter. And then simply
4 elaborating, based on Mr. Helfrich's experience,
5 that this is something that can be amended and
6 revisited when warranted by the Commission.

7 JUDGE: The objection's overruled.
8 Mr. Helfrich, you may answer the question.

9 THE WITNESS: Could you please state
10 the question again, Ms. Noyes?

11 BY ATTORNEY NOYES:

12 Q. Certainly.

13 As far as the process goes, you know we
14 see that there's an exhibit here indicating the case
15 is closed. However, there are still opportunities
16 to subsequently amend the letter for things like
17 assignment of maintenance cost.

18 Correct?

19 A. Yes. If they were not adequately
20 addressed in the original letter or if the parties
21 would come to us with a petition to suggest a change
22 or something like that, then, yes, we could amend
23 them.

24 Q. And certainly if the property is sold,
25 that's something that would need to be addressed in

1 terms of an agreement or assignment of maintenance
2 costs, then.

3 Correct?

4 A. I'm not sure what property you're
5 referring to. If you're referring to this specific
6 case, you know I would - I'm not sure I could answer
7 that.

8 Q. I'm sorry.

9 I wasn't - I wasn't clear.

10 I mean, generally, procedurally. One
11 example of a situation where amendment might be -
12 necessary is if, for example, PennDOT - it was
13 previously a PennDOT road or PennDOT's property at a
14 crossing and that is subsequently sold, to say a
15 private entity. That's something that would be
16 addressed by an amendment to a secretarial letter
17 clarifying the maintenance.

18 Correct?

19 A. Yes, if we're made aware of that
20 situation, we would - could amend the secretarial
21 letter to account for the future maintenance
22 responsibilities going forward.

23 Q. And Counsel for the railroad asked you
24 about the property of interest. And this was
25 alluded to previously. Am I correct that that can

1 be - the sale of a property can be voided if the
2 procedure set forth in the Utilities Code are not
3 followed?

4 ATTORNEY STEIDLE: Objection, Your
5 Honor. Calls for a legal conclusion.

6 JUDGE: Overruled. He testified
7 earlier about Commission procedure.

8 Mr. Helfrich, you may answer the
9 question.

10 THE WITNESS: I believe that Section
11 2709 of the Public Utility Code clearly states that
12 the property disposition is voidable if the
13 requirements of that section are not properly
14 followed.

15 ATTORNEY NOYES: Thank you.
16 I have nothing further.

17 JUDGE: All right.

18 Mr. Helfrich?

19 THE WITNESS: Yes, Your Honor?

20 JUDGE: Yeah.

21 I'm trying to think how to phrase my
22 question.

23 Generally speaking, what is the
24 Commission's procedure to grant a request to abolish
25 a crossing?

1 THE WITNESS: We would - we would
2 suggest that it would come to us either through
3 applications to us or we would launch our own
4 application docket, if necessary, if - if the
5 parties couldn't agree to something. But typically
6 it would come in as an application to abolish
7 crossings.

8 JUDGE: And would that application be
9 disposed of by a secretarial letter or would it be
10 disposed of with a Commission Order?

11 THE WITNESS: A secretarial letter -
12 it can be done both ways. Typically, if there is
13 anything that is concerning Commission regulations,
14 such as clearance exemptions, there would be
15 property appropriation needs to take place, either
16 as a temporary condition for construction or a
17 permanent condition and that would go through a -
18 full Commission Order.

19 If the parties are agreeable and
20 amicable to a resolution, that - then a secretarial
21 letter can be issued to accommodate the - the
22 application and to clearly define the issues for all
23 parties.

24 JUDGE: Okay.

25 Thank you.

1 that the STB only is concerned with the economic of
2 - of commerce's side of the rail line and the
3 constituents that it serves and the functionality of
4 the - the railroad transactions, such as mergers or
5 line acquisitions or abandonments. But I believe
6 that once the STB has fully approved that
7 abandonment, its jurisdiction is relinquished to the
8 State for State property laws then determine the
9 real property interest and how that is disposed of.

10 That's always been my understanding. I
11 don't know if there are other situations that might
12 take place or how some of these other states do
13 things, but I think it would be very difficult for
14 the STB to have authority over real property rights
15 in all these individual states. It just doesn't
16 make a lot of sense to me.

17 ATTORNEY STEIDLE: Thank you for your
18 time, sir. I have no further questions.

19 JUDGE: All right.

20 Ms. Noyes, do you have any follow-up
21 with Mr. Helfrich, based on my questions or Mr.
22 Steidle's questions?

23 ATTORNEY NOYES: I do not, Your Honor.
24 Thank you.

25 JUDGE: Thank you.

1 Ms. Rost, do you have any Redirect for
2 Mr. Helfrich?

3 ATTORNEY ROST: I do, briefly, Your
4 Honor. Thank you.

5 JUDGE: Go ahead.

6 ---

7 REDIRECT EXAMINATION

8 ---

9 BY ATTORNEY ROST:

10 Q. Mr. Helfrich, we talked a lot about the
11 February 2012 secretarial letter.

12 In reference to that - well, I guess in
13 reference to the April 2002 secretarial letter, did
14 the Commission order any work to be completed on the
15 tunnel?

16 A. Excuse me. In reference to the April
17 30th, 2002 secretarial letter, no, there is nothing
18 ordered for the disposition of the tunnel.

19 Q. Okay.

20 So the - so in reference to the February
21 2012 secretarial letter, was the work ordered in the
22 April 30th, 2002 letter completed?

23 A. I - I would assume so. I mean, I was not
24 the engineer responsible for writing out this
25 letter, but my assumption would be the work that was

1 initially assigned in 2002 was completed as - as of
2 that date of February 1st, 2012.

3 Q. So we can agree that the secretarial
4 letter closing the record did not concern the tunnel
5 based upon that language.

6 Right?

7 A. Yes, that's correct because there's
8 nothing in the original secretarial letter that
9 orders anything if it's involving the tunnel or the
10 other grade-separated crossing that was - I forget
11 the number, but it was the other one that was
12 mentioned in that April 30th, 2002 letter that the
13 Department and the railroad were still discussing at
14 that time.

15 Q. So Mr. Steidle asked you a lot of
16 questions about benefits. And I think we need to -
17 to make it kind of even.

18 Does the railroad benefit from a
19 below-grade or grade-separated crossing?

20 A. Yeah, it - in terms of public safety and
21 liability concerns, I would say yes.

22 Q. Was the railroad able to use the tunnel
23 for approximately - I'd say 30 years without
24 worrying about hitting a car at this crossing?

25 A. Yes.

1 Q. Are you aware of any other benefits the
2 railroad may have had from the use of this tunnel?

3 A. There are safety benefits from the
4 tunnel, I would think, in terms of its, you know,
5 potential conflict with the motoring public. Such
6 aspects, some would be maintenance and the section
7 requirements for the structure set. So you know,
8 it's - I think it - it definitely is a benefit in
9 terms of being grade-separated.

10 And it is the federal government's FRA,
11 Federal Railroad Administration, position that
12 typically those are much more favorable than a grade
13 - again, an at-grade crossing.

14 Q. So both the railroad and the road owner
15 benefited from the use of this grade-separated
16 crossing.

17 Is that correct?

18 A. Yes, that's correct.

19 ATTORNEY ROST: That's all the
20 questions I have, Your Honor. Thank you.

21 JUDGE: Thank you.

22 Mr. Marshall, did you have any
23 questions for Mr. Helfrich? I forgot to ask you.

24 ATTORNEY MARSHALL: Thank you, Your
25 Honor, for asking. No, I do not have any questions

1 for him.

2 JUDGE: All right.

3 Thank you.

4 And Ms. Sherwin, did you have any
5 questions for Mr. Helfrich?

6 MS. SHERWIN: No, Your Honor. Thank
7 you.

8 JUDGE: Okay.

9 Thank you. All right.

10 Ms. Rost, would you like to move Mr.
11 Helfrich's written testimony into the record?

12 ATTORNEY ROST: I would, thank you.
13 At this time, I & E motions for the admission of the
14 preserved Direct Testimony of the Bureau of
15 Investigation and Enforcement labeled as I & E
16 Statement Number 1 and the preshared Rebuttal
17 Testimony of the Bureau of Investigation and
18 Enforcement, labeled as I & E Statement Number 2.

19 JUDGE: Is there any objection to the
20 admission of I & E Statement Number 1 or I & E
21 Statement Number 2 for admission into the record?

22 ATTORNEY STEIDLE: Your Honor, John
23 Steidle here.

24 JUDGE: Go ahead, Mr. Steidle.

25 ATTORNEY STEIDLE: Thank you.

1 John Steidle, on behalf of the
2 railroad. With - to the extent that Mr. Helfrich's
3 testimony refers to - seems to make legal
4 conclusions, I would ask that that part of it - part
5 of his testimony be stricken.

6 For instance, on page three of his
7 testimony, he refers to the - B and LE as the
8 operating railroad. And further on, with respect on
9 page five of his testimony, he refers to case law
10 affirming the Commission's practice of establishing
11 jurisdiction.

12 With the - Mr. Helfrich is not an
13 attorney, is not a representative of B and LE -
14 excuse me, he's not representing the Bureau in a
15 legal capacity. And I would ask that his testimony
16 that - that refer to legal conclusions be stricken.
17 Thank you.

18 JUDGE: Ms. Rost, what's your
19 response?

20 ATTORNEY ROST: I would submit that
21 Mr. Helfrich is not providing legal conclusions.
22 Instead he is providing fact information, as well as
23 testimony and information based upon his personal
24 experience and also his - his time at the
25 Commission.

1 The statements that Mr. Steidle
2 referenced are clearly within his purview as a rail
3 safety engineer and expert with us in his capacity
4 as a Commission employee.

5 JUDGE: All right.

6 I will overrule Mr. Steidle's
7 objection and let the testimony stand, with the
8 understanding that at the end of the day all legal
9 conclusions are mine to make and not those of the
10 various witnesses.

11 Does anybody else have anything
12 further they'd like to say about the admission of
13 I & E Statements Number 1 and I & E Statement Number
14 2?

15 ATTORNEY NOYES: Your Honor, Melissa
16 Noyes, for the Department, for the record -. I'm
17 sorry, Melissa Noyes, for the Department. We have
18 no objection.

19 JUDGE: Thank you.

20 All right.

21 I & E Statement Number 1 and I & E
22 Statement Number 2 are hereby admitted into the
23 record.

24 ---

25 (Whereupon, Bureau of Investigations and

1 Enforcement's Exhibit Statement Number 1, Daniel
2 Helfrich Direct Testimony, was admitted.)
3 (Whereupon, Bureau of Investigations and
4 Enforcement's Exhibit Statement Number 2, Daniel
5 Helfrich Rebuttal Testimony, was admitted.)

6 ---

7 JUDGE: Ms. Rost, does I & E have any
8 further evidence they would like to introduce for
9 the purposes of today's hearing?

10 ATTORNEY ROST: No, Your Honor. We
11 have completed our case. Thank you.

12 JUDGE: Thank you.

13 All right.

14 Ms. Noyes, we come to you. Mr.
15 Keilman.

16 MR. KEILMAN: Hello.

17 JUDGE: Mr. Keilman, are you on the
18 line? Hello.

19 MR. KEILMAN: It's Charles.

20 ATTORNEY PALMER: Your Honor, Your
21 Honor. I'm sorry to interrupt. This is Edwin
22 Palmer.

23 JUDGE: Yes, go ahead.

24 ATTORNEY PALMER: Can we take a
25 three-minute break so I can use the facilities?

1 JUDGE: You know what, I think we
2 could all use to stretch our legs. It is now 12:14.
3 We will take a - well, let me ask you this.

4 Ms. Noyes, do you anticipate your
5 witness will take - your two witnesses will take a
6 lot of time to finish? Do you think it would make
7 more sense to take a lunch break at this point or do
8 you think we could take a 15-minute break and finish
9 up in maybe an hour or so?

10 ATTORNEY NOYES: Your Honor, my - my
11 questions for the witness are - are frankly limited
12 to the extent - maybe one or two questions. So -
13 excuse me, to their prior testimony. So from my
14 point, it's nothing, next to nothing.

15 JUDGE: All right.

16 And Mr. Palmer, do you anticipate
17 needing more than an hour to finish up the testimony
18 here?

19 ATTORNEY PALMER: Mr. Steidle will be
20 crossing the - but we do not anticipate it will be
21 more than an hour.

22 JUDGE: All right.

23 The time is now 12:15. Let's take a
24 15-minute break and call back in at 12:30. And we
25 will resume at that time. So I will go ahead and

1 we're going to go off the call and ask everyone else
2 to do the same. And call back in at 12:30. We are
3 off the record.

4

5 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

6

7 JUDGE: We are now back on the record
8 and we are going to begin by calling PennDOT's
9 witness Mr. Keilman to present his testimony.

10

11

CHARLES KEILMAN, IV,

12 CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
13 HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS
14 FOLLOWS:

15

16 JUDGE: Could you please state and
17 spell your name for the court reporter and provide
18 your business address?

19

20 THE WITNESS: My name is Charles Peter
21 Keilman, IV. Keilman is K-E-I-L-M-A-N. And my
22 business address is 2550 Oakland Avenue, Indiana,
PA, 15701.

23

JUDGE: Thank you.

24

Ms. Noyes, you may proceed.

25

ATTORNEY NOYES: Thank you.

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DIRECT EXAMINATION

BY ATTORNEY NOYES:

Q. Mr. Keilman, could you identify how - in what capacity you are currently employed?

A. I am employed full time by PennDOT District 10 as a civil engineer supervisor and I work as a grade crossing engineer for District 10.

Q. And sir, have you prepared written testimony and exhibits for the purpose of this proceeding?

A. Yes.

Q. Do you have a document in front of you that's identified and labeled as Hearing Statement Number 1, Direct Testimony of Charles Keilman, IV, along with the exhibits that are referenced within that testimony?

A. Yes.

Q. Was this document prepared by you or under your supervision?

A. Yes.

Q. Do you have any changes or corrections to this document?

A. I do not.

1 Q. If I were to ask you the same questions
2 contained in your Direct Testimony, would your
3 answers be the same?

4 A. Yes, my answers would be the same.

5 Q. And would those answers be true and
6 correct to the best of your knowledge, information
7 and belief?

8 A. Yes, they would be true and correct to
9 the best of my knowledge and belief.

10 Q. So based on your testimony that's been
11 presented today, did you also have an opportunity to
12 review the Rebuttal Testimony presented by the
13 railroad?

14 A. I have.

15 Q. Okay.

16 And you were present for the entire
17 proceeding thus far today.

18 Correct?

19 A. Correct.

20 Q. Now I want to go back to Mr. Radle's
21 testimony concerning the - the cost anticipated of
22 whatever pick, if you will is - is ultimately
23 implemented.

24 Do you have concerns with regards to his
25 assessment of the cost?

1 A. I do. The - the cost only takes into -
2 the cost that he provided only takes into account
3 the construction. It doesn't take into account
4 anything that's required preconstruction, including
5 the - you know, further engineering studies. It
6 also does not take into account any of the
7 remediation work that would need done through the
8 DEP. You know, that - that includes - you know,
9 we're not going to be allowed to just leave a pond
10 of water along an abutment. You know, there's going
11 to be a lot of erosion and sedimentation and
12 stormwater controls that are going to need
13 implemented as well.

14 Q. And would that - would that likely result
15 in additional costs for that remediation?

16 A. Yeah. I feel that it would increase it
17 significantly.

18 Q. Okay.

19 And Mr. Radle asked - or Steidle, excuse
20 me, asked Mr. Helfrich about the nature of the
21 at-grade crossing versus the current setup with the
22 tunnel.

23 Could you explain, practically speaking,
24 the difference as far as the road was there first,
25 the shape of the land? Where does it make sense to

1 construct an at-grade crossing or would that have
2 been more cost-effective at the time of its
3 construction?

4 A. In my professional opinion, you know, the
5 idea to put a tunnel in is a cost savings versus the
6 amount of buildup that would have been required to
7 put in an at-grade crossing for the railroad or the
8 railroad's previous interest of -. You know,
9 whoever built the crossing there, you know, you're
10 looking at probably 50 feet of - of fill that would
11 have had to have been put in and then graded back
12 along the property to give an acceptable approach.

13 So yeah, in my opinion, it would have
14 been cost-effective to put in a tunnel.

15 And as far as the crossing, you know, we
16 had no benefit of the crossing. The benefit - you
17 know, we already were reaping the benefit of not
18 having a crossing there for 40 years.

19 Q. And in terms of the - you know, the
20 maintenance, your maintenance of that crossing, what
21 would it have been had it been at grade?

22 A. If it would have been at grade, PennDOT
23 would have been assigned some sort of maintenance of
24 the approach and the line painting coming up to the
25 approach, and potentially some of the signage as

1 well. Versus, you know, at the time we have no -
2 it's like any other grade-separated crossing, you
3 know, we don't have any maintenance of it. You
4 know, that - that's not our responsibility.

5 Q. And finally, sir, did you have any notice
6 or were you provided with notice of the STB or
7 Surface Transportation Board proceedings in this
8 matter?

9 A. To - to the best of my knowledge, we were
10 not, and we do not receive those notifications.

11 ATTORNEY NOYES: Thank you.

12 That's all I have. I offer him for
13 Cross Examination.

14 JUDGE: Thank you.

15 Mr. Steidle, you may proceed with your
16 Cross Examination.

17 ATTORNEY STEIDLE: Thank you, Your
18 Honor.

19 ---

20 CROSS EXAMINATION

21 ---

22 BY ATTORNEY STEIDLE:

23 Q. Good afternoon, Mr. Keilman.

24 A. Good afternoon.

25 Q. Mr. Keilman, just a few questions. On

1 page six of your testimony, you refer to - you state
2 that the - that the tunnel is still - that the B and
3 L - it's still the B and LE's facility. Now you're
4 aware that there's no ownership interest with
5 respect to the B and LE.

6 Is that true?

7 A. I based that statement off of the
8 secretarial letter not being amended to change
9 ownership of the crossing itself.

10 Q. What secretarial letter is that?

11 A. It would have been the 2002 one, where
12 you were looking to abolish it and, you know - you
13 know, you were the interested party then.

14 Q. Is it your testimony, on behalf of
15 PennDOT, that the 2002 letter addresses the
16 ownership of the tunnel?

17 ATTORNEY NOYES: Your Honor - I'm
18 sorry. Your Honor, I'm going to object at this
19 point, understanding what the testimony says. But
20 we're getting too far afield into asking for both
21 legal conclusions -. The document speaks for itself
22 as far as what it does and doesn't say. He based
23 his testimony on what he interpreted the document to
24 say and that's it.

25 JUDGE: Mr. Steidle, what's your

1 response?

2 ATTORNEY STEIDLE: Well, Your Honor,
3 first off this testimony was submitted on behalf of
4 PennDOT, refers to the facility as the B and LE's
5 facility. Now, the - the record's clear with
6 respect to the - transfer of property. I just want
7 to make sure - I just would like to know what his
8 answer is with respect - what supports his
9 contention that it's the B and LE's facility -
10 currently the B and LE's facility?

11 JUDGE: I think he answered that
12 question by saying he was - he put an interpretation
13 - all right.

14 The witness has understood that their
15 - all right.

16 I would like - Mr. Steidle, can you
17 rephrase your question, please?

18 ATTORNEY STEIDLE: Okay.

19 JUDGE: I don't want to put words in
20 the witness's mouth. I think I understand where
21 you're going.

22 ATTORNEY STEIDLE: Yeah, I'll ask a
23 different way.

24 JUDGE: Yes.

25 BY ATTORNEY STEIDLE:

1 Q. Okay.

2 On page - on page six of your testimony,
3 you state on behalf of PennDOT that any future
4 maintenance issues should be addressed by the B and
5 LE since it is their facility.

6 Okay? Now that's assuming - question
7 number one, that's assuming that it's still B and
8 LE's facility.

9 Correct?

10 A. Correct.

11 Q. And - and if the record reflects that the
12 B and LE does not have any ownership issues - excuse
13 me, does not have any ownership interests in the
14 Commonwealth currently, would you agree that they
15 should not be responsible for any future
16 maintenance?

17 A. I do not agree with that. If you would
18 like my explanation -

19 Q. Yes, sir.

20 A. - as to how I came to that opinion?

21 Q. Yes.

22 A. So typically when we relinquish ownership
23 of what we call them as turnbacks, we return
24 portions of road to the municipality or the county
25 and we have a secretarial letter that is directing

1 us to - directing us to either maintain or to do
2 some sort of repair work on it, we - we file an
3 application to reopen the secretarial letter to
4 amend it to transfer that maintenance or whatever
5 responsibility was stated in that secretarial letter
6 to the new owner. And we've done that as recent as
7 last year.

8 And in this case, it was never done to
9 transfer the negotiation parts - if you look at the
10 - we - we keep going back to that fourth paragraph
11 in the secretarial letter. I - I - here real quick.

12 That crossing - at crossing number 27a, B
13 and LE and PennDOT presently are negotiating the
14 disposition of the tunnel. The order - going back
15 and say the new owner and PennDOT are going to be
16 negotiating.

17 So in my mind, you know, based off of my
18 experience and, you know, how we operate with these
19 secretarial letters, you know, it's still B and LE
20 that's responsible. And it's their crossing,
21 according to the secretarial letter.

22 Q. Well, you - you testified that you
23 oversaw and were responsible for Exhibit B.

24 Is that correct?

25 A. Correct.

1 Q. Now, with - with respect to the February
2 2012 letter, -

3 A. Okay.

4 Q. - at the end it says if you're
5 dissatisfied with the resolution of this matter, you
6 may, as set forth in 52 Pa. Code, file a 5.445
7 petition.

8 Did PennDOT file a petition or move for
9 reconsideration of that - of that Order of that
10 secretarial letter?

11 A. We did not because we did not have any -
12 we didn't have any concerns with, you know, the
13 Order stating that that crossing number 27a B and LE
14 and PennDOT would negotiate the disposition of. And
15 it would be in a future secretarial letter, so we
16 had no reason to have concerns.

17 Q. Now, you - you talked - you talked about
18 construction of the road. Isn't it true that
19 construction of the road continued after the tunnel
20 was built?

21 A. We did widen the road after construction
22 of the tunnel.

23 Q. It was originally a dirt road then over
24 the years, would you agree that the road was
25 upgraded?

1 A. I would have to - I would have to go back
2 and look at if it was a dirt road. But yes, over
3 the years it has been upgraded.

4 Q. And that all occurred after the tunnel
5 was constructed in 1906?

6 A. Of course, we continue to maintain our
7 roads constantly.

8 Q. Okay.

9 But then - it was probably upgraded to
10 packed gravel?

11 A. I do not know off the top of my head what
12 it was at the time of the road -. I - I am not sure
13 what the road was made of.

14 Q. At some point it was ultimately paved.
15 Correct?

16 ATTORNEY NOYES: You know, I'm going
17 to object at this point. He's asked and answered
18 the same question. He doesn't know about the makeup
19 of the road. He doesn't have that information at
20 his fingertips.

21 JUDGE: Sustained.

22 Next question, Mr. Steidle.

23 BY ATTORNEY STEIDLE:

24 Q. Sir, do you know if the road is currently
25 paved today?

1 A. Yes, it's currently paved today.

2 Q. Okay.

3 Would you agree that traffic has - has
4 continued to increase over the years?

5 A. Yes, traffic has continued to increase.

6 Q. And at the present time, there's over
7 1,400 cars that use it per day?

8 A. That is correct.

9 Q. And would you agree that there are
10 benefits to both the public and the railroad from
11 the grade-separated crossing?

12 A. In - in general, yes.

13 Q. Were you present for Mr. - Mr. Helfrich's
14 testimony?

15 A. I was.

16 Q. Would you - do you agree with what he
17 testified to with regard to the benefits?

18 A. Yes, I would agree that if there has to
19 be a crossing, a grade-separated crossing is the
20 best option.

21 ATTORNEY STEIDLE: Very good.

22 Thank you very kindly, sir. No
23 further questions.

24 JUDGE: Ms. Rost, did you have any
25 questions for Mr. Keilman?

1 ATTORNEY ROST: I do not have any
2 questions at this time. Thank you.

3 JUDGE: All right.

4 Mr. Marshall, do you have any
5 questions for Mr. Keilman?

6 ATTORNEY MARSHALL: I do not at this
7 time, Your Honor. Thank you.

8 JUDGE: Thank you.

9 Ms. Sherwin?

10 MS. SHERWIN: No, Your Honor, thank
11 you.

12 JUDGE: Thank you.

13 Ms. Noyes, do you have any Redirect of
14 Mr. Keilman?

15 ATTORNEY NOYES: I do not, thank you.

16 JUDGE: All right.

17 And would you like to move Mr.
18 Keilman's testimony into the record?

19 ATTORNEY NOYES: Yes, please, Your
20 Honor.

21 JUDGE: Okay.

22 Go ahead, Ms. Noyes.

23 ATTORNEY NOYES: Your Honor, I didn't
24 know if you wanted me to formally officially make
25 the motion in - in full or not, but we would move

1 for the admission of his testimony and the
2 accompanying exhibits.

3 JUDGE: All right.

4 Is there any objection to the
5 admission of PennDOT Hearing Statement Number 1,
6 along with Exhibits A, B, and C, included with that
7 statement?

8 ---

9 (Whereupon, PennDOT's Exhibit Statement 1,
10 Hearing Statement 1, was marked for identification.)

11 (Whereupon, PennDOT's Exhibit A, Attachment for
12 Statement 1, was marked for identification.)

13 (Whereupon, PennDOT's Exhibit B, Attachment for
14 Statement 1, was marked for identification.)

15 (Whereupon, PennDOT's Exhibit C, Attachment for
16 Statement 1, was marked for identification.)

17 ---

18 ATTORNEY STEIDLE: John Steidle here,
19 no objection on behalf of the railroad, Your Honor.

20 JUDGE: Thank you.

21 Was there a verification attached to
22 the written testimony when you preserved it?

23 ATTORNEY NOYES: Your Honor, I'd have
24 to go back and check. I see now that the exhibit as
25 I provided it doesn't have it.

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ALICIA KAVULIC,
CALLED AS A WITNESS IN THE FOLLOWING PROCEEDING, AND
HAVING FIRST BEEN DULY SWORN, TESTIFIED AND SAID AS
FOLLOWS:

JUDGE: Could you please state and
spell your name and provide your business address
for the court reporter?

THE WITNESS: Yes.

My name is Alicia Kavulic,
A-L-I-C-I-A, K-A-V-U-L-I-C. And my business address
is PennDOT District 10, 2550 Oakland Avenue,
Indiana, PA, 15701.

JUDGE: Ms. Noyes, you may proceed.

ATTORNEY NOYES: Thank you.

DIRECT EXAMINATION

BY ATTORNEY NOYES:

Q. Ms. Kavulic, could you state then your
official title with the Department of
Transportation?

A. Yes, I'm a civil engineer manager and I
am employed as the district geotechnical engineer.

1 Q. Have you prepared written testimony and
2 exhibits for the purpose of this proceeding?

3 A. Yes.

4 Q. Do you have a document in front of you
5 identified as Hearing Statement Number 2, Direct
6 Testimony of Alicia Kavulic in front of you?

7 A. Yes.

8 Q. Was this document prepared by you or
9 under your supervision?

10 A. Yes, it was.

11 Q. And do you have any changes or
12 corrections that you would like to make to this
13 document?

14 A. I do not have any changes or corrections.

15 Q. If I were to ask you the same questions
16 contained in this Direct Testimony, would your
17 answers be the same?

18 A. Yes, they would be the same.

19 Q. And would those answers be true and
20 correct to the best of your knowledge, information
21 and belief?

22 A. Yes, they would.

23 Q. Am I correct that you had the opportunity
24 to review the Rebuttal Testimony provided by Mr.
25 Helfrich and by the railroad?

1 A. Yes.

2 Q. And further, you have been present for
3 the duration of this proceeding thus far.

4 Correct?

5 A. Yes, I have been present.

6 Q. Okay.

7 Based on what you read and what you have
8 heard today, do you have anything you wish to add as
9 it relates to your concerns and your testimony?

10 A. No, I don't have anything to add.

11 ATTORNEY NOYES: Okay.

12 Thank you very much. I would offer
13 this witness for Cross.

14 THE WITNESS: Thank you.

15 JUDGE: All right.

16 Mr. Steidle, do you have any Cross
17 Examination for Ms. Kavulic?

18 ATTORNEY STEIDLE: John Steidle, no
19 Your Honor, on behalf of the railroad, we do not
20 have any Cross for this witness.

21 JUDGE: All right.

22 Thank you.

23 Ms. Rost, do you have any Cross?

24 ATTORNEY ROST: I & E does not have
25 any cross for this witness. Thank you.

1 behalf of the WALA. She was an -

2 JUDGE: I believe -.

3 ATTORNEY STEIDLE: According to - this
4 is - according to the document, she's an officer of
5 the corporate - the nonprofit entity that - that -
6 that - that the property was originally sold to.

7 JUDGE: All right.

8 I am at the moment speaking to Ms.
9 Sherwin and not Ms. Barnhart. And after I place her
10 under oath and ask her about this exhibit, you can
11 certainly talk about on whose behalf she is
12 testifying.

13 So I'm going to go back to Ms.
14 Barnhart (sic), who has solemnly sworn and affirmed
15 she is going to tell the truth. And I'm going to
16 ask her to spell her name for the court reporter and
17 to provide her address.

18 THE WITNESS: This is Anna Marie
19 Sherwin, not Mrs. Barnhart.

20 JUDGE: I'm sorry. Ms. Sherwin.

21 THE WITNESS: Okay.

22 My name is Anna Marie Sherwin, A-N-N-
23 A, capital M, A-R-I-E, capital S, H-E-R-W-I-N. And
24 my home - I'm the property owner of the above ground
25 of the tunnel.

1 JUDGE: Okay.

2 And you have provided me with a
3 document - looks like it's a collection of
4 documents. The first page appears to be letterhead
5 of Bessemer and Lake Erie Railroad Company. It has
6 a date of January 22nd, 2002. And it says land sale
7 perspective.

8 Can you tell me how this document came
9 to be in your possession and what it is?

10 THE WITNESS: This document was given
11 to me by Mrs. Barnhart, due to the fact that we both
12 owned property that includes the tunnel.

13 JUDGE: Okay.

14 So you -? All right.

15 So are you testifying on your behalf
16 as a property owner or are you testifying in some
17 other capacity?

18 THE WITNESS: No, as a property owner.

19 JUDGE: Okay.

20 So did you ever receive a copy of this
21 document yourself or was it only given to you by Ms.
22 Barnhart?

23 THE WITNESS: It was given to me by
24 Ms. Barnhart, given the fact that she was one of the
25 people that was in charge of organizing the group of

1 people who were going to buy the railroad property.

2 JUDGE: Okay.

3 But you weren't - you weren't present
4 when this document was generated and - or - you
5 never received it in the context?

6 THE WITNESS: I was - no. I was -
7 meeting - I was in the meeting -.

8 ---

9 (WHEREUPON, A BRIEF INTERRUPTION IN THE PROCEEDINGS
10 WAS HELD.)

11 ---

12 JUDGE: Okay.

13 Here's - here's my problem. Your
14 phone - mute your phone, please.

15 Ms. Sherwin, are you still listening?

16 THE WITNESS: Yes, Your Honor.

17 JUDGE: Okay.

18 So here's my problem. Because this
19 document - you never received this document and you
20 don't necessarily have any firsthand knowledge of
21 what's in this document, I'm - I'm not sure I can
22 let you offer it into the record.

23 If you have any testimony about your
24 firsthand experience that you personally witness it
25 - witnessed, I can let you talk about that.

1 THE WITNESS: The only thing that we
2 were informed of at the meeting was that we were -
3 that Bessemer was responsible for the - for the
4 tunnel -

5 ATTORNEY STEIDLE: Objection, hearsay.

6 THE WITNESS: - and -.

7 JUDGE: Okay.

8 What meeting are you talking about,
9 Ms. Sherwin?

10 THE WITNESS: Whenever we were meeting
11 with Bessemer - and - and when we formed a group and
12 that. And this is what was stated to us, that they
13 were responsible for - that the sale would fulfil
14 the requirements of PUC about the crossing and
15 taking care of the bridges and the - tunnel.

16 JUDGE: Okay.

17 And were you at the meeting where you
18 heard that statement made?

19 THE WITNESS: Yes.

20 JUDGE: And can you give me some idea
21 of when that meeting occurred?

22 THE WITNESS: On - no, I wouldn't have
23 any recollection of the date and time, no.

24 JUDGE: Can you - like, what year
25 maybe?

1 THE WITNESS: I really - I - at that
2 time, I really can't - this would just be an
3 estimated guess, and I don't want to do that.

4 JUDGE: Okay.

5 When did you - when did you purchase
6 the - the property -

7 THE WITNESS: That was - I think -.

8 JUDGE: - over the tunnel?

9 THE WITNESS: That was in 2002, I'm
10 pretty sure.

11 JUDGE: All right.

12 So did the meeting you're talking
13 about happen before you purchased your property?

14 THE WITNESS: Yes.

15 JUDGE: Okay.

16 So it's likely - I'm sorry?

17 THE WITNESS: Yeah, yes.

18 JUDGE: Okay.

19 Okay.

20 And it's your testimony that - okay.

21 So you're testifying that you heard
22 the railroad say that - what at that meeting?

23 THE WITNESS: That we had no right to
24 the overpasses or the Blackburn Tunnel, and that
25 they were going to be -

1 ATTORNEY STEIDLE: Objection.

2 THE WITNESS: - that they were going
3 to be taking those down and filling in the tunnel.

4 JUDGE: Okay.

5 ATTORNEY PALMER: Your Honor, Edwin
6 Palmer again. I object, hearsay.

7 ATTORNEY ROST: Your Honor, if I
8 may -.

9 JUDGE: Go ahead Ms. Rost.

10 ATTORNEY ROST: Sorry, I was just
11 going to say it's a statement made by a party
12 opponent, as well as personal knowledge,
13 understanding of the witness. Thank you.

14 JUDGE: Yeah, I'm going to -.

15 ATTORNEY PALMER: Your Honor, she -.

16 JUDGE: All right.

17 Yeah, I'm going to overrule the
18 objection.

19 But I am going to ask Ms. Sherwin, do
20 you remember who from the railroad made that
21 statement that you're referring to?

22 THE WITNESS: I have no idea.

23 JUDGE: All right.

24 Was it a man or a woman?

25 THE WITNESS: I think it was a man at

1 the time, but I - I really could not say for sure.

2 JUDGE: All right.

3 Is there anything else you would like
4 to offer as your testimony at this time?

5 THE WITNESS: We were discussing
6 before that - the timing of the matter. And the
7 timing of the matter, in fact, the railroad's timing
8 itself started at - to tell you about the times in
9 the railroad's - the rails and then graded that
10 down. When they say graded that down, they took the
11 hump out of the tunnel, removed drainage ditches
12 going along the side and that's why it ponded.

13 JUDGE: Okay.

14 How do you know that?

15 THE WITNESS: I live right above it.

16 JUDGE: And did you see the work being
17 performed?

18 THE WITNESS: Yes.

19 JUDGE: Okay.

20 Is there anything else you'd like
21 to -?

22 THE WITNESS: Pardon?

23 JUDGE: I'm sorry?

24 I - I asked you if have any further
25 testimony.

1 THE WITNESS: No, that's all.

2 JUDGE: All right.

3 Mr. Palmer, do you have any Cross
4 Examination of Ms. Sherwin?

5 ATTORNEY PALMER: Just briefly.

6 ---

7 CROSS EXAMINATION

8 ---

9 BY ATTORNEY PALMER:

10 Q. Ms. Sherwin, this conversation that you
11 had with someone at the railroad occurred more than
12 20 years ago.

13 Correct?

14 A. Correct.

15 Q. And you have no specific recollection of
16 that conversation you told us.

17 Correct?

18 A. I just don't remember the date, the time,
19 and the person that we were talking to because there
20 were multiple people at the meeting.

21 Q. And you can't even tell us for sure
22 whether it was a man or a woman who made that
23 statement?

24 A. I - I don't want to lie. I just - I
25 don't remember at that time.

1 Q. Okay.

2 That's fine. If you don't remember
3 something, that's fine.

4 A. Mrs. Barnhart would be able to give you
5 more information, more detailed information, due to
6 the fact that she sat on the Board of a group of
7 people - her and her husband both did.

8 Q. Okay. Okay.

9 And Ms. Barnhart's not - not here today.
10 Correct?

11 A. Correct.

12 Q. And subsequent to this conversation,
13 there was a - a deed that transferred the property
14 from the railroad to the Western Allegheny
15 Landowners' Association.

16 Correct?

17 A. Correct.

18 Q. Okay.

19 And you are involved in the Western
20 Allegheny Landowners' Association.

21 Correct?

22 A. I was, yes.

23 Q. Oh, you were?

24 A. I was.

25 Q. Okay.

1 And the Western Allegheny Landowners'
2 Association was represented by Counsel with respect
3 to the sale.

4 Correct?

5 A. Correct.

6 Q. And after that -?

7 Okay.

8 So after all these discussions with the
9 railroad, which you can't go to the particulars on,
10 there was ultimately a deed that was executed.

11 Correct?

12 A. Correct.

13 Q. And that was the quit claim deed.

14 Correct?

15 A. Correct.

16 Q. And then you and - and your husband, in
17 May of 2003, purchased a section of this property
18 from the Western Allegheny Landowners' Association.

19 Correct?

20 A. Correct.

21 ATTORNEY PALMER: And I would just
22 note for the record that that deed is referenced as
23 B and LE Exhibit 8.

24 We have no further questions.

25 JUDGE: Thank you.

1 Excuse me. Ms. Rost, did you have any
2 questions for Ms. Sherwin?

3 ATTORNEY ROST: I - I just had one or
4 two quick clarification questions.

5 JUDGE: Go ahead.

6 ---

7 CROSS EXAMINATION

8 ---

9 BY ATTORNEY ROST:

10 Q. Ms. Sherwin, I believe my - my thing went
11 out a little bit. So could you please tell me a
12 little bit more about the ponding of water? So did
13 the water pond at the portals of the tunnel whenever
14 the railroad was in service?

15 A. No.

16 Q. And you saw the - I guess you were - you
17 saw the property whenever the railroad was active
18 there.

19 Right?

20 A. Yes.

21 Q. So were there -?

22 A. My husband's family had moved here prior
23 to us taking over the house.

24 Q. And whenever you visited the - the tunnel
25 prior to the tracks being removed, were there

1 drainage facilities there?

2 A. No, it was just a raised-up area for the
3 track and then like ditches down along the side, so
4 the water ran freely through there, so it did not
5 pond in the entire tunnel or even at the - you know,
6 at the entrance.

7 Q. Okay.

8 So the hump you referenced to earlier was
9 actually the - the fill of land which rose the
10 tracks above where the drainage was?

11 A. Correct.

12 ATTORNEY ROST: Okay.

13 Thank you. That's all the questions I
14 have.

15 JUDGE: Thank you.

16 Ms. Noyes, do you have any questions
17 for Ms. - Ms. Sherwin?

18 ATTORNEY NOYES: Yes, very briefly.

19 ---

20 CROSS EXAMINATION

21 ---

22 BY ATTORNEY NOYES:

23 Q. Ms. Sherwin, I'm Melissa Noyes, for the
24 Department of Transportation. In your testimony,
25 you indicated that the water appeared after they

1 took out the ties.

2 Do you know who - who they was? Was that
3 the railroad?

4 A. That was the railroad.

5 Q. All right.

6 And was that before or after the purchase
7 of the land - by - no, I'm sorry. I'm sorry. After
8 the purchase?

9 JUDGE: All right.

10 Time out. One at a time.

11 ATTORNEY PALMER: I'm sorry. This is
12 Edwin Palmer. I just - we talked about a couple
13 different things with this witness.

14 Can we just clarify which sale we're
15 talking about?

16 JUDGE: Ms. Noyes, can you -? Yes.
17 Rephrase your question.

18 ATTORNEY NOYES: Thank you.

19 I apologize for not being clear.

20 BY ATTORNEY NOYES:

21 Q. Ms. Sherwin, the - when you saw the
22 removal of the ties, the railroad ties, was that
23 before or after the first sale of the property from
24 the railroad to the group?

25 A. The ties were removed after the sale.

1 Q. Okay.

2 And you're referring to the sale - the
3 first sale?

4 A. I only know one sale, and that was to the
5 - you know, to our group.

6 Q. Okay.

7 But to be clear, that - it was before you
8 individually purchased the property.

9 Correct?

10 A. We - we formed the Landowners'
11 Association, which was a group of people. And from
12 that group of people, I mean everybody had their own
13 section that they had purchased from the railroad.
14 The railroad was bought by the Landowner Association
15 and then divided up.

16 Q. Okay.

17 And the - so the removal of the ties was
18 before it was divided up?

19 A. I think so.

20 Q. Okay.

21 After - you're clear that it was after
22 the railroad sold the property to the group?

23 A. After - yeah, after - after it was sold -
24 it was in - it was stipulated that they had control
25 over the tunnels and - and that they were to remove

1 the railroad ties and the rails.

2 Q. And as far as you know, they did that?

3 A. Yes.

4 Q. Okay.

5 And prior to this meeting that you've
6 testified about, had you even heard of the PUC, the
7 Public Utility Commission?

8 A. I know the Public - yes, I know about
9 them.

10 Q. Generally - I'm sorry.

11 Do you - did you know that they had any
12 involvement or could have any involvement in this
13 transaction or the elimination, if you will, of the
14 railroad? Did you know anything about their
15 involvement in that?

16 A. No.

17 Q. Are you aware of a sinkhole in the land
18 above the tunnel?

19 A. Not at this point.

20 Q. And to your knowledge, are there people
21 that enter the tunnel, that walk through the tunnel
22 or use ATVs?

23 A. Yes.

24 Q. Did you walk through the tunnel prior to
25 its purchase by the group?

1 A. Yes.

2 Q. And have you walked - when's the last
3 time you walked through it, as we sit here today?

4 A. It's been several years because it's
5 collapsed. Prior to that, my house is just - I
6 can't get down over the hill and through there.

7 Q. So when I asked you about the - the
8 sinkhole, you haven't been - you haven't walked
9 across the top of the property either - across the
10 top of the tunnel either in a few years?

11 A. Oh, yes, definitely because I - because -
12 there - I moved past there. So at this point, I've
13 seen nothing.

14 Q. Okay.

15 And have you - approximately how long
16 after the property was sold to the group would you
17 say that the ties and spikes were removed by the
18 railroad?

19 A. It was shortly after that. I mean, it
20 didn't take them long in order to, you know, remove
21 the ties and the rails.

22 Q. The - the document that you have faxed in
23 that was presented to you by the Judge, is - is that
24 consistent with what you recall was said in this
25 meeting that you had with railroad representatives?

1 A. Yes.

2 Q. And just to be clear, do you own the
3 property surrounding the tunnel crossing? What is
4 the - what is the scope of your own - your
5 individual ownership?

6 A. If you split the tunnel right down to the
7 center, there's four people that own the property,
8 each side - four on each - two - two on each side.

9 Q. And which side is - is yours or are you
10 saying that you share ownership with the others?

11 A. I - I would share ownership with
12 Pasquarellis.

13 Q. Okay.

14 A. That's one the one side of the main road,
15 268.

16 ATTORNEY NOYES: I believe that's all
17 I have Your Honor. Thank you.

18 JUDGE: All right.

19 Thank you.

20 Ms. Sherwin, is there anything you
21 would like to add to your testimony based on the
22 questions that the other folks have asked you?

23 THE WITNESS: No, to my knowledge
24 there's nothing else. I think that pretty much sums
25 it up.

1 JUDGE: All right.

2 All right.

3 Thank you as well.

4 As I explained, I am not going to
5 permit your document to be admitted for its
6 consideration into the record. But we will consider
7 your testimony based on your personal knowledge and
8 observations. So thank you very much for your
9 testimony today and you may step down.

10 MS. SHERWIN: Thank you.

11 JUDGE: All right.

12 Before we talk about briefs and
13 wrapping things up, does any party have anything
14 further they would like to add for the purposes of
15 the evidentiary record in this case?

16 ATTORNEY PALMER: On behalf of
17 Bessemer and Lake Erie, this is Edwin Palmer. No,
18 Your Honor.

19 JUDGE: All right.

20 Thank you.

21 Ms. Rost, did the parties have any
22 discussion of scheduling for filing of briefs or
23 anything in this matter?

24 ATTORNEY ROST: We have not, Your
25 Honor.

1 JUDGE: All right.

2 Does anybody have any thoughts about
3 when they would like to file their briefs? With the
4 understanding that the transcript will come in in
5 about - I'll just say 30 days to be safe.

6 Go ahead.

7 ATTORNEY ROST: This is Kayla Rost.
8 Sorry.

9 JUDGE: Yes.

10 ATTORNEY ROST: In light of the - I
11 guess the court reporter transcript timing, as well
12 as the pending Motion for Summary Judgement, may I
13 suggest roughly 60 days after the court - the
14 transcript is received?

15 JUDGE: For main briefs?

16 ATTORNEY ROST: Yes, 60 days for the
17 main brief and then 30 days - well, actually, maybe
18 20 days for Rebuttal.

19 JUDGE: All right.

20 Does anybody have any objection to
21 main brief 60 days following receipt of the
22 transcript, with reply briefs 20 days thereafter?

23 Good.

24 ATTORNEY NOYES: No objection from the
25 Department.

1 Your Honor, could we - I'm sorry to
2 interrupt. Could we address the Motion for Summary
3 Judgement that's been filed as far as how that
4 interacts with the briefing schedule here and the
5 matters here?

6 If we're going to - filing an Answer
7 to that - to the motion, generally, but if there's a
8 briefing requirement, it seems to be fairly
9 redundant, I guess. So I'm wondering if we can wrap
10 both into the same process or if something can be
11 done to - to respond appropriately, but also - as to
12 time and resources?

13 JUDGE: Yeah.

14 I - I'm open to suggestion, Ms. Noyes.
15 What would be your suggestion for dealing with the
16 response to the Motion of Summary Judgement as well
17 as briefs?

18 ATTORNEY NOYES: Well, Your Honor, I
19 think if I may - I - I would be - you know, happy to
20 file an Answer - I think the motion was somewhat
21 untimely or even premature coming on the eve of -
22 basically, eve of the hearing itself.

23 So I don't - I'm fine with filing an
24 Answer, but I would ask that it be taken into
25 consideration, along with, you know, generally the

1 merits and the - the hearing as a whole.

2 JUDGE: Yeah, it would be my
3 preference to issue one decision that deals with
4 both the jurisdictional issues and any factual
5 issues thereafter. If we waive the 20-day response
6 period to the Motion for Summary Judgement and allow
7 the responsive parties to include their response
8 with their main briefs, we still need 60 days after
9 the transcript to put all that paperwork together.

10 ATTORNEY ROST: Your Honor, this is
11 Kayla Rost with I & E.

12 JUDGE: Yeah.

13 ATTORNEY ROST: As the party who
14 offered the 60 days, that was within mind of
15 providing an Answer a lot shorter. So if we could
16 attach our answers to the Motion of Summary
17 Judgement to our brief, mine - mine will be a much
18 larger filing, you know, I think we could probably
19 do anywhere from 30 to 45 days.

20 JUDGE: All right.

21 So let me ask Mr. Steidle and Mr.
22 Palmer this.

23 Do you have any objection to let's say
24 consolidating the response to the Motion for Summary
25 Judgement with the main brief for I & E and PennDOT?

1 ATTORNEY PALMER: Your Honor, this is
2 Edwin Palmer. I mean, we appreciate this Court for
3 doing everything at one time. So I guess that makes
4 sense.

5 JUDGE: All right.

6 So let's do this. Let's say main
7 briefs 45 days after the transcript. The main brief
8 will include I & E and PennDOT's response to Motion
9 for Summary Judgment. And then we'll do reply
10 briefs 45 - 20 days thereafter.

11 And Mr. Palmer, if the railroad has
12 anything they would like to add to the
13 jurisdictional argument, I will permit you some
14 leeway to put that in your reply briefs. And I
15 also -.

16 ATTORNEY PALMER: Thank you.

17 JUDGE: Yeah.

18 I also want to caution people that -
19 you know, the legal argument is - necessarily the
20 factual arguments and the legal arguments will kind
21 of overlap each other with the testimony today. But
22 I expect the - the meat of legal discussion to be
23 based on, you know, statutes, regulation, case law
24 and such and the - the legal analysis of the sharp
25 legal minds who are actually representing the

1 parties in these proceedings.

2 So with that, does anybody have any
3 further questions?

4 ATTORNEY ROST: Your Honor, this is
5 Kayla Rost with I & E.

6 I would just like to ask, what is the
7 email address to send the testimony that's been
8 admitted?

9 JUDGE: Oh, yes. Actually I was going
10 to take care of that for you, but if you - you know,
11 why don't you just let me do it. I will send the
12 preserved testimony that you provided to me and
13 assume that what you have admitted into the record
14 is the same stuff.

15 Ms. Rost?

16 ATTORNEY ROST: Yes, sorry. I'm just
17 used to having to send it afterwards. But thank you
18 for that.

19 JUDGE: I know. Most Judges do it
20 that way. But I just - I think - we don't have an
21 overwhelming volume today and it's easier for the
22 court reporter if it just comes from me.

23 And I'm going to wait - Ms. Garbinski,
24 I'm going to wait until I get the verifications from
25 Ms. Noyes to go along with PennDOT's Exhibits and I

1 will provide those to you.

2 Last thing I wanted to mention, I will
3 issue a Briefing Order that memorializes some of the
4 things we've talked about today. I'm going to ask
5 each party to include an appendix to their main
6 brief that includes references to the testimony
7 regarding the - the directed questions, the Q and A
8 questions that are relevant to your client, so that
9 the Commission can easily find the answers to those
10 responses.

11 You don't have to repeat verbatim your
12 testimony, but at least include a citation for where
13 the testimony can be found.

14 Does anybody have anything further
15 they would like to provide at this time?

16 And Ms. Garbinski, for the purposes of
17 the transcript, is there anything you need from the
18 parties at - at this time before we all hang up?

19 COURT REPORTER: No, I think I've got
20 everyone's spellings and everything. Thank you.

21 JUDGE: All right.

22 And as I said before, I will be
23 providing Sargent's with copies of these exhibits
24 that were admitted in today's record.

25 So if there's nothing further, we are

1 concluded. I wish you all a good rest of the day
2 and I look forward to reading your briefs with great
3 attention.

4 ATTORNEY PALMER: Your Honor, this
5 is -

6 ATTORNEY ROST: Thank you, Your Honor.

7 ATTORNEY PALMER: - Edwin Palmer.

8 Does Ms. Garbinski need contact
9 information for transcript ordering purposes?

10 JUDGE: I'm sure she would love that.
11 Would you like to provide Ms. Garbinski with your
12 contact information?

13 ATTORNEY PALMER: Yeah.

14 For Bessemer Lake Erie, my email
15 address is E, B as in boy, Palmer at Burnslake dot
16 com, and Mr. Steidle's -.

17 ATTORNEY STEIDLE: It's J M Steidle at
18 Burnslake dot com.

19 COURT REPORTER: Okay.

20 And will you each be ordering a
21 transcript separately?

22 ATTORNEY PALMER: No, one, just one.

23 COURT REPORTER: Okay.

24 And is it all right if I send that
25 primarily to Mr. Palmer's email address?

1 ATTORNEY PALMER: That's fine.

2 COURT REPORTER: Okay.

3 Thank you.

4 ATTORNEY ROST: This is Kayla Rost
5 with I & E. I would also like a transcript. My
6 email is K-A-R-O, S as in Susan, T, as in Tom at PA
7 dot gov. I would like to note whenever you send the
8 transcript to the Commission, that doesn't come to
9 me, so you have to send it to me separately. Thank
10 you.

11 COURT REPORTER: Okay.

12 All right. Thank you.

13 ATTORNEY NOYES: And this is Melissa
14 Noyes. My email - my - Melissa Noyes. My email
15 address is my first initial and my last name, so M,
16 as in Melissa, N, as in Nancy, O-Y-E, S as in Sam,
17 looks like M, no, yes at PA dot gov.

18 COURT REPORTER: All right.

19 Thank you so much.

20 JUDGE: All right.

21 And Mr. Marshall, did you want a copy
22 of the transcript?

23 ATTORNEY MARSHALL: I do not need a
24 copy of the transcript at this time. If you would
25 like my email address anyway for whatever reason, it

1 is M Marshall. So that's M-M-A-R-S-H-A-L-L @ D, as
2 in dog, M, as in Mary, K, as in king, C, as in
3 Charles, G, as in George, DMKCG dot com.

4 COURT REPORTER: All right.

5 Thank you.

6 JUDGE: All right, then.

7 I think that's it. And we can all
8 hang up now and thank you very much for your
9 presentations today.

10 * * * * *

11 HEARING CONCLUDED AT 1:28 P.M.

12 * * * * *

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CERTIFICATE

I hereby certify, as the stenographic reporter,
that the foregoing proceedings were taken
stenographically by me, and thereafter reduced to
typewriting by me or under my direction; and that this
transcript is a true and accurate record to the best
of my ability.

Dated the 4 day of February, 2022.



Amber Garbinski, Court Reporter

Sargent's Court Reporting Service, Inc.
210 Main Street
Johnstown, PA 15901

EXHIBIT B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s :
motion into matters pertaining to the proper :
safety of the traveling public and disposition :
of the crossing where State Route SR0268, :
crosses over a railroad tunnel formally used :
by Bessemer and Lake Erie Railroad in : Docket No. I-2019-3012769
Fairview Township, Butler County and :
where State Route SR0068 formerly :
crossed, below grade, the track of Bessemer :
and Lake Erie Railroad in Bradys Bend :
Township, Armstrong County. :

JOINT STIPULATION

TO ADMINISTRATIVE LAW JUDGE MARY D. LONG:

Pursuant to 52 Pa. Code § 5.232(a) and 52 Pa. Code § 5.234, the Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”) files this Joint Stipulation, whereas the parties agree and stipulate to the following facts for the sole purpose of resolving the uncontested disposition of the SR 0068 public crossing in Bradys Bend Township, Armstrong County, in the above-captioned matter.

I. HISTORY OF THE PROCEEDING

By Secretarial Letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of 29 crossings on the abandoned line of Bessemer & Lake Erie Railroad Company. The two remaining crossings located at SR0268 and SR0068 were to be the subject of future Secretarial Letters or formal hearing.

In 2018, the Commission was contacted by the Pennsylvania Department of

Transportation (“PennDOT”) concerning the disposition of the two crossings. An informal investigative field conference was held on June 26, 2018 and attended by the Commission’s Bureau of Technical Utility Services-Rail Safety (“Rail Safety”), PennDOT, CN/Bessemer & Lake Erie Railroad Company (“Bessemer & Lake Erie Railroad” or “B&LE”), and six (6) local homeowners located near the SR0268 tunnel.

By Order dated October 3, 2019, the Commission instituted an investigation for the purpose of determining all matters relating to the abolition and safety of the crossings where State Route SR0268 crosses, above grade, a track of Bessemer & Lake Erie Railroad in Fairview Township, Butler County, and where State Route SR0068 crosses, below grade, a track of Bessemer & Lake Erie Railroad in Bradys Bend Township, Armstrong County. The investigation was instituted to determine the future disposition of the crossings, what work shall be performed, and the allocation of cost of any work performed.

Prehearing conferences were held in this matter on November 10, 2020; December 1, 2020; December 30, 2020; and August 16, 2021. During the December 30, 2020 prehearing conference, ALJ Long instructed the parties to submit a stipulation for her review if the parties reached an agreement for the final disposition of the SR0068 crossing.¹

II. STIPULATED FACTS

1. The parties now submit this Joint Stipulation for the Commission’s consideration regarding the public crossing where State Route SR0068 crossed, below grade, a former track of B&LE in Bradys Bend Township, Armstrong County.

2. Bessemer & Lake Erie Railroad is a class II common carrier by rail.

¹ December 30, 2020 Hearing Transcript, pages 77-79.

3. Bessemer & Lake Erie Railroad is the former owner and operator of the line of track which crossed over SR0068. The track was formerly a part of the Western Allegheny Branch line.

4. Bessemer & Lake Erie Railroad received approval from the Surface Transportation Board in January 2001 to discontinue service and abandon service on the Western Allegheny Branch line, which included the subject crossing over SR0068, under docket number Ab-88 (Sub No. 10X).

5. Bessemer & Lake Erie Railroad initially sought approval with the Commission to abolish the subject crossing in addition to 27 other crossings and one tunnel on this line, A-00117858, but the SR0068 crossing was not included in the Secretarial Letter approving the abolishment of the other crossings.

6. The railway bridge carried a single track for B&LE over SR0068 and contained substandard horizontal and vertical clearances that hindered safe passage of the traveling public and created a bottleneck, resulting in an area prone to accidents.

7. PennDOT, with permission from B&LE, removed the SR0068 crossing structure in 2004 to realign the roadway at its sole cost and expense.

8. The removal of the bridge in its entirety opened up the crossing area and allowed it to meet both horizontal and vertical clearance designs, while reducing the likelihood of fixed object accidents. The roadway was also realigned which improved the sight distance and overall safety of the traveling public.

9. The parties agree that the SR0068 public crossing should be abolished and request that the Commission issue an Opinion and Order effectuating the abolishment of the SR0068 crossing in Bradys Bend Township, Armstrong County.

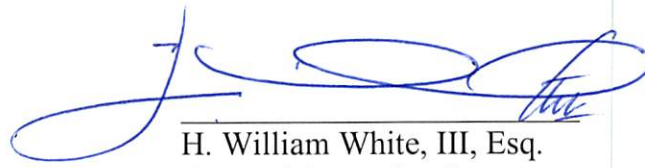
10. PennDOT agrees to maintain the roadway within its right-of-way at the subject crossing at its sole cost and expense.

11. The benefits and obligations of this Joint Stipulation shall be binding upon the successor and assigns of the parties to this Joint Stipulation.

12. This Joint Stipulation may be signed in counterparts and all signatures attached hereto will be considered as originals.

[SIGNATURE PAGE TO FOLLOW]

Date: 11/9/2021



H. William White, III, Esq.
Counsel for Butler County

Date: _____

Jennifer Brown-Sweeney, Esq.
*Counsel for the Commonwealth of
Pennsylvania, Department of
Transportation*

Date: _____

Kayla L. Rost, Esq.
*Counsel for the Commission's Bureau of
Investigation and Enforcement*

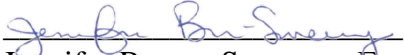
Date: _____

John M. Steidle, Esq.
*Counsel for Bessemer & Lake Erie
Railroad Company*

Date: _____

H. William White, III, Esq.
Counsel for Butler County

Date: 11/8/2021



Jennifer Brown-Sweeney, Esq.
*Counsel for the Commonwealth of
Pennsylvania, Department of
Transportation*

Date: _____

Kayla L. Rost, Esq.
*Counsel for the Commission's Bureau of
Investigation and Enforcement*

Date: _____

John M. Steidle, Esq.
*Counsel for Bessemer & Lake Erie
Railroad Company*


Date: _____

H. William White, III, Esq.
Counsel for Butler County

Date: _____

Jennifer Brown-Sweeney, Esq.
*Counsel for the Commonwealth of
Pennsylvania, Department of
Transportation*

Date: 11/10/2021



Kayla L. Rost, Esq.
*Counsel for the Commission's Bureau of
Investigation and Enforcement*

Date: _____

John M. Steidle, Esq.
*Counsel for Bessemer & Lake Erie
Railroad Company*

Date: _____

H. William White, III, Esq.
Counsel for Butler County

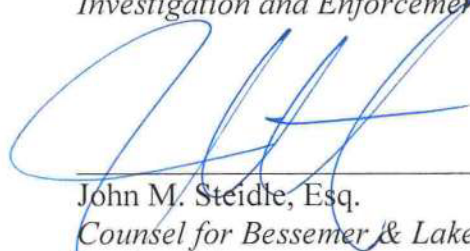
Date: _____

Jennifer Brown-Sweeney, Esq.
*Counsel for the Commonwealth of
Pennsylvania, Department of
Transportation*

Date: _____

Kayla L. Rost, Esq.
*Counsel for the Commission's Bureau of
Investigation and Enforcement*

Date: 11/10/2021



John M. Steidle, Esq.
*Counsel for Bessemer & Lake Erie
Railroad Company*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's :
motion into matters pertaining to the proper :
safety of the traveling public and disposition :
of the crossing where State Route SR0268, :
crosses over a railroad tunnel formally used :
by Bessemer and Lake Erie Railroad in : Docket No. I-2019-3012769
Fairview Township, Butler County and :
where State Route SR0068 formerly :
crossed, below grade, the track of Bessemer :
and Lake Erie Railroad in Bradys Bend :
Township, Armstrong County. :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Joint Stipulation** dated November 12, 2021, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail Only

Honorable Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222
malong@pa.gov

Jennifer Brown-Sweeney, Esquire
Pennsylvania Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
jbrownswee@pa.gov

Armstrong County Commissioners
Armstrong County Courthouse
450 East Market Street
Kittanning, PA 16201
aspoule@co.armstrong.pa.us

Bradys Bend Township Supervisors
1004 State Route 68
East Brady, PA 16028
bbtownship@gmail.com

John M. Steidle, Esquire
Edwin B. Palmer, Esquire
Burns White LLC
48 26th Street
Pittsburgh, PA 15222
jmsteidle@burnswhite.com
ebpalm@burnswhite.com
*Counsel for
Bessemer & Lake Erie Railroad*

H. William 'Wil' White, III, Esquire
Butler County Commissioners' Office
124 West Diamond Street
P.O. Box 1208
Butler, PA 16003-1208
wwhite@co.butler.pa.us
Solicitor for the County of Butler

Matthew F. Marshall, Esquire
Dillon McCandless King Coulter &
Graham, LLP
600 Cranberry Woods Drive, Suite 175
Cranberry Twp., PA 16066
mmarshall@dmkcg.com
Counsel for Fairview Township

Service by First Class Mail Only

Tracy Miller, General Manager
CN/Bessemer & Lake Erie Railroad
Company
2800 Livernois Road, Suite 220
Troy, MI 48083

Ronald and Madeline Stitt
1281 Kittanning Pike
Chicora, PA 16025

Maria Thomas
Planning Department
P.O. Box 1208
124 West Diamond Street
5th Floor County Government Center
Butler, PA 16003


Bruce and Rebecca Rodgers
P.O. Box 429
Chicora, PA 16025

Dean and Patricia Tascarella
1270 Kittanning Pike
Chicora, PA 16025

Paul R. Dorr, Chairman
Fairview Township Supervisors
1571 Hooker Road
Karns City, PA 16041

Ann Marie Sherwin
1276 Kittanning Pike
Chicora, PA 16025

William and Kay Barnhart
136 Boosel Road
Chicora, PA 16025



Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 322768
(717) 787-1888
karost@pa.gov



Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Harrisburg, PA 17105-3265
EFILING - FILING DETAIL

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11/12/2021	2326310

Your filing has been electronically received. Upon review of the filing for conformity with the Commission's filing requirements, a notice will be issued acknowledging acceptance or rejection (with reason) of the filing. The matter will receive the attention of the Commission and you will be advised if any further action is required on your part.

The date filed on will be the current day if the filing occurs on a business day before or at 4:30 p.m. (EST). It will be the next business day if the filing occurs after 4:30 p.m. (EST) or on weekends or holidays.

Docket Number: I-2019-3012769

Case Description:

Transmission Date: 11/12/2021 10:27 AM

Filed On: 11/12/2021 10:27 AM

eFiling Confirmation Number: 2326310

File Name	Document Type	Upload Date
I-2019-3012769 (Bradys Bend) Joint Stipulation FINAL.pdf	Joint Stipulation/Stipulation	11/12/2021 10:25:59 AM

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No paper submission is necessary for filings under 250 pages.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's motion :
into matters pertaining to the Proper safety of :
the traveling public and disposition of the :
crossing where State Route SR0268, crosses :
over a railroad tunnel formally used by :
Bessemer and Lake Erie Railroad in : Docket No. I-2019-3012769
Fairview Township, Butler County and :
where State Route SR0268 formerly crossed, :
below grade, the track of Bessemer and Lake :
Erie Railroad in Bradys Bend Township, :
Armstrong County :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Main Brief** dated April 14, 2022, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (related to service by a party).

Service by Electronic Mail Only:

Honorable Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222
malong@pa.gov

Kayla L. Rost
PA PUC Bureau of Investigation and
Enforcement
400 North Street
Harrisburg, PA 17120
karost@pa.gov

Melissa J. Noyes
Assistant Counsel
Pennsylvania Department of Transportation
Office of Chief Counsel
P. O. Box 8212
Harrisburg, PA 17105-8212
mnoyes@pa.gov

Armstrong County Commissioners
Armstrong County Courthouse
450 East Market Street
Kittanning, PA 16201
aspoole@co.armstrong.pa.us

H. William White, III, Esquire
Butler County Commissioners' Office
124 West Diamond Street
P.O. Box 1208
Butler, PA 16003-1208
WWhite@co.butler.pa.us
Solicitor for the County of Butler

Bradys Bend Township Supervisors
1004 State Route 68
East Brady, PA 16028
bbtownship@gmail.com

Matthew F. Marshall, Esquire
Dillon McCandless King Coulter &
Graham, LLP
600 Cranberry Woods Drive, Suite 175
Cranberry Township, Pa 16066
mmarshall@dmkcg.com
Counsel for Fairview Township

Nick Andreassi
Andreassi Gas Company
1073 Kittanning Pike
Chicora Pa 16025
724-445-3606
N_Andreassi@Yahoo.Com

Service by First Class United States Mail Only:

Maria Thomas
Planning Department
P.O. Box 1208
124 West Diamond Street
5th Floor County Government Center
Butler, PA 16003

Paul R. Dorr, Chairman
Fairview Township Supervisors
1571 Hooker Road
Karns City, PA 16041

William and Kay Barnhart
136 Boosel Road
Chicora, PA 16025

Bruce and Rebecca Rodgers
P.O. Box 429
Chicora, PA 16025

Ann Marie Sherwin
1276 Kittanning Pike
Chicora, PA 16025

Ronald and Madeline Stitt
1281 Kittanning Pike
Chicora, PA 16025

Dean and Patricia Tascarella
1270 Kittanning Pike
Chicora, PA 16025

Respectfully submitted,

BURNS WHITE LLC



By: _____

John M. Steidle, Esquire
Edwin B. Palmer, Esquire
Burns White Center
48 26th Street
Pittsburgh, PA 15222
(412) 995-3000
jmsteidle@burnswhite.com
ebpalmer@burnswhite.com

Attorneys for The Bessemer & Lake Erie
Railroad Company