

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's motion into : I-2019-3012769
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 :

**MAIN BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

Melissa J. Noyes
Assistant Counsel
Supreme Court I.D. Number 91495
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
PO Box 8212
Harrisburg, PA 17105
Telephone No. (717) 787-3128

DATED: April 15, 2022

TABLE OF CONTENTS

HISTORY OF THE PROCEEDING1

DISCUSSION.....2

**I. BESSEMER AND LAKE ERIE RAILROAD’S MOTION FOR SUMMARY
JUDGMENT SHOULD BE DENIED..... 2**

**II. IT IS JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION
TO ALLOCATE THE RESPONSIBILITY AND COSTS OF SR0268 CROSSING TO
BESSEMER AND LAKE ERIE RAILROAD. 7**

**a. The Commission is not limited to any set or fixed test, but considers all relevant factors on a
 case-by-case analyses. 7**

**b. An analysis of the relevant factors demonstrates that it is just and reasonable for the
 Commission to allocate the responsibility and costs to Bessemer and Lake Erie Railroad. 8**

**ii. B&LE and its predecessor-in-interest received the initial benefits of the construction of
 the rail line and tunnel..... 10**

**iii. B&LE, or its predecessor-in-interest, is primarily responsible for the deterioration of the
 crossing that has led to the need for replacement or repair..... 11**

**iv. The equities hold that B&LE should be held responsible for the sole cost and expense of
 any alterations or abolishment of the crossing. 13**

PROPOSED FINDINGS OF FACTS.....14

PROPOSED CONCLUSIONS OF LAW.....16

PROPOSED ORDER.....19

CONCLUSION.....21

APPENDIX A

History of the Proceeding

On May 31, 2001, Bessemer and Lake Erie Railroad Company (“B&LE”) filed an application with the Pennsylvania Utility Commission (“Commission”) to abolish 29 at-grade and separated-grade crossings at various locations in Armstrong and Butler Counties. *See* Commission Docket No. A-00117858. Ultimately, the Commission approved the application as to 27 of the 29 crossings. The two crossings that were not approved for abolition are the crossings that are the subject of the within proceeding: the crossing where State Route SR0268 crosses over a railroad tunnel formerly used by B&LE in Fairview Township, Butler County (DOT No. 051 728 M) (the “SR0268 Crossing”) and where State Route SR0068 formally crosses, below grade, the B&LE track in Brady’s Bend Township, Armstrong County (DOT No. 051 730 N) (the “SR0068 Crossing”) (collectively hereinafter referred to as the “Crossings”).

In 2002, B&LE sold a 394-acre tract of land that encompassed the SR0268 Crossing and the SR0068 Crossing to a private non-railroad entity, the Western Allegheny Landowners’ Association (“WALA”), which later subdivided the tract into parcels and distributed the parcels to individual landowners. Following the sale of the land to WALA, B&LE physically dismantled and removed the rails and ties from the track. B&LE did not provide notice of the 2002 sale or dismantling of the railroad tracks to the Commission or the Department of Transportation.

In 2004, the Pennsylvania Department of Transportation (“Department”), with the permission of B&LE, removed the SR0068 Crossing bridge structure to alleviate safety concerns and realigned the roadway at its sole cost and expense.

In 2018, in response to a local resident’s complaint about the collapse of tunnel at the SR0268 Crossing, the Department contacted the Commission concerning the formal disposition

of the Crossings. Following an investigative field conference held on June 26, 2018, on October 3, 2019, the Commission initiated the within investigation docket for the purpose of determining all matters relating to the abolition and safety of the Crossings, what work would be performed at the Crossings and the allocation of costs for any such work.

On or about November 12, 2021, a joint stipulation was entered and filed with the Commission whereby all parties agreed that the SR0068 Crossing should be formally abolished and requested that the Commission issue an Opinion and Order effectuating the abolishment, with the Department agreeing to maintain the roadway within its right-of-way at the SR0068 Crossing at its sole cost and expense.

On or about January 3, 2022, B&LE filed a Motion for Summary Judgment. At the January 18, 2022 hearing concerning the Commission's investigation, the parties agreed that the Department and the Commission's Bureau of Investigation & Enforcement ("BIE") would respond to the Motion within their main briefs following the hearing.

This matter is before the Commission to determine the condition and disposition of the Crossings.¹

DISCUSSION

I. BESSEMER AND LAKE ERIE RAILROAD'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

A Motion for Summary Judgment will be awarded where, based upon a review of pleadings, depositions, answers to interrogatories, admissions and affidavits, "there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law."

¹ In light of the November 12, 2021 Stipulation concerning the SR0068 crossing, the Department will focus its argument on the disposition of the SR0268 Crossing tunnel.

52 Pa. Code § 5.102(d)(1). When considering such motions, the Commission must view the record in the light most favorable to the non-moving party, affording that party the benefit of all reasonable inferences. *United Transp. Union v. Pa. PUC*, 68 A.3d 1026, 1033 (Pa. Cmwlth. 2013) citing *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlth. 1978). All doubts as to whether genuine issues of material fact exist must be resolved against the moving party. *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466 (Pa. 1979).

B&LE raises two bases for Summary Judgment: federal pre-emption of the Commission's jurisdiction by the Surface Transportation Board ("STB"), and opposition to B&LE's status as a "concerned party" subject to allocation of costs for the repair or maintenance of the crossing by the Commission. For the following reasons, both of these contentions are erroneous and cannot serve as a basis for B&LE being removed as a party to this action.

The Constitution's Supremacy Clause allows Congress to preempt state legislation if it so intends. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004) (citation omitted). However, a "preemption analysis should be 'tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Id.* Our federal courts have recognized three general ways in which federal law may preempt, and thereby displace, state law: (1) express preemption, which requires an explicit statutory command that state law be displaced; (2) field preemption, when federal law so thoroughly occupies a legislative field that a reasonable inference exists that Congress left no room for the States to supplement it; and (3) conflict preemption, when a state law as written makes compliance with both state and federal law impossible, or when the state law poses an obstacle to accomplishing the Congressional objectives of the federal law. *Id.* at 303.

B&LE has neither asserted nor proven any of these means of preemption, instead baldly asserting that, because the STB regulates rail transportation, the Commission cannot have jurisdiction over crossings such as the SR0268 crossing here. However, rail transportation and public safety of railroad crossings are not synonymous, and nothing in the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501(b), specifies that its provisions prevent states from enacting legislation or creating agencies to address the abolition and safety of railroad crossings.

Pursuant to Federal Law, the jurisdiction of the STB is exclusive over:

"...the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State," and, except as otherwise provided in the legislation, the remedies provided "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

49 U.S.C. § 10501(b). Unless the STB attaches post-abandonment conditions to a certificate of abandonment, once the certificate is issued, its jurisdiction ends, and the property becomes subject to ordinary processes of state law. *In re Cty. of Lancaster*, 909 A.2d 913, 918 (Pa. Cmwlth. 2006). Our courts have consistently held that the Commission’s authority to authorize and set conditions for the abolition of rail-highway **crossings** is distinct from the STB’s exclusive jurisdiction to regulate **rail service or transportation**. *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlth. 2001) (emphasis added). *See also, Friends of the Atglen-Susquehanna Trail Inc. v. Pennsylvania PUC*, 717 A.2d. 581 (Pa. Cmwlth. 1998) (“There is no question that in general the jurisdictions of the Commission over crossing abolition and the STB over rail line abandonment are different matters.” (citation omitted)).

Furthermore, as a general rule, preemption of the states' traditional police power by the federal statute is not favored. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132

(1963). Pursuant to its exercise of police power, the Commonwealth has given the Public Utility Commission broad powers with respect to the crossings of facilities of utilities, and particularly with respect to the crossing of highways and railroads. *Tarentum Borough v. Pa. P.U.C.*, 90 A.2d 853 (Pa. Super. 1952). In such a proceeding, the basis for the Commission's action is the public interest. *Pennsylvania Railroad Co. v. Pa. P.U.C.*, 35 A.2d 588, and the standard to be applied is "the prevention of accidents and the promotion of the safety of the public". *Pittsburgh R. Co. v. Pa. Pub. Util. Com.*, 182 A.2d 80, 84 (Pa. Super. 1962). Regardless of how a proceeding was commenced, the Commission can properly deal with replacement and repair of a crossing. *Port Auth. of Allegheny Cty. v. Pa. Pub. Util. Com.*, 217 A.2d 810, 814 (Pa. Super. 1966).

None of the authority relied upon by B&LE in its assertion of preemption squarely addresses the authority of the STB as compared to that of the Commission. Rather, the well-established precedent demonstrates the opposite: the regulatory authority of the STB and the Commission is distinct. As such, B&LE's claim of pre-emption as a basis for its dismissal from the within action lacks merit and the Motion for Summary Judgment cannot be granted on this basis.

Next, relying on 66 Pa.C.S. § 2704 and a narrow interpretation of our Supreme Court's decision in *Norfolk Southern Railway Company v. Public Utility Commission*, 77 A.3d 619 (Pa. 2013), B&LE asserts that it is not a "concerned party," and therefore cannot be assigned any costs for the subject crossing and tunnel. This assertion lacks merit and defies the very essence and purpose of the Commission's jurisdiction over crossings.

The Commission's exclusive authority over crossings such as the SR0268 Crossing and abolition thereof is clearly set forth in statute. *See*, 66 Pa.C.S. §2702. Although B&LE applied

for the abolition of 29 crossings in 2001, thereby conceding the Commission’s jurisdiction, the Commission declined to approve abolition of the SR0268 Crossing. Rather than reapplying for abolition of the SR0268 Crossing or otherwise addressing future maintenance and safety concerns to the satisfaction of the Commission, B&LE instead sold the property to a private, non-railroad entity without providing the notice required by 66 Pa.C.S. § 2709.² B&LE then proceeded to dismantle the rails and ties, again, without the approval of the Commission. Following this malfeasance, for B&LE to now assert that it should be excused from any responsibility for the SR0268 Crossing and tunnel would result in rendering the statutory authority of the Commission meaningless. With this rationale, any railroad that is not successful in obtaining Commission approval for abolition of a crossing could then simply sell the property to avoid having to incur costs of maintenance or repair. This is the exact conduct that the Commission was established to prevent. The legislature sought to have oversight over crossings for public safety concerns. To allow railroads to engage in this kind of evasive behavior and reap the benefits by escaping Commission jurisdiction should not be allowed.

Additionally, B&LE’s interpretation of the *Norfolk Southern* decision is flawed, if not altogether incorrect. In *Norfolk Southern*, the Supreme Court did not impose a minimum requirement of usage where a railroad does not own the property, in order for a non-owner railroad to be assessed costs or maintenance of a crossing as a “concerned party.” Rather, the Court was satisfied that the facts and circumstances of the case as well as equitable factors, including usage by the non-owner railroad, supported its assessment of costs and maintenance. *Norfolk, supra.*, 77 A.3d 619 at 631. Had the Court intended to set usage as a mandatory threshold for concerned party status, it would have expressly indicated as much. Here, the facts

² Upon a violation of § 2709, the transfer of the property is voidable. 66 Pa.C.S. § 2709

and circumstances demonstrate that B&LE shirked its legal duties and responsibilities by sidestepping the Commission. B&LE was unjustly enriched by benefitting from the crossing for many years, then profiting from the sale of the property while avoiding the costs of maintenance, repair or abolition of the tunnel in 2001. It should not be rewarded for this conduct by being dismissed from the within action.

II. IT IS JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ALLOCATE THE RESPONSIBILITY AND COSTS OF SR0268 CROSSING TO BESSEMER AND LAKE ERIE RAILROAD.

It is well established that the Public Utility Commission has jurisdiction over rail-highway crossings. 66 Pa.C.S. § 2702. The Commission also has the exclusive authority to allocate the costs related to the creation, maintenance, repair, replacement, or removal of a crossing. 66 Pa.C.S. § 2704(a). In evaluating a rail-highway matter, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999). Reviewing courts will not overturn an allocation of costs or responsibilities unless it is unjust or unreasonable. *Phila. v. Pa. P.U.C.*, 676 A.2d 1298 (Pa. Cmwlth. 1995).

a. The Commission is not limited to any set or fixed test, but considers all relevant factors on a case-by-case analyses.

The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit conferred on each party with the construction of the crossing.

4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.
5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

N. Lebanon Twp. v. Pa. P.U.C., 962 A.2d 1237, 1247 (Pa. Cmwlt. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlt. 1995)). The Commission is not required to set forth an analysis of these five factors since such “a practice . . . would hold PUC to a more rigorous standard in expressing its reasons for a cost allocation determination [and] would unnecessarily infringe upon the discretionary aspect of [its] decision” *Millcreek Twp. v. Pa. P.U.C.*, 753 A.2d 324 (Pa. Cmwlt. 2000) (quoting *AT&T v. Pa. P. U. C.*, 737 A.2d 201 (1999)). However, the Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlt. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981). Overall, the Commission has wide latitude “to determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. P.U.C.*, 672 A.2d 352, 355 (Pa. Cmwlt. 1995).

b. An analysis of the relevant factors demonstrates that it is just and reasonable for the Commission to allocate the responsibility and costs to Bessemer and Lake Erie Railroad.

In the instant case, the Commission should consider all of the above factors as each applies. They are: (1) The party that originally built the crossing; (2) The party that owned and maintained the crossing; (3) The relative benefit conferred on each party with the construction of the crossing; (4) Whether each party is responsible for the deterioration of the crossing that has led to the need

for its repair, replacement, or removal; (5) The relative benefit that each party will receive from the repair, replacement, or removal of the crossing; (6) The availability of state and/or federal funding for a project; and (7) The equities of a particular situation.

i. Bessemer and Lake Erie Railroad or its predecessor-in-interest constructed the rail-highway crossing tunnel.

In *Greene Twp.*, the Commonwealth Court states the initial factor that the Commission should consider is: “[t]he party that originally built the crossing.” *Greene Twp. Bd. of Supervisors* at 619 citing *Dep’t of Transp. v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). In *Dep’t of Transp.*, the Commonwealth Court held that it was unreasonable for the Commission to allocate costs associated with relocating railroad facilities made necessary by a bridge rehabilitation project onto the County and Township involved because, in short, the railroad had built the subject bridge and they should assume the costs. *Dep’t of Transp.* at 533. In each case before it, the Commission may consider any one of many factors; however, the original construction of the crossing has been relied upon in numerous cases. *See Id.*; *Borough of Bridgeville v. Allegheny County.*, Docket No. C-79091518, 1991 Pa. PUC LEXIS 82 (Order entered April 29, 1991); *In Re: Investigation into Montgomery Drive*, Docket No. I-870030, 70 Pa. PUC 321, 1989 Pa. PUC LEXIS 150 (Order entered July 26, 1989).

In the present case, the fact that B&LE (or its predecessor-in-interest) is responsible for original construction of the crossing must be heavily weighed. The unrebutted evidence presented demonstrates that the tunnel was B&LE, as evidenced by its predecessor-in-interest’s well thought-out decision to construct the tunnel under SR0268.

ii. B&LE and its predecessor-in-interest received the initial benefits of the construction of the rail line and tunnel.

The Commission can consider the initial benefits of the crossing between the parties. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). In our case, it is clear that the railroad received all of the initial benefits of the crossing. Courts have found an inherent benefit to railroads from the creation and maintenance of separated grade crossings. See *Consol. R.R. Corp. v. Pa. P.U.C.*, 671 A.2d 248, 251 (Pa. Cmwlth. 1995) (“Clearly, a railroad receives a significant benefit from a grade-separated crossing”). In *Pittsburgh and Lake Erie R.R. Co. v. Pa. P.U.C.*, 556 A.2d 944 (Pa. Cmwlth. 1989), the Commonwealth Court, in affirming the Commission’s Order, discussed the benefits of separated grade crossings. The inherent benefits of separated grade crossings, were identified as: “1) relief from liability for accidents and reduced insurance costs, 2) elimination of the need and maintenance for automatic signals, and 3) uninhibited use of the rail line.” *Id.* at 946. It is axiomatic that the Department also receives some benefit from grade-separated crossings. A grade separation is the safest type of rail crossing because it eliminates the chance of train-vehicle contact. This benefits both the rail and roadway users as safety is greatly increased for both and neither are inconvenienced since the grade separation provides for the free movement of trains and vehicles.

As such, the railroad clearly benefits on a much greater scale than the Department, and has since the tunnel was first constructed. Therefore, it is just and reasonable to allocate responsibility and costs to B&LE, as evidenced by its predecessor-in-interest’s many initial and ongoing benefits from the construction of the line.

iii. B&LE, or its predecessor-in-interest, is primarily responsible for the deterioration of the crossing that has led to the need for replacement or repair.

In determining the allocation of costs, the court in *Greene Twp.* acknowledged that the party who is responsible for the deterioration of the crossing is a factor that should be considered. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). Additionally, in *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, the court noted that where a railroad was assigned maintenance but failed to properly maintain a crossing, that it was not unjust to assign total reconstruction costs to the successor railroad. *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, 778 A.2d 785, 793 (Pa. Cmwlth. 2001).

In *Wheeling & Lake Erie Ry. Co.*, the railroad's predecessor-in-interest constructed the railroad crossing in 1930. The construction of the bridge was made necessary due to the excavation of a hill by the railroad in order to expand its service through the area. At the hearing in 1995 the railroad testified that no maintenance had taken place on the bridge despite maintenance responsibilities being assigned to the railroad. The Commission allocated the entire reconstruction costs to the railroad. In appealing the decision, the railroad argued that other parties should bear some of the costs as the railroad should have been notified that repairs were necessary sooner and that there were improper repairs performed to the bridge. In weighing the factors and finding the total allocation of costs to the railroad to be reasoned and articulate, the court stated that since the predecessor railroad had the obligation to properly maintain the bridge yet allowed the bridge to fall in disrepair, they would dismiss the argument that other entities should have been made to share in the costs. *Id.*

In our case, B&LE built the tunnel and was exclusively responsible for its maintenance until 2001. When the Commission did not grant its request to abolish the crossing, rather than continuing to fulfill its legal duty to obtain the approval, which undoubtedly would have included

some degree of repair or maintenance responsibilities, B&LE sold the property without notifying the Commission, thereby avoiding any repair or maintenance responsibilities.

Thus, B&LE realized a substantial cost savings by not spending money on adequate repair and maintenance or preservation of the tunnel in 2001 and received the benefit of payment from the purchasers of the property. B&LE now continues the feckless behavior by asserting it has no responsibility for the deterioration of the tunnel since the 2001 sale.

As the *Wheeling & Lake Erie Ry. Co.* court found, the Commission should find that where maintenance would have been assigned to the railroad, the total cost of making the tunnel safe should be assigned to the railroad. *Wheeling, supra.* 778 A.2d 785. Just as in the *Wheeling* case, B&LE and its predecessor-in-interest received the initial benefits from the construction of the tunnel crossing, and the construction of the tunnel was necessary due to the railroad's desired and less costly placement of the rail line under the highway and more consistent with the contours of the land. The fact that the railroad utilized and benefitted from this railroad for many years should be weighed against the railroad in allocating all costs to the railroad. In *Wheeling*, the court noted specifically that since the predecessor railroad had the obligation to properly maintain the bridge yet allowed the bridge to fall in disrepair, that they would dismiss the argument that other entities should have been made to share in the costs. *Id.* This should be true for our case as well and B&LE should not be rewarded for shirking its duty to obtain Commission approval to abolish the crossing, which would have addressed properly maintaining or closing the tunnel in order to ensure its safety to the travelling public.

Moreover, even where maintenance is currently unassigned, the fact that the railroad has not provided any maintenance on structures that it built and profited from for over a hundred years should be weighed against the railroad. If B&LE had followed through with its application for the

abolition of the crossing or if an issue with its safety had arisen sooner, the Commission likely would have assigned maintenance to B&LE, as discussed above. Again, B&LE should not be rewarded for evading its responsibilities. Therefore, this factor should be weighed against the railroad and the Commission should allocate all replacement, rehabilitation, and maintenance costs to B&LE.

iv. The equities hold that B&LE should be held responsible for the sole cost and expense of any alterations or abolishment of the crossing.

The “equities of a particular situation” is a factor that can be considered. *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981). The equities have also been discussed as a factor in *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992).

In the present matter, equity dictates that it is just and reasonable to assign the responsibility and any cost allocation onto B&LE. B&LE was aware of its duty to obtain approval of the abolition of the SR0268 crossing in 2001, and instead of working to obtain approval and agreeing to repair or maintenance terms, it underhandedly sold the property, thereby depriving the Commission and the Department of the ability to fully address the safety of the tunnel.

The Department should not be made to incur any expense at any time that results from B&LE’s failure to maintain or properly fill or remove the tunnel and thereby compromising the integrity of the ground underneath SR0268. The only equitable remedy here is for B&LE to do what it should have done 20 years ago – either close off and fill the tunnel entirely, to the satisfaction of the Department and the Commission, or agree or arrange to maintain the structural integrity of the tunnel going forward.

Given the aforementioned factors, it is both just and reasonable for the Commission to require B&LE to bear the sole cost of maintenance as well as any construction, rehabilitation, or removal costs for the tunnel.³ Further, if the tunnel is not filled in, B&LE should be required to provide for all costs associated with inspections, design plan reviews and other costs such as insurance and right of entry acquisitions or entry onto the railroad property.

Proposed Findings of Fact

1. 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 (“B&LE”) at B&LE’s request. (Dep’t Ex. B)
2. The two remaining crossings that were not abolished by the Commission were the former Kaylor railroad bridge crossing on SR0068 located in Brady’s Bend Township, Armstrong County (“SR068 Crossing”) and the tunnel crossing under SR0268 in Fairview Township, Butler County (the “SR0268 Crossing”). (Dep’t St. 1, p. 2, lines 21-23; p. 3, lines 1-3).
3. The SR068 Crossing is the subject of a separate Joint Stipulation amongst the parties pertaining to its disposition. (Joint Stipulation, November 8, 2021).
4. SR0268 Crossing was established in 1906 when B&LE or its predecessor in interest created a timber bent support tunnel under existing SR0268 for operation of its railway line. (Dep’t. St. 1, p. 3, lines 16-20).
5. The Department owns a 50-foot right of way from the center line of SR0268. (Dep’t St. 1, p. 4, lines 20-23, Ex. C).

³ The Department is not intending to limit the type or scope of work by using general terms such as “repairs,” “replacement,” “removal,” or “abolishment.” These terms are intended to include any type of maintenance, repair, removal, replacement, reconstruction, abolition, or rehabilitation as may be required.

6. B&LE or its predecessor-in-interest had maintenance of the tunnel at the SR0268 Crossing prior to 2001. (Dep't St. 1, p. 6, lines 1-2).
7. B&LE benefitted from the construction of the tunnel since it reduced safety risk for the railroad as well as costs savings due to not having to build up or fill the surrounding land at the time of construction for an at-grade crossing. (N.T. 108, lines 18-25; 109, lines 1-18; 119, lines 4-12).
8. B&LE did not provide notice to the Department, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, or the Department of Environmental Resources of any sale of the SR0268 Crossing. (N.T. 21-23).
9. The predecessors-in-interest to B&LE, as well as B&LE are primarily responsible for the deterioration of the crossings due to inadequate maintenance despite being aware of the deteriorated conditions of the structures. (BIE St. 1, p. 3, lines 18-20).
10. Although the tunnel is accessible from both ends to pedestrians and all-terrain vehicles, the tunnel is currently collapsed approximately 100 feet in from the east end closing it off. (Dep't St. 2, page 2, lines 7-16).
11. The collapse of the tunnel creates a dangerous situation for anyone entering the tunnel. (Dep't St. 2, page 2, lines 9-10).
12. Although there is no current impact to SR 0268 above the tunnel, continued deterioration of the tunnel and movement of the ground between the tunnel and the roadway could cause settlement or a sinkhole on the roadway, thereby endangering the travelling public. (Dep't St. 2, page 2, lines 10-12).

13. The collapse of the tunnel was caused by deterioration of the tunnel roof due to water and soil penetrating the roof, sending fill material into the tunnel, weakening the ground above it and causing a sinkhole at the surface above. (Dep't St. 2, page 2, lines 20-22).
14. The concern with the tunnel is the presence of water in the tunnel, which will continue to wash away or erode the soil, compromising the ground above; and the water could get trapped, build up, and release all at once, endangering anyone in the area. (Dep't St. 2, page 3, lines 1-4).
15. At the direction of the ALJ, B&LE had a preliminary engineering report prepared; however the report is only an overview and is not comprehensive enough to determine the exact condition of the tunnel. (Dep't St. 2, page 3, lines 20-22) (BIE St. 1, page 6, lines 7-19).
16. Further testing needs to be conducted to properly assess the structural integrity of the tunnel and the presence of water before a solution can be determined. (Dep't St. 3, page 3 lines 21-22; page 4, lines 1-11); (BIE St. 1, page 6, lines 7-19).

Proposed Conclusions of Law

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. §§102, 501, 2702 *et seq.*
2. The Commission's authority to authorize and set conditions for the abolition of rail-highway crossings is distinct from the STB's exclusive jurisdiction to regulate rail service or transportation, and is therefore not pre-empted by Federal authority. *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlth. 2001).
3. The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition or alteration of railroad facilities that cross any other public utility or a public highway either at grade or above or below grade as well as the authority to

determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. § 2702.

4. In appropriating costs in railroad crossing cases, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that it is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999); *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995).
5. The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs: the party that originally built the crossing; the party that owned and maintained the crossing; the relative benefit conferred on each party with the construction of the crossing; whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal, and; the relative benefit that each party will receive from the repair, replacement, or removal of the crossing. *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).
6. However, the Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981).
7. Overall, the Commission has wide latitude “to determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. P.U.C.*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

8. Applying the facts to the above factors, it is just and reasonable that Bessemer and Lake Erie Railroad, at its sole cost and expense, furnish all material and do all work necessary to remove and fill the subject tunnel at the SR0268 Crossing. *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995); *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); Application of the City of Wilkes-Barre, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, *5-*6 (Order entered April 9, 1981).
9. It is just and reasonable for Bessemer and Lake Erie Railroad to be assigned future maintenance and costs including inspections, design plan reviews, insurance, right of entry acquisitions and any other maintenance of the tunnel structure once it is filled in. *Id.*
10. The Commission may, at its discretion, rescind or amend a prior order after giving all parties notice and an opportunity to be heard. 66 Pa.C.S. § 703(g).
11. Amending or rescinding a prior order must be done judiciously and only under appropriate circumstances. *City of Pittsburgh v. Dep't of Transp.*, 416 A.2d 461 (1980).
12. It is just and reasonable for the Department of Transportation to be allocated current and future maintenance of the roadway for the SR0268 Crossing. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999).

Proposed Order

THEREFORE,

IT IS RECOMMENDED:

1. That Bessemer and Lake Erie Railroad's Motion for Summary Judgment is Denied.
2. That Bessemer and Lake Erie Railroad shall, at its sole cost and expense, furnish all material and do all work necessary to adequately fill in the tunnel structure with flowable back fill.
 - a. Within two months of this Order, B&LE shall have a full inspection report prepared of the tunnel, including core borings and testing sufficient to fully describe and assess the structural integrity and water presence within the entirety of the tunnel structure.
 - b. Within three months of this Order, at its sole cost and expense, B&LE shall submit plans to be reviewed by all parties and approved by the Commission for all work ordered herein.
2. That the Commonwealth of Pennsylvania, Department of Transportation, shall, at its sole cost and expense, furnish all material and do all work necessary to maintain the roadway surface of SR0268 in a smooth and satisfactory manner and perform appropriate winter maintenance.
3. Bessemer & Lake Erie Railroad shall, at its sole cost and expense, perform all work necessary in a manner satisfactory to the Commission within six months of this order, and

that on or before said date, Bessemer and Lake Erie Railroad shall report to the Commission the dates of actual completion of the work; and certify to the Commission that the work has been satisfactorily completed in accordance with the approved plans and this Order.

3. That Bessemer and Lake Erie Railroad shall, at its sole cost and expense, furnish all material and do all work necessary to provide for the future maintenance costs of the tunnel, including but not limited to inspections, design plan reviews, insurance, right of entry acquisitions.
4. That Norfolk Southern Railway Company, at its sole cost and expense, furnish all material and do all work necessary for the current and future maintenance of the structure located on SR 4005 and any other railroad facilities, existing or altered, located at the highway-rail crossing.
5. That any relocation of, changes in and/or removal of any adjacent structures, equipment or other facilities of any non-carrier public utility located within the limits of the highway, within the Commission's jurisdiction, be made by said public utility, at its initial cost and expense, and in such manner as will not interfere with the construction of the improvement; and such relocated or altered facilities thereafter be maintained by said public utility, at its sole cost and expense.
6. That any relocation of, changes in, and/or removal of any adjacent structures, equipment, or other facilities of any non-carrier public utility located beyond the limits of the highway, within the limits of the Commission's jurisdiction, be made by said public utility in such a manner as will not interfere with the construction of the improvement; and such relocated or altered facilities thereafter be maintained by said public utility, at its sole cost and expense.

7. That non-carrier public utility companies cooperate with Bessemer & Lake Erie Railroad so that the alteration and/or relocation of any facilities will not interfere with the completion of any crossing alteration or maintenance project.

CONCLUSION

The Department respectfully requests, that based on the foregoing, the Commission determine that it is just and reasonable to allocate the removal and maintenance responsibility, and the cost thereof, of the Bessemer and Lake Erie Railroad. These costs should include all, repairs, removal, replacement/fill as well as future costs associated with inspections, design plan reviews, right of entry, insurance,

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION

_____/s/ Melissa J. Noyes_____
Melissa J. Noyes
Assistant Counsel
Supreme Court I.D. Number 91495
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
PO Box 8212
Harrisburg, PA 17105
Telephone No. (717) 787-3128
mnoyes@pa.gov

DATED: April 15, 2022

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
RESPONSES TO QUESTIONS AND PROCEDURES

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

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.

See, DOT Hearing Statement No. 1: page 2, lines 21-23; page 3, lines 11-14.

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

See, DOT Hearing Statement No. 1: page 3, lines 22-23; and DOT Hearing Statement No. 2: page 2, lines 7-22; page 3, lines 1-4

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

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

See, DOT Hearing Statement No. 1: Exhibit B.

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, DOT Hearing Statement No. 2: page 3, lines 5-9.

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

See, DOT Hearing Statement No. 2: page 2 lines 7-23; page 3, lines 1-4.

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, DOT Hearing Statement No. 2: page 2, lines 13-18.

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, DOT Hearing Statement No. 2: page 2, lines 19-23; page 3, lines 1-4; page 5, lines 17-22.

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, DOT Hearing Statement No. 1: page 4, lines 18-23; page 5, lines 1-13, Exhibit C.

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, DOT Hearing Statement No. 1: page 5, lines 17-21; page 6, lines 1-12.

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

See, DOT Hearing Statement No. 1: page 5, lines 14-21; page 6, lines 1-18; and DOT Hearing Statement No. 2: page 3, lines 17-22; page 4, lines 1-11, 18-20; page 5, lines 1-22.

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, DOT Hearing Statement No. 2: page 2, lines 6-12, 19-23; page 3, lines 1-4.