



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

April 15, 2022

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

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 SR0068 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County.  
Docket No. I-2019-3012769  
**I&E's Main Brief**

Dear Secretary Chiavetta:

Enclosed please find the **Main Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

Kayla L. Rost  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 322768  
(717) 787-1888  
[karost@pa.gov](mailto:karost@pa.gov)

KLR/jfm  
Enclosures

cc: As per Certificate of Service  
Daniel R. Helfrich, P.E. (via email - [dhelfrich@pa.gov](mailto:dhelfrich@pa.gov))

**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 :

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**MAIN BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Kayla L. Rost  
Prosecutor  
PA Attorney ID No. 322768

Pennsylvania Public Utility Commission  
Bureau of Investigation and Enforcement  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
(717) 787-1888  
[karost@pa.gov](mailto:karost@pa.gov)

Dated: April 15, 2022

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## **I. PROCEDURAL HISTORY**

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 (“Bessemer & Lake Erie” or “B&LE”). The two remaining crossings located at SR0268 and SR0068 were to be subject to a future application and Commission action.

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, and six (6) local homeowners located near the SR0068 tunnel.

By Order entered 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.

On October 5, 2020, an Initial Telephone Prehearing Conference Notice was issued, scheduling a telephonic prehearing conference for November 10, 2020 before Deputy Chief ALJ Mark A. Hoyer. On October 7, 2020, a Prehearing Conference Order was issued, instructing the parties to submit Prehearing Conference Memoranda prior to 12:00 p.m. on November 9, 2020.

On or about November 4, 2020, this matter was reassigned to ALJ Mary D. Long.

On November 10, 2020, ALJ Long conducted the prehearing conference which was attended by I&E and PennDOT. After some discussion, ALJ Long scheduled a further prehearing conference so that an attorney for the Bessemer & Lake Erie Railroad Company could be directly notified of the proceeding and given an opportunity to participate.

On November 12, 2020, counsel for the Bessemer & Lake Erie Railroad Company entered his appearance in this matter.

On November 13, 2020, an Interim Order on Further Prehearing Conference was issued, scheduling the further prehearing conference for December 1, 2020 and instructing the parties to submit prehearing conference memoranda by 3:00 p.m. on November 30, 2020.

On January 4, 2021, an Interim Order directing an Engineering Study and Scheduling a further Status Conference was issued. Specifically, Bessemer & Lake Erie was ordered, at its initial cost and expense, to prepare and submit an engineering report detailing the current condition of the tunnel structure at the crossing located in Fairview Township, Butler County, on or before July 30, 2021. Additionally, a Status Conference Notice was issued scheduling a Status Conference for August 16, 2021.

On August 16, 2021, an Interim Order was issued granting Bessemer & Lake Erie's Motion for a Protective Order for the July 30, 2021 Engineer Report.

On August 17, 2021, a Prehearing Order was issued memorializing the litigation schedule discussed at the August 16, 2021 further prehearing conference. Specifically, it provided that direct testimony was due November 15, 2021, rebuttal testimony was due December 15, 2021, and the evidentiary hearing was scheduled for January 18-19, 2022.

On November 15, 2021, I&E, Bessemer & Lake Erie, and PennDOT filed direct testimony.

On November 12, 2021, the parties submitted a Joint Stipulation for the State Route 68 crossing as the railroad bridge had been removed by PennDOT in 2004 so it could realign the roadway. The parties agreed that the State Route 68 crossing should be abolished.

On November 17, 2021, an Amended Prehearing Order was issued modifying the submission of the witness matrix from January 17, 2022 to January 14, 2022. All other provisions from the August 17, 2021 Prehearing Order remained in effect.

On November 17, 2021, a Call-in Telephonic Evidentiary Hearing Notice was issued, scheduling the evidentiary hearing for January 18, 2022.

On December 15, 2021, I&E and Bessemer & Lake Erie filed rebuttal testimony.

On January 3, 2022, Bessemer & Lake Erie filed a Motion for Summary Judgement seeking to be dismissed as a party from the instant proceeding and a judgment of no costs to be assessed to it.

On January 18, 2022, an evidentiary hearing was held before ALJ Long and attended by I&E, PennDOT, B&LE, Fairview Township, and Mrs. Anna Marie Sherwin. Of importance, ALJ Long modified the due date for Answers to the Motion for Summary Judgement and instructed the parties to file their Answers on the date the Main Brief is due.

On March 2, 2022, a Briefing Order was issued, instructing the parties to submit Main Briefs (and Answers to B&LE's Motion for Summary Judgment) by April 15, 2022 and Reply Briefs by May 5, 2022.

I&E submits this Main Brief in accordance with the briefing schedule that was established at the conclusion of the evidentiary hearing and documented through the March 2, 2022 Briefing Order.<sup>1</sup> Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs are attached as Appendix A, B, and C, respectively.

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<sup>1</sup> N.T. pgs. 155-158; *see also* Briefing Order, dated March 2, 2022.

## II. STATEMENT OF THE CASE

The Commission instituted this investigation for the purpose of determining all matters relating to the abolition and safety of two crossings (State Route 68 and State Route 268) on an abandoned line of the Bessemer & Lake Erie Railroad Company. The public crossing at State Route 268 is a railroad tunnel approximately 744-feet in length made of bare rock with timber bent supports that was originally constructed in 1906.<sup>2</sup> The tunnel's interior was lined with corrugated metal in 1975 and the railroad track and ties were removed from the structure at some point in the past.<sup>3</sup>

Today, access to the tunnel portals is limited by heavy vegetation, steep slopes, and ponding of water at both the inside and outside of the tunnel.<sup>4</sup> The east portal of the tunnel is visibly cracked and deteriorated above the tunnel, and individuals peering at the east portal can see evidence of a complete collapse at approximately 100-feet inside the tunnel entrance.<sup>5</sup> The west portal is also visibly cracked and deteriorated, and individuals can see that portions of the corrugated steel liner are deformed, which could indicate some degree of structural failure in that area.<sup>6</sup>

B&LE originally filed an application on or about May 31, 2001 with the Commission, Docket No. A-00117858, for approval to abolish 29 public crossings, including the subject tunnel and State Route 68.<sup>7</sup> However, the April 30, 2002 Secretarial Letter granting the

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<sup>2</sup> I&E Statement No. 1, pgs. 2-3; B&LE Statement No. 3, pg. 3.

<sup>3</sup> I&E Statement No. 1, pgs. 2-3; B&LE Statement No. 3, pg. 3.

<sup>4</sup> I&E Statement No. 1, pg. 3; B&LE Statement No. 3, pg. 5; B&LE Exhibit 14, Appendix D.

<sup>5</sup> B&LE Statement No. 3, pg. 4; B&LE Exhibit 14.

<sup>6</sup> B&LE Statement No. 3, pgs. 4-5; B&LE Exhibit 14.

<sup>7</sup> I&E Statement No. 1, pg. 4; *see generally Application of Bessemer and Lake Erie Railroad Company for Approval of the Abolition of Twenty-Eight Crossings where Applicant's Former Hilliard's Branch and Western Allegheny Branch are Intersected by Public Highways and Streets in the Townships of Marion, Clay, Concord, and Fairview in Butler County and in the Township of Brady's Bend in Armstrong County and Application for the Abolition of One Tunnel Located in the Township of Fairview in Butler County*, Docket No. A-00117858.

application did not include the final disposition of the tunnel nor the crossing at State Route 68.<sup>8</sup>

### III. BURDEN OF PROOF

Section 2702(c) of the Public Utility Code (“Code”) provides that:

Upon its own motion or upon complaint, the Commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the Commission.

66 Pa. C.S. § 2702(c).

Section 315 provides that “[i]n any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.”<sup>9</sup> Accordingly, Bessemer & Lake Erie, as the public utility responsible for the tunnel, bears the burden of proving, by a preponderance of evidence, that the crossing is necessary and proper for the service, accommodation, convenience, and safety of the public.<sup>10</sup> “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the

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<sup>8</sup> I&E Statement No. 1, pg. 4; N.T. pgs. 93, 107-108 (Mr. Helfrich explained that the April 30, 2002 Secretarial Letter outlined specific work that needed to be completed on all the crossings in the application except for the tunnel, no work was ordered to be completed on the tunnel. Thus, the February 1, 2012 Secretarial Letter stating that the work has been completed and that the matter could be closed did not include the tunnel); *see generally Application of Bessemer and Lake Erie Railroad Company for Approval of the Abolition of Twenty-Eight Crossings where Applicant’s Former Hilliard’s Branch and Western Allegheny Branch are Intersected by Public Highways and Streets in the Townships of Marion, Clay, Concord, and Fairview in Butler County and in the Township of Brady’s Bend in Armstrong County and Application for the Abolition of One Tunnel Located in the Township of Fairview in Butler County*, Docket No. A-00117858.

<sup>9</sup> 66 Pa.C.S. § 315.

<sup>10</sup> 66 Pa.C.S. §§ 315 and 332(a); *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

other party.”<sup>11</sup> As evident in the record of this case and as supported by I&E’s Main Brief, Bessemer & Lake Erie has failed to prove that the railroad tunnel is necessary and proper for the accommodation, convenience, and safety of the public, and thus the tunnel should be made safe and then abolished.

#### **IV. SUMMARY OF ARGUMENT**

It is well established that in rail-highway crossing cases, the guiding principle for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience, and welfare of the travelling public.<sup>12</sup> There is a consensus among the parties that the subject tunnel poses an immediate threat of collapsing and poses a threat to the public in its current state.<sup>13</sup> Thus, the unsafe nature of the tunnel is not at issue, rather, B&LE attempts to provide preemption challenges and ownership challenges to try to bypass its obligations to its railroad tunnel.<sup>14</sup> As discussed in detail below, B&LE’s legal challenges to the jurisdiction of the Commission or to its status as a concerned party are red herrings and misinterpretations of the law. While B&LE has acknowledged that the tunnel is unsafe and requires immediate attention, it has chosen to sidestep the obligations to which it is clearly bound.

It’s legal sleight of hand should not be entertained as the record is clear that B&LE owns the tunnel, B&LE is responsible for the inspection, maintenance, and costs associated with the upkeep of the tunnel, B&LE failed to inspect the tunnel since 2001, and B&LE’s

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<sup>11</sup> *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

<sup>12</sup> *Application of the Dep’t of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135\*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002.

<sup>13</sup> I&E Statement No. 1, pg. 8; PennDOT Statement No. 2, pg. 2; B&LE Statement No. 3, pg. 7; B&LE Statement No. 4, pg. 4.

<sup>14</sup> B&LE Statement No. 1, pgs. 9-10.

failure to maintain the tunnel (and arguably its unsatisfactory job of grading the area after removing its tracks which resulted in the water issues) is the direct reason for the tunnel's deteriorated state today. It would be unjust and unreasonable to find any other party responsible for the tunnel's current state and to order any remedial work on any party than B&LE. It is not in the public interest to allow railroad companies to simply sell their land and wash their hands of their ignored obligations to public crossings, thus reaping the rewards while escaping their responsibilities.

## **V. ARGUMENT**

### **A. LEGAL STANDARD**

Section 2702 of the Public Utility Code (the "Code") vests the Commission with exclusive jurisdiction to determine the points at which and the manner in which a rail-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished, as well as the manner and conditions under which a rail-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety.<sup>15</sup> The Commission possesses exclusive authority to determine and order which parties should perform such work at a crossing and which parties will maintain the crossing in the future, all to effectuate the prevention of accidents and promote the public safety.<sup>16</sup> The Commission retains jurisdiction over a crossing until such time as permission to abandon the crossing is obtained from the Commission.<sup>17</sup>

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<sup>15</sup> 66 Pa. C.S. § 2702.

<sup>16</sup> *SEPTA v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991).

<sup>17</sup> *City of Pittsburgh v. Pa. P.U.C.*, 404 A.2d 786 (Pa. Cmwlth. 1979).

The Commission also is empowered to order the reconstruction or abolishment of a crossing upon such reasonable terms and conditions as it shall prescribe.<sup>18</sup> The Commission determines which parties are “concerned” or “interested” within the meaning of 66 Pa. C.S. §§ 2704(a) & 2702(c).<sup>19</sup> In apportioning costs, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement is that its order must be just and reasonable.<sup>20</sup> Whether a public crossing should be abolished is dependent upon whether it has been established that the abolition is necessary and proper for the service, accommodation, convenience or safety of the public.<sup>21</sup>

## **B. THE COMMISSION HAS JURISDICTION OVER THIS PROCEEDING**

The Interstate Commerce Commission Termination Act (“ICCTA”),<sup>22</sup> the statute which created the Surface Transportation Board (“STB”), preempts a state’s regulation of “transportation by rail carriers”<sup>23</sup> but does not preempt a state’s ability to exercise traditional police powers to protect the public health and safety.<sup>24</sup> The ICCTA regulates, *inter alia*, rail

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<sup>18</sup> *Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa. Cmwlth. 1994).

<sup>19</sup> *County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979).

<sup>20</sup> *East Rockhill Township v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988).

<sup>21</sup> *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956).

<sup>22</sup> 49 U.S.C.A. § 10501 *et seq.*

<sup>23</sup> Several courts and the STB have declined to find preemption where the state or local regulation does not interfere with rail operations. *See N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 253-54 (3rd Cir. 2007) (holding that ICCTA does not pre-empt state regulation where the regulation does not unreasonably burden rail operations and does not discriminate against railroads); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001) (holding that ICCTA does not pre-empt a city’s application of zoning and occupational license ordinances against the operations of a railroad lessee because it “does not constitute ‘regulation of rail transportation;’” and it “does not frustrate the objectives of federal railroad policy”); *Maumee & W. R.R. Corp. and RMW Ventures, LLC - Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 STB LEXIS 140, \*3, 2004 WL 395835, \*1 (S.T.B. March 2, 2004) (observing that “state and local regulation [affecting railroad property] is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety”).

<sup>24</sup> 49 U.S.C. § 10501(b); *see Village of Ridgefield Park v. NYS&W*, 163 N.J. 446, 457-58, 750 A.2d 57 (2001); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *see also Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 227 (1941). (“Our jurisdiction over railroad facilities, like that of the former [Interstate Commerce Commission], is limited to those facilities that are part of a railroad’s ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities.”)

carriers' rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines.<sup>25</sup> Thus it regulates the *economics and finances* of the rail carriage industry.<sup>26</sup> Because the ICCTA's subject matter is limited to deregulation of the railroad industry,<sup>27</sup> courts and the STB have rightly held that it does not preempt all state regulation affecting transportation by rail carrier.<sup>28</sup>

In interpreting Section 10501, the STB itself has determined that while ICCTA preempts state municipal planning regulations, it does not preempt state safety regulations. According to the STB, "state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety."<sup>29</sup> The STB continued to say "that, while state and local government entities . . . retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce."<sup>30</sup> Thus, state regulation is not preempted if it is not unreasonably burdensome and it does not discriminate against the railroads, nor if the state

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<sup>25</sup> See generally 49 U.S.C. §§ 10101–11908.

<sup>26</sup> See 49 U.S.C. §§ 11701–11707.

<sup>27</sup> *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001).

<sup>28</sup> See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *J.P. Rail, Inc. v. N.J. Pinelands Comm'n*, 404 F.Supp.2d 636, 652 n. 31 (D.N.J.2005); *Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 63 (2000); *Borough of Riverdale Petition for Declaratory Order v. The New York, Susquehanna and Western Railway Corp.*, 4 S.T.B. 380, 1999 W.L. 715272 (I.C.C.) (STB decision September 10, 1999) at \*5 ("[S]tate or local regulation is permissible where it does not interfere with interstate rail operations....").

<sup>29</sup> *Borough of Riverdale Petition for Declaratory Order v. The New York, Susquehanna and Western Railway Corp.*, 4 S.T.B. 380, 1999 W.L. 715272 (I.C.C.) (STB decision September 10, 1999).

<sup>30</sup> *Borough of Riverdale Petition for Declaratory Order v. The New York, Susquehanna and Western Railway Corp.*, 4 S.T.B. 380, 1999 W.L. 715272 (I.C.C.) (STB decision September 10, 1999).

law has a remote or incidental effect on rail transportation.<sup>31</sup>

Here, the Commission's exclusive jurisdiction and authority over the public crossing is not unreasonably burdensome and does not discriminate against the railroads. First, the Commission is not attempting to regulate the "transportation by rail carriers" in this matter as B&LE is not operating on this rail line nor through the tunnel. Thus, the ICCTA does not preempt the Commission's jurisdiction over the tunnel because B&LE is not transporting or moving freight through the tunnel as it abandoned and discontinued service on this line in 2001. Additionally, a rail crossing does not serve rail transportation, to the contrary a crossing serves non-rail transportation by allowing those who drive, ambulate, or bike to cross over the tracks and cannot be considered facilities under ICCTA.<sup>32</sup>

Second, the Commission's jurisdiction over the public crossing is not unreasonably burdensome nor is it discriminatory. The Commission is tasked with ensuring the safety of the public at all public crossings in Pennsylvania. The Commission's authority under Section 2702 does not impose or order a party to complete work beyond what is expected or anticipated with the ownership or use of a public crossing, i.e., maintenance, rehabilitation, reconstruction, etc. Moreover, the Commission's purpose of public safety does not impact interstate commerce nor create an unreasonable burden on the economic regulation of railroads. The Commission's jurisdiction over safety does not preclude or prevent the railroad companies from operating their trains or attempt to regulate the transportation of goods, but rather ensures that the transportation, whether by way of a railroad bridge, a

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<sup>31</sup> *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238 (3rd Cir. 2007.); *Maumee & W. R.R. Corp. & RMW Ventures, LLC*, 2004 WL 395835, (STB Decision dated Mar. 2, 2004); *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2nd Cir. 2009).

<sup>32</sup> *Colbassani v. Reading Blue Mt. & N. R.R. Co.*, 2010 U.S. Dist. LEXIS 156626, \*10 (M.D. Pa. 2010).

highway bridge, or at-grade crossing, is safe and functional for all parties involved. If anything, the Commission's jurisdiction over public crossings ensures the safe and smooth transition of rail freight over or through the public crossings.

Moreover, the Commission's jurisdiction over public crossings applies to all parties, not just the railroad companies. Any concerned party, such as PennDOT, a local municipality, a public utility, or even a private individual, can invoke the Commission's jurisdiction to review and assess a safety concern at a public crossing. Also, as explained in more detail below, the cost associated with any work ordered by the Commission must be just and reasonable, which furthers the non-discriminatory nature of the Commission's jurisdiction over public crossings. Accordingly, the Commission's jurisdiction over the subject tunnel is not preempted because the Commission is not attempting to regulate the transportation by rail carriers, the Commission's jurisdiction over public crossings does not unreasonably burden interstate commerce and is not discriminatory towards the railroad companies, and the STB has previously stated that it does not preempt the state's police powers to protect public health and safety.

The other federal statute at play is the Federal Rail Safety Act.<sup>33</sup> The Federal Rail Safety Act was enacted to promote safety in every area of railroad operations and to reduce railroad-related accident and incidents.<sup>34</sup> The Federal Rail Safety Act does contain sweeping pre-emption language; however, it does not eliminate the regulation of railroads by the states.

49 U.S.C. § 20106 provides:

(1) Laws, regulations, and orders related to railroad safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable.

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<sup>33</sup> 49 U.S.C. § 20101 *et seq.*

<sup>34</sup> 49 U.S.C. § 20101.

(2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters) . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

- (A) is necessary to eliminate or reduce an essentially local safety hazard;
- (B) is not incompatible with a law, regulation, or order of the United States Government; and,
- (C) does not unreasonably burden interstate commerce.<sup>35</sup>

Thus, Congress has specifically allowed states to adopt or continue to enforce state railroad safety laws or regulations “ . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.”<sup>36</sup>

In an Eighth Circuit matter, the court issued a decision relating to a railroad company’s challenge to an Iowa statute which required it to pay for the replacement of four (4) bridges.<sup>37</sup> The court stated that “Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular,” which ICCTA did not address.<sup>38</sup> Thus, the court concluded that ICCTA’s “silence cannot reflect the requisite ‘clear and manifest purpose of Congress’ to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.”<sup>39</sup>

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<sup>35</sup> 49 U.S.C. § 20106.

<sup>36</sup> 49 U.S.C. § 20106.

<sup>37</sup> *Iowa, Chi. & R. R. Corp. v. Wash. County*, 384 F. 3d 557 (8th Cir. 2004).

<sup>38</sup> *Iowa, Chi. & R. R. Corp. v. Wash. County*, 384 F. 3d 557, 561 (8th Cir. 2004).

<sup>39</sup> *Iowa, Chi. & R. R. Corp. v. Wash. County*, 384 F. 3d 557, 561 (8th Cir. 2004).

In interpreting the Eighth Circuit decision, it has been found that regulations which implicate rail safety concerns the Federal Rail Safety Act and not the ICCTA, however, the Federal Rail Safety Act allows states to impose rail safety requirements as long as they are not inconsistent with federal mandates.<sup>40</sup> B&LE has not pointed to any provision of the Federal Rail Safety Act which relates to public crossings and I&E is not aware of any such provision existing. Accordingly, ICCTA nor the Federal Rail Safety Act preempt the Commission's jurisdiction over the safety of public crossings.<sup>41</sup> As the Pennsylvania Commonwealth Court reasonably articulated:

As pointed out by the Department, intervenor in this matter, “[t]o allow railroads to ignore the exclusive authority of the Commission to order and abolish a crossing in Pennsylvania would allow a railroad to receive rail line abandonment approval from the ICC and simply walk away from the deteriorating structure for which it had past maintenance responsibility.” Such a result would divest the Commission of its ability to protect the public safety pursuant to the Code. For all of the foregoing reasons, we must conclude that the federal statute does not preempt the Code with respect to the abandonment of rail/highway crossings.<sup>42</sup>

Lastly, as the subject tunnel has not been abolished through the Commission, it is still deemed an active public crossing subject to the Commission's jurisdiction. If the STB

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<sup>40</sup> *Island Park, LLC v. CSX Transp.* 559 F.3d 96 (2nd Cir. 2009).

<sup>41</sup> *See Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010) (“Resolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB.”); *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 105 (2d Cir. 2009) (holding that there was no preemption where the plaintiff failed to show how a state court order closing a private rail crossing would interfere with rail operations); *Maumee & W. R.R. Corp.*, S.T.B. Finance Docket No. 34354, 2004 WL 395835, at \*2 (Mar. 3, 2004) (“[R]outine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations . . . [t]hese crossing cases are typically resolved in state courts.”).

<sup>42</sup> *CSX Transp., Inc. v. Pa. P.U.C.*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989) (also holding “CSXT, simply by virtue of the removal of its tracks without Commission authority, cannot circumvent the power of the Commission to dictate the manner in which rail/highway crossings may be abandoned. The promotion of public safety is fostered by requiring that those parties who wish to abandon a crossing comply with the established procedure for doing so.”).

approves a standard abandonment application and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect.<sup>43</sup> Thus, the STB's approval for abandonment and discontinuance of service of the rail line in 2001 did not affect B&LE's responsibility to inspect and maintain the public crossings on the rail line.<sup>44</sup> Until the final disposition of the subject tunnel is determined, B&LE continues to be responsible for the inspection and maintenance of the subject tunnel, and the subject tunnel remains an active public crossing subject to the Commission's jurisdiction.<sup>45</sup>

The Commission has historically extended its jurisdiction to include the full length of a railroad tunnel and to assess costs to a railroad company even after the land surrounding the tunnel was sold.<sup>46</sup> In comparison to bridge matters where the Commission takes jurisdiction over the entirety of the bridge regardless of the length which actually crosses a public highway or rail line, Mr. Daniel Helfrich credibly testified that the Commission established jurisdiction over the entire length of the tunnel, portal to portal, pursuant to Section 2702 and Section 1501.<sup>47</sup> Accordingly, the Commission has jurisdiction over this proceeding and the full length of the tunnel, i.e., from portal to portal.

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<sup>43</sup> *Arnold v. United States*, 137 Fed. Cl. 524, 551 (2018); *Caldwell v. United States*, 391 F.3d 1226, 1228–29 (Fed. Cir. 2004) (citing *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 6-8 (1990)), *reh'g en banc denied* (Fed. Cir.), *cert. denied*, 546 U.S. 826 (2005).

<sup>44</sup> I&E Statement No. 1, pg. 5.

<sup>45</sup> I&E Statement No. 1, pg. 5.

<sup>46</sup> *See generally William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297 (May 11, 2000 Recommended Decision where the Commission established jurisdiction over the subject tunnel from portal to portal and ordered work and maintenance costs to Norfolk Southern/Consolidated Rail Corporation even though the railroad discontinued service through the ICC and sold the property by quitclaim deed to the Allegheny Valley Land Trust.) (September 5, 2000 Opinion and Order affirming the ALJ's determination that the railroad is a concerned party and the cost and maintenance allocation ordered.).

<sup>47</sup> I&E Statement No. 1, pgs. 5-6; 66 Pa.C.S. § 2702 (the subject tunnel is a facility of the railroad).

### C. BESSEMER & LAKE ERIE RAILROAD IS A “CONCERNED” PARTY

Because B&LE’s failure to abolish the tunnel continues its substantial interest beyond that of the general public, B&LE is a concerned party under 66 Pa.C.S. § 2702(c) and can be allocated costs under 66 Pa.C.S. § 2704(a). It is well settled that the Commission has exclusive jurisdiction over matters involving railroad-highway crossings, which jurisdiction includes exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future.<sup>48</sup> The Commission also has exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proper proportions as the Commission may determine.<sup>49</sup> It is well settled that the Commission determines which parties are “concerned” or “interested” within the meaning of 66 Pa.C.S. §§ 2704(a) & 2702(c).<sup>50</sup>

Notably, the Pennsylvania Supreme Court has determined that “concerned party” status under 66 Pa.C.S. §2704(a) for transportation facilities, including railroads, does not turn upon an ownership litmus test.<sup>51</sup> The Supreme Court, in distinguishing concerned parties from non-concerned parties, made the following distinction:

[T]he overarching intent of the Legislature relative to administrative cost allocation, we believe, was to bring before the Commission, for an equitable allocation of costs, *all parties having a substantial interest in rail-highway crossing sites and projects, beyond that which is coterminous with members of the general public at large* (such as the interests of motor common

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<sup>48</sup> 66 Pa. C.S. §§ 2702, 2704; *AT&T v. Pa. P.U.C.*, 709 A.2d 980 (Pa. Cmwlth. 1998), *appeal granted in part*, 717 A.2d 1022; *Application of the Dep't of Transportation of the Commonwealth of Pennsylvania for Approval to Abolish the Existing Crossing Where S.R. 0522 Crosses at Grade Two Tracks of E. Broad Top R.R. & Coal Co. (Aar 003 135\*) in Cromwell Twp., Huntingdon County; & the Allocation of Costs & Expenses Incident Thereto.*, Docket No. A-00114338, Opinion and Order dated Mar. 14, 2002.

<sup>49</sup> 66 Pa. C.S. § 2704.

<sup>50</sup> *County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979).

<sup>51</sup> *Norfolk Southern Ry. Co. v. Pa. P.U.C.*, 2014 Pa. Commw. Unpub. LEXIS 233, \*10-11 (citing *Norfolk S. Ry. Co. v. Pa. P.U.C.*, 77 A.3d 619 (Pa. 2013)).

carriers merely using the public highway at a crossing for deliveries...).<sup>52</sup>

While the Court's factual holding addressed the specific conditions of Norfolk Southern's interest in the crossing at issue, the above language should be relied upon to show that concerned parties are those "having a substantial interest in rail-highway crossing sites and projects, beyond that which is coterminous with members of the general public at large."<sup>53</sup> Rather than limiting concerned parties to those utilities situated identically to Norfolk Southern, the Court arguably adopted a broader definition of concerned parties.

Here, the record is clear that B&LE, or its predecessor, constructed the subject tunnel and that B&LE is the owner of the tunnel located at State Route 268, a public crossing which it failed to abolish formally through the Commission prior to transferring ownership of the adjacent land.<sup>54</sup> This ownership installed a responsibility on B&LE to inspect and maintain the tunnel until such time that an application to abolish was approved, a substantial interest above and beyond that of the general public.<sup>55</sup>

I&E's witness, Mr. Daniel Helfrich, credibly testified that B&LE is responsible for the inspection and maintenance of the subject tunnel.<sup>56</sup> It has always been Rail Safety's position that inspection and maintenance of railroad facilities and infrastructure is the responsibility of the railroad.<sup>57</sup> B&LE, or its predecessor, built the subject tunnel, operated and maintained the subject tunnel for decades, and was the party that benefited the most by having a safe and operable tunnel to efficiently move freight and commodities without the

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<sup>52</sup> *Norfolk Southern Ry. Co. v. Pa. P.U.C.*, 621 Pa. 312, 331 (2013) (emphasis added).

<sup>53</sup> *Norfolk Southern Ry. Co. v. Pa. P.U.C.*, 621 Pa. 312, 331 (2013).

<sup>54</sup> I&E Statement No. 1, pg. 3; N.T. pg. 87.

<sup>55</sup> I&E Statement No. 1, pg. 3.

<sup>56</sup> I&E Statement No. 1, pg. 3.

<sup>57</sup> I&E Statement No. 1, pg. 3.

liability of an alternative crossing such as an at-grade crossing.<sup>58</sup> Mr. Helfrich explained that B&LE benefited from the tunnel in terms of public safety and liability concerns by enjoying the use of the tunnel without worrying about hitting a vehicle at the crossing or having other conflicts with the motoring public.<sup>59</sup> Additionally, Mr. Helfrich credibly opined that B&LE is the party responsible for the deterioration of the subject tunnel due to the lack of proper maintenance which resulted in the deteriorated conditions existing at the tunnel today.<sup>60</sup> Thus, Mr. Helfrich explained that the disposition of the railroad property had not been determined 20 years ago when the line was inactive, therefore the inspection and maintenance of the tunnel continued to lie with B&LE.<sup>61</sup>

Accordingly, there is no doubt that B&LE is a concerned party to this proceeding and can be assessed costs to effectuate the final disposition of the tunnel. B&LE holds an interest in this matter and in the subject tunnel greater than the general public and has been intimately involved in the existence of the tunnel, through its prior maintenance and enjoyment of the tunnel for approximately 34 years.<sup>62</sup>

#### **D. THE RAILROAD TUNNEL IS A SAFETY HAZARD TO THE PUBLIC**

The tunnel is a safety hazard that poses an immediate risk of collapse and should be filled and made safe prior to abolition. The subject tunnel was originally built in the early 1900's and B&LE constructed a non-structural corrugated metal liner through the entire length of the subject tunnel in or around 1975 without Commission authorization to alter the

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<sup>58</sup> I&E Statement No. 1, pg. 3; N.T. pg. 87.

<sup>59</sup> N.T. pgs. 108-109.

<sup>60</sup> I&E Statement No. 1, pg. 3; N.T. pgs. 87-88.

<sup>61</sup> N.T. pgs. 87-88.

<sup>62</sup> B&LE Statement No. 1, pg. 6.

crossing.<sup>63</sup> No inspection or maintenance activities have occurred on the subject tunnel since at least 2002.<sup>64</sup> The subject tunnel has been entered and used by local residents who have either walked through the tunnel or have utilized off-road vehicles such as ATVs prior to the east portal collapse.<sup>65</sup> The roadway above the subject tunnel is open for public use and has an average traffic volume of 1,454 vehicles per day.<sup>66</sup>

- 1) The AECOM engineering report confirms that the tunnel is a public safety hazard.

B&LE's consulting engineer firm, AECOM, conducted a site investigation and prepared a preliminary engineering report on the subject tunnel.<sup>67</sup> The engineering report noted that the existing tunnel structure has isolated failures and shows signs of distress.<sup>68</sup> The east portal of the tunnel is visibly cracked and deteriorated above the tunnel and AECOM could see evidence of the complete collapse at approximately 100-feet inside the tunnel entrance.<sup>69</sup> The west portal is also visibly cracked and deteriorated, and AECOM could see portions of the corrugated steel liner were deformed, which could indicate some degree of structural failure in that area.<sup>70</sup> While AECOM only completed a visual review of the subject tunnel, its visual review was more than sufficient to determine that the tunnel does not have the structural integrity to prevent future collapse or potential roadway subsidence and that corrective action is necessary.<sup>71</sup> Specifically, the report stated "it has been determined that

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<sup>63</sup> PennDOT Statement No. 1, pg. 3; I&E Statement No. 1 pgs. 2-3, 4; B&LE Statement No. 3, pg.4.

<sup>64</sup> B&LE Statement No. 1, pg. 5.

<sup>65</sup> N.T. pg. 151; PennDOT Statement No. 1, pgs. 3-4 (PennDOT was advised of the portal collapse when a local resident provided a PennDOT employee with a picture of the collapse portal which was taken while driving a 6-wheeler through the tunnel.)

<sup>66</sup> PennDOT Statement No. 1, pgs. 3-4.

<sup>67</sup> B&LE Statement No. 3, pgs.1-2; B&LE Exhibit 14.

<sup>68</sup> *See generally* B&LE Exhibit 14.

<sup>69</sup> B&LE Statement No. 3, pg. 4; B&LE Exhibit 14.

<sup>70</sup> B&LE Statement No. 3, pgs. 4-5; B&LE Exhibit 14.

<sup>71</sup> B&LE Statement No. 4, pg. 4; I&E Statement No. 1, pg. 8.

this structure does not have the structural integrity to prevent future collapsing or any subsidence in the roadway above.”<sup>72</sup>

Notably, the AECOM report does not address the pools of water located in and around the subject tunnel as observed by all parties involved and showcased in B&LE’s exhibits.<sup>73</sup> It is clear that the water did not exist at the time the line was active with train traffic, and thus the pooling of water is logically a direct result of B&LE’s removal of its track and ties and re-grading of the area without the Commission’s approval.<sup>74</sup> As homeowner who resides near the tunnel, Ms. Ann Marie Sherwin’s uncontroverted testimony that the water did not pool at the portals when the line was active and that B&LE re-graded the area after removing their rails which resulted in the ponding further confirms the causation of B&LE’s actions.<sup>75</sup> Ms. Sherwin’s testimony is bolstered by the AECOM report which noted that the grading of the railroad right of way after removal of the track and ties caused significant ponding with depths varying from a few inches to 3-feet deep.<sup>76</sup> Thus, not only has B&LE not inspected or maintained the tunnel since 2001, but its actions have also caused the significant ponding in and around the tunnel seen today.

The significant ponding of water in and around the tunnel poses a safety hazard in and of itself. Mr. Helfrich stated that the poor surface drainage in the areas near the tunnel portals is undesirable and may be considered dangerous if the water is deep enough to constitute a hazard, such as drowning.<sup>77</sup> Moreover, unrestricted access to the tunnel and tunnel portal

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<sup>72</sup> B&LE Exhibit 14, pg. 1.

<sup>73</sup> I&E Statement No. 1, pg. 8; PennDOT Statement No. 2, pgs. 3, 5; N. T. pgs. 147, 150-151; B&LE Statement No. 3, pg. 5; B&LE Exhibit 14, Appendix D.

<sup>74</sup> I&E Statement No. 1, pg. 8.

<sup>75</sup> N.T. pgs. 143, 147-151.

<sup>76</sup> B&LE Statement No. 3, pg. 5; B&LE Exhibit 14, Appendix D.

<sup>77</sup> I&E Statement No. 1, pg. 8; PennDOT Statement No. 2, pg. 3.

areas can be an inviting site for trespassers who may not know of the potentially dangerous conditions within the tunnel or the area of the portals.<sup>78</sup> The combination of ponding in and around the tunnel and the potential for the tunnel to collapse is dangerous to anyone in or around the tunnel.<sup>79</sup>

- 2) Local mining has no effect on the tunnel's condition nor a possible resolution to make the tunnel safe.

B&LE attempted to raise an argument that past mining in the surrounding area may have had an effect on the tunnel or contributed to its structural failure. This argument is baseless and not supported by the facts on the record. In addition to his engineering duties with the Rail Safety Section, Mr. Helfrich serves as the Commission's representative on the State Mining Commission, which has exclusive jurisdiction of the mining of coal under lands and easements or rights-of-way, and its proceedings involve the determination of the amount of coal that must be left in place to prevent subsidence of public roadways, rights-of-way, and structures, such as bridges and tunnels.<sup>80</sup> Prior to working at the Commission, Mr. Helfrich worked at the Department of Environmental Protection ("DEP") in the Bureau of Abandoned Mine Reclamation for eighteen (18) years, which included evaluating project sites for potential mine subsidence or designing mine subsidence control projects.<sup>81</sup> Accordingly, Mr. Helfrich is the only individual and expert witness in this proceeding qualified to provide an opinion on mining and mine subsidence.

Based upon his engineering expertise, past experience, and the evidence he reviewed for this case, Mr. Helfrich unequivocally stated that the Kincade Mine does not have any

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<sup>78</sup> I&E Statement No. 1, pg. 8.

<sup>79</sup> I&E Statement No. 1, pg. 8; PennDOT Statement No. 2, pg. 2.

<sup>80</sup> I&E Statement No. 1, pg. 2.

<sup>81</sup> I&E Statement No. 1, pg.; I&E Statement No. 2, pg. 1.

bearing on the structural integrity of the subject tunnel because the mine complex terminates approximately 300-feet west of the subject tunnel.<sup>82</sup> Mr. Helfrich noted that the Upper Freeport Coal Seam is still present under the subject tunnel, and credibly opined that the coal seam does provide support under the subject tunnel but does not affect the structural integrity of the subject tunnel itself, and that mine subsidence is not anticipated or expected below the subject tunnel.<sup>83</sup> Mr. Helfrich credibly and unequivocally opined that the presence of the Upper Freeport Coal Seam would not affect the long-term integrity or safety of the subject tunnel if the tunnel were to be completely filled.<sup>84</sup> Based upon his engineering expertise and experience, Mr. Helfrich unequivocally stated that if future subsidence or sinkholes develop above the subject tunnel and affect the roadway or property above the subject tunnel, the cause would most likely be from the subject tunnel's structural failure and would not be related to past mining in the area.<sup>85</sup> Accordingly, the presence of mining activities in the vicinity of the tunnel have no bearing on the tunnel's structural integrity nor any resolution to make the tunnel safe.

**E. BESSEMER & LAKE ERIE SHOULD BEAR THE COST TO MAKE THE TUNNEL SAFE**

Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995), are the following:

- 1) The party that originally built the crossing, and whether the roadway existed before the construction of the crossing;
- 2) The party that owned and maintained the crossing;

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<sup>82</sup> I&E Statement No. 2, pg. 4.

<sup>83</sup> I&E Statement No. 2, pgs. 4-5.

<sup>84</sup> I&E Statement No. 2, pg. 5.

<sup>85</sup> I&E Statement No. 2, pg. 5.

- 3) The relative benefit initially conferred on each party with the construction of the crossing;
- 4) Whether either party is responsible for the deterioration of the crossing resulting in 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.<sup>86</sup>

In addition, the Commission has considered the following: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation.<sup>87</sup> These factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.<sup>88</sup>

Notably, ownership is not a controlling factor considered in allocating costs and/or maintenance.<sup>89</sup> Most recently, the Commission reinforced the position that ownership is not the sole controlling factor in allocating cost.<sup>90</sup> In the Cemetery Avenue matter, the Commission noted that CSXT and the City of Philadelphia put forth arguments about which party owns the bridge, but stated that it would not consider or address that issue.<sup>91</sup> The

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<sup>86</sup> *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995); *see also AT&T v. Pa. P.U.C.*, 558 Pa. 290, 737 A.2d 201 (1999)(when allocating costs of constructing, removing or altering a rail-highway crossing, the PUC is not confined to any one rate or formula; it must consider all relevant factors).

<sup>87</sup> *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981).

<sup>88</sup> *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793; *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996)..

<sup>89</sup> *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979)(“ the issue of costs of future maintenance and repair is separable from the issue of compensation for property rights appropriated.”)

<sup>90</sup> *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783 (Opinion and Order dated February 3, 2022) (Petition for Reconsideration currently pending before the Commission which relates to assignment of maintenance and costs, not the issue of ownership).

<sup>91</sup> *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783, fn. 5 (Opinion and Order dated February 3, 2022).

Commission instead agreed with the ALJ's conclusion that ownership is not a controlling factor considered in allocating costs and/or maintenance and affirmed the ALJ's conclusion that CSXT was responsible for the bridge's deterioration over the years due to lack of maintenance and was properly assessed maintenance responsibilities.<sup>92</sup>

Here, B&LE operated through the subject tunnel for decades and was the party that benefited the most by having a safe and operable tunnel to efficiently move freight and commodities without the liability of an alternative crossing such as an at-grade crossing.<sup>93</sup> The record is clear that B&LE has not inspected or maintained the tunnel since 2001, and is the sole party responsible for the deterioration of the tunnel.<sup>94</sup> Moreover, Ms. Sherwin testified that B&LE, during a meeting regarding the sale of the surrounding land, told her that B&LE was responsible for the tunnel and would fulfill the requirements of the PUC.<sup>95</sup> Ms. Sherwin was also advised by B&LE representatives that her and the other landowners had no right to the tunnel and that B&LE was going to fill the tunnel.<sup>96</sup>

It is undisputed that the tunnel is deteriorated, not structurally sound, and at risk of collapse, as evident by the testimony of all parties and the pictures showing the most recent collapse at the eastern portal of the tunnel. In short, the tunnel is a public safety hazard and

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<sup>92</sup> *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783, pgs. 21-22, fn. 5 (Opinion and Order dated February 3, 2022) (citing *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979)), (Petition for Reconsideration pending whereas CSXT argues that the City of Philadelphia should be allocated costs for maintenance of the bridge superstructure, no argument made regarding ownership.).

<sup>93</sup> I&E Statement No. 1, pg. 3; N.T. pg. 87.

<sup>94</sup> I&E Statement No. 1, pg. 3; N.T. pgs. 87-88; B&LE Statement No. 1, pg. 5.

<sup>95</sup> N.T. pg. 140.

<sup>96</sup> N.T. pgs. 141-142.

needs to be made safe. To make the tunnel safe, the tunnel must be filled from portal to portal and access to the portals must be blockaded.

Mr. Helfrich credibly opined that the subject tunnel portal areas should be permanently sealed with a concrete or grouted rock bulkhead, and the tunnel filled with suitable material such as foam sand, flowable fill, or other acceptable material to encompass the whole void space within the entire limits of the subject tunnel.<sup>97</sup> This solution would prevent potential subsidence over the entire length of the tunnel, eliminate potential access to the tunnel, and remove the potential for trespassing.<sup>98</sup> B&LE's own witness testified that it defers to the recommendations of I&E and PennDOT for the disposition of the tunnel from an engineering standpoint.<sup>99</sup>

The Commission has ordered similar work to be completed when determining the final disposition of a tunnel.<sup>100</sup> In *In re: Application of Penn Central Transportation Company*, Docket No. A-98891, the Commission found that the tunnel in that matter, which was previously abandoned through the Interstate Commerce Commission, was constructed and placed after the construction of the Turnpike for the sole benefit of the railroad, and that the benefits from utilizing the tunnel have been exclusively realized by the railroad company and it would be inconsistent to assess the cost of backfilling the tunnel to the users of the

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<sup>97</sup> I&E Statement No. 1, pg. 9.

<sup>98</sup> I&E Statement No. 1, pg. 9.

<sup>99</sup> B&LE Statement No. 1, pg. 11.

<sup>100</sup> *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County, Docket No. A-98891 (Order entered May 8, 1975).*

Turnpike.<sup>101</sup> Accordingly, the Commission ordered the railroad company, at its sole cost and expense, to completely backfill the tunnel with suitable material to fill all voids and to seal the tunnel openings with sand and cement grout.<sup>102</sup>

Thus, the record is clear that the tunnel is a safety hazard to the public and needs to be completely filled to prevent further collapse, prevent land subsidence, and to prevent access to potential trespassers. It is also clear that B&LE, as the entity responsible for the tunnel's deteriorated condition and the entity which benefited the most from the tunnel's existence, should bear the costs associated with filling the tunnel and barricading the portals.<sup>103</sup>

## VI. CONCLUSION

I&E respectfully requests that presiding ALJ Long and the Commission find that (1) Bessemer & Lake Erie Railroad is and was at all times responsible for the cost and maintenance of the railroad tunnel; (2) that Bessemer & Lake Erie Railroad failed to inspect and maintain the railroad tunnel since 2001 and is responsible for the tunnel's deterioration and most recent collapse; (3) that Bessemer & Lake Erie Railroad should be ordered to

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<sup>101</sup> *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County, Docket No. A-98891 (Order entered May 8, 1975).*

<sup>102</sup> *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County, Docket No. A-98891 (Order entered May 8, 1975).*

<sup>103</sup> B&LE may make an argument related to access to the tunnel to complete the work. This argument should be discounted because the Commission has the jurisdiction and ability to order a temporary construction easement if B&LE is unable to acquire an agreement from the local landowners. *See generally* N.T. pgs. 83-84.

completely fill the tunnel and barricade the tunnel portals at its sole cost and expense to ensure the safety of the public; and (4) once the work is completed satisfactorily, that the tunnel is no longer necessary for safe transportation of railroad freight, and therefore should be abolished.

Respectfully submitted,

A handwritten signature in blue ink that reads "Kayla L. Rost". The signature is written in a cursive style.

Kayla L. Rost  
Prosecutor  
PA Attorney ID No. 322768

Pennsylvania Public Utility Commission  
Bureau of Investigation and Enforcement  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
(717) 787-1888  
[karost@pa.gov](mailto:karost@pa.gov)

Dated: April 15, 2022

**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.	:	

**PROPOSED STATEMENT OF FACTS**

1. By Secretarial Letter dated April 30, 2002, Docket No. A-00117858, the Pennsylvania Public Utility Commission (“Commission”) abolished 27 of 29 crossings on the abandoned line of Bessemer & Lake Erie Railroad (“Bessemer and Lake Erie” or “B&LE”). The two remaining crossings located at SR0268 and SR0068 were to be subject to a future application and Commission action.

2. 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, and six (6) local homeowners located near the SR0068 tunnel.

3. 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.

4. On October 5, 2020, an Initial Telephone Prehearing Conference Notice was issued, scheduling a telephonic prehearing conference for November 10, 2020 before Deputy Chief ALJ Mark A. Hoyer. On October 7, 2020, a Prehearing Conference Order was issued, instructing the parties to submit a Prehearing Conference Memorandum prior to 12:00 p.m. on November 9, 2020.

5. On or about November 4, 2020, this matter was reassigned to ALJ Mary D. Long.

6. On November 10, 2020, ALJ Long conducted the prehearing conference which was attended by the Bureau of Investigation and Enforcement (“I&E”) and PennDOT. After some discussion, ALJ Long scheduled a further prehearing conference so that an attorney of the Bessemer & Lake Erie Railroad Company could be directly notified of the proceeding and given an opportunity to participate.

7. On November 12, 2020, counsel for the Bessemer & Lake Erie Railroad Company entered his appearance in this matter.

8. On November 13, 2020, an Interim Order on Further Prehearing Conference was issued, scheduling the further prehearing conference for December 1, 2020 and instructing the parties to submit prehearing conference memos by 3:00 p.m. on November 30, 2020.

9. On January 4, 2021, an Interim Order directing an Engineering Study and Scheduling a further Status Conference was issued. Specifically, Bessemer & Lake Erie was

ordered, at its initial cost and expense, to prepare and submit an engineering report detailing the current condition of the tunnel structure at the crossing located in Fairview Township, Butler County, on or before July 30, 2021. Additionally, a Status Conference Notice was issued scheduling a Status Conference for August 16, 2021.

10. On August 16, 2021, an Interim Order was issued granting Bessemer & Lake Erie's motion for a protective order for the July 30, 2021 Engineer Report.

11. On August 17, 2021, a Prehearing Order was issued memorializing the litigation schedule discussed at the August 16, 2021 further prehearing conference. Specifically, it provided that direct testimony was due November 15, 2021, rebuttal testimony was due December 15, 2021, and the evidentiary hearing was scheduled for January 18-19, 2022.

12. On November 15, 2021, I&E, Bessemer & Lake Erie, and PennDOT filed direct testimony.

13. On December 15, 2021, I&E and Bessemer & Lake Erie filed rebuttal testimony.

14. On November 12, 2021, the parties submitted a Joint Stipulation for the State Route 68 crossing as the railroad bridge had been removed by PennDOT in 2004 so it could realign the roadway. The parties agreed that the State Route 68 crossing should be abolished.

15. On November 17, 2021, an Amended Prehearing Order was issued modifying the submission of the witness matrix from January 17, 2022 to January 14, 2022. All other provisions from the August 17, 2021 Prehearing Order remained in effect.

16. On November 17, 2021, a Call-in Telephonic Evidentiary Hearing Notice was

issued, scheduling the evidentiary hearing for January 18, 2022.<sup>1</sup>

17. On January 3, 2022, Bessemer & Lake Erie filed a Motion for Summary Judgement seeking to be dismissed as a party from the instant proceeding and a judgment of no costs to be assessed to it.

18. On January 18, 2022, an evidentiary hearing was held by ALJ Long and attended by I&E, PennDOT, B&LE, Fairview Township, and Mrs. Anna Marie Sherwin. Of importance, ALJ modified the due date for Answers to the Motion for Summary Judgement and instructed the parties to file their Answers on the date the Main Brief is due.<sup>2</sup>

19. On March 2, 2022, a Briefing Order was issued, instructing the parties to submit Main Briefs by April 15, 2022 and Reply Briefs by May 5, 2022.

20. The Commission instituted this investigation for the purpose of determining all matters relating to the abolition and safety of two crossings (State Route 68 and State Route 268) on an abandoned line of the Bessemer & Lake Erie.<sup>3</sup>

21. The Bureau of Investigation and Enforcement presented the testimony of Daniel Helfrich, P.E.<sup>4</sup>

22. Mr. Helfrich is a Civil Engineer Consultant in the Rail Safety Section of the Bureau of Technical Utility Services. Mr. Helfrich has been a licensed professional engineer in Pennsylvania since 1998.<sup>5</sup>

23. In addition to his engineering duties in the Rail Safety Section, Mr. Helfrich serves at the Commission's representative on the State Mining Commission. The State

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<sup>1</sup> In addition to January 18, 2022, the November 17, 2021 notice scheduled the hearing for January 19, 2022 if a second day was needed.

<sup>2</sup> N.T. pgs. 157-158 (January 18, 2022 transcript). Please note that all cites to N.T. relate to the January 18, 2022 hearing transcript unless stated otherwise.

<sup>3</sup> N.T. pg. 49 (August 16, 2021 transcript).

<sup>4</sup> *See generally* I&E Statement No. 1 and I&E Statement No. 2.

<sup>5</sup> I&E Statement No. 1, pg. 1.

Mining Commission has exclusive jurisdiction of the mining of coal under lands and easements or rights-of-way, and its proceedings involve the determination of the amount of coal that must be left in place to prevent subsidence of public roadways, rights-of-way, and structures, such as bridges and tunnels.<sup>6</sup>

24. Prior to working at the Commission, Mr. Helfrich worked at the Department of Environmental Protection (“DEP”) in the Bureau of Abandoned Mine Reclamation for eighteen (18) years. One of Mr. Helfrich’s job duties at DEP was evaluating project sites for potential mine subsidence or designing mine subsidence control projects.<sup>7</sup>

25. The public crossing at State Route 268 is a railroad tunnel approximately 750-feet in length made of bare rock with timber bent supports that was originally constructed in the early 1900’s. The tunnel’s interior was lined with corrugated metal sometime in the 1970’s and the railroad track and ties were removed from the structure at some point in the past.<sup>8</sup>

26. B&LE originally filed an application on or about May 31, 2001 with the Commission, Docket No. A-00117858, for approval to abolish 29 public crossings, including the subject tunnel and State Route 68. However, the April 30, 2002 Secretarial Letter granting the application did not include the final disposition of the tunnel nor the crossing at State Route 68.<sup>9</sup>

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<sup>6</sup> I&E Statement No. 1, pg. 2.

<sup>7</sup> I&E Statement No. 1, pg.; I&E Statement No. 2, pg. 1.

<sup>8</sup> I&E Statement No. 1, pgs. 2-3.

<sup>9</sup> I&E Statement No. 1, pg. 4; *see generally Application of Bessemer and Lake Erie Railroad Company for Approval of the Abolition of Twenty-Eight Crossings where Applicant’s Former Hilliard’s Branch and Western Allegheny Branch are Intersected by Public Highways and Streets in the Townships of Marion, Clay, Concord, and Fairview in Butler County and in the Township of Brady’s Bend in Armstrong County and Application for the Abolition of One Tunnel Located in the Township of Fairview in Butler County*, Docket No. A-00117858.

27. Mr. Helfrich noted that the February 1, 2012 Secretarial Letter, Docket No. A-00117858, did not close the case and/or determine the final disposition of the tunnel. He explained that the April 30, 2002 Secretarial Letter outlined specific work that needed to be completed on all the crossings in the application except for the tunnel, no work was ordered to be completed on the tunnel. Thus, the February 1, 2012 Secretarial Letter stating that the work has been completed and that the matter could be closed did not include the tunnel.<sup>10</sup>

28. The Commission has the ability to re-open cases and amend Secretarial Letters if certain measures, such as maintenance or cost allocation, are not adequately addressed.<sup>11</sup>

29. Mr. Helfrich is not aware of any other Commission decision or secretarial letter which handled the final disposition of the tunnel or the crossing at State Route 68. Mr. Helfrich is also not aware of any application filed by B&LE as it relates to the alteration of installing a corrugated metal liner inside the tunnel.<sup>12</sup>

30. Mr. Helfrich is aware that B&LE filed an application in 2000 with the Surface Transportation Board (“STB”) requesting to abandon and discontinue service on the rail line which used the subject tunnel and State Route 68 crossings. The STB granted the application on or about January 9, 2001 and January 12, 2001.<sup>13</sup>

31. The STB’s approval for abandonment and discontinuance of service of the rail line in 2001 did not effect B&LE’s responsibility to inspect and maintain the public crossings on the rail line. The public crossings will not be abolished by the Commission until the final disposition of the subject tunnel is determined by the Commission.<sup>14</sup>

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<sup>10</sup> N.T. pgs. 93, 107-108.

<sup>11</sup> N.T. pg. 101.

<sup>12</sup> I&E Statement No. 1, pg. 4.

<sup>13</sup> I&E Statement No. 1, pg. 4.

<sup>14</sup> I&E Statement No. 1, pg. 5.

32. Until the final disposition of the subject tunnel is determined, B&LE continues to be responsible for the inspection and maintenance of the subject tunnel, and the subject tunnel remains an active public crossing subject to the Commission's jurisdiction.<sup>15</sup>

33. Historically, the Commission and Rail Safety have consistently established jurisdictional limits over the entire length of the subject structure, whether it is a bridge structure or a tunnel. In this case, the Rail Safety Section established jurisdiction over the entire length of the subject tunnel pursuant to Section 2702 and Section 1501.<sup>16</sup>

34. Mr. Helfrich last visited the crossing on March 31, 2021. He noted that access to the tunnel portals was limited by heavy vegetation, steep slopes, and standing water. He did not notice or identify any surface subsidence above the tunnel.<sup>17</sup>

35. Mr. Helfrich opined that B&LE is responsible for the inspection and maintenance of the subject tunnel. It has always been Rail Safety's position that inspection and maintenance of railroad facilities and infrastructure is the responsibility of the railroad.<sup>18</sup>

36. In this case, B&LE, or its predecessor, built the subject tunnel, operated and maintained the subject tunnel for decades, and was the party that benefited the most by having a safe and operable tunnel to efficiently move freight and commodities without the liability of an alternative crossing such as an at-grade crossing.<sup>19</sup>

37. Mr. Helfrich explained that B&LE benefits from the tunnel in terms of public safety and liability concerns. Specifically, B&LE enjoyed the use of the tunnel without

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<sup>15</sup> I&E Statement No. 1, pg. 5.

<sup>16</sup> I&E Statement No. 1, pgs. 5-6; 66 Pa.C.S. § 2702; 66 Pa.C.S. § 1501 (the subject tunnel is a facility of the railroad).

<sup>17</sup> I&E Statement No. 1, pg. 3.

<sup>18</sup> I&E Statement No. 1, pg. 3.

<sup>19</sup> I&E Statement No. 1, pg. 3; N.T. pg. 87.

worrying about hitting a vehicle at the crossing or having other conflicts with the motoring public.<sup>20</sup>

38. Additionally, Mr. Helfrich opined that B&LE is the party responsible for the deterioration of the subject tunnel due to the lack of proper maintenance which resulted in the deteriorated conditions existing at the tunnel today.<sup>21</sup>

39. Mr. Helfrich noted that the disposition of the railroad property had not been determined 20 years ago when the line was inactive, therefore the inspection and maintenance of the tunnel continued to lie with B&LE.<sup>22</sup>

40. Mr. Helfrich reviewed the July 30, 2021 preliminary engineering report (“July 30, 2021 Report” or “Report”) completed by AECOM. Mr. Helfrich opined that the Report did not adequately address all public safety concerns at the crossing.<sup>23</sup>

41. Specifically, Mr. Helfrich opined that the Report provides a good summary of the history and existing condition of the subject tunnel, but the report itself is preliminary and not a detailed engineering study. Notably, the study does not provide recommendations to prevent land subsidence outside of the highway right-of-way or the prevention of access to the tunnel or the tunnel portal areas. The individual(s) who conducted the study did not complete any tests to check the status or condition of the tunnel beyond the portals, such as bore/vertical holes to determine the structural integrity of the overlaying rock strata or the extent of the collapsed areas in the middle portions of the tunnel beyond the visible sight from the portals.<sup>24</sup>

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<sup>20</sup> N.T. pgs. 108-109.

<sup>21</sup> I&E Statement No. 1, pg. 3; N.T. pgs. 87-88.

<sup>22</sup> N.T. pgs. 87-88.

<sup>23</sup> I&E Statement No. 1, pg. 6.

<sup>24</sup> I&E Statement No. 1, pg. 6.

42. The recommended alternatives in the Report do not account for the areas outside the highway right-of-way. If the recommended alternative from the preliminary engineering report was approved and implemented for the final disposition of the subject tunnel, the property owners would be left with the remaining liability of the deteriorated legacy structure that remains.<sup>25</sup>

43. As the agency with exclusive jurisdiction over public crossings and responsible for public safety, there is a potential for future liability for the Commission if an accident or incident would occur at, inside, or near the tunnel if the entirety of the subject tunnel is not properly and fully addressed.<sup>26</sup>

44. The individual(s) who completed the Report did not assess or investigate the condition of the tunnel beyond looking at what was visible through the portals. The area beyond the initial collapse is unknown and the air quality is unknown. Even more concerning is the lack of structural integrity in light of the recommendation to have individuals inside the tunnel installing bulkheads and inserting the foam sand. To complete the recommendation by the Report would involve Occupational and Safety Health Administration (“OSHA”) and potentially Mine Safety and Health Administration (“MSHA”) requirements and be very dangerous for the workers completing the job.<sup>27</sup>

45. The Report does not address the drainage issues clearly documented in the photos. It is pretty clear that the drainage issues did not occur while the line was active, so it is unclear when the water started pooling and where it came from.<sup>28</sup>

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<sup>25</sup> I&E Statement No. 1, pg. 7.

<sup>26</sup> I&E Statement No. 1, pg. 7.

<sup>27</sup> I&E Statement No. 1, pg. 7.

<sup>28</sup> I&E Statement No. 1, pg. 8.

46. In reviewing the Report, Mr. Helfrich also reviewed B&LE Exhibit 15 which contained documents from DEP relating to coal mining activities. Mr. Helfrich clarified that the coal seam in the area of the subject tunnel is the Upper Freeport Coal Seam.<sup>29</sup>

47. Mr. Helfrich explained that the Upper Freeport Coal Seam lies under the entire eastern region of Butler County, and lies approximately 100-feet below the roadway surface. In reviewing the documents, Mr. Helfrich noted that the Upper Freeport Coal Seam is approximately 50-60 feet below the bottom of the subject tunnel.<sup>30</sup>

48. The Kincade Mine was a deep mine or underground mine that extracted Upper Freeport coal from the early 1900's until approximately 1936. The Kincade Deep Mine is generally located to the northwest of the subject tunnel and the extent of the underground mining of the Upper Freeport coal seam via the Kincade Mine complex terminates approximately 300-feet west of the western portal of the subject tunnel.<sup>31</sup>

49. Based upon his review of B&LE Exhibit 15, Mr. Helfrich stated that no underground mining occurred below the subject tunnel and that the Upper Freeport coal is still present under the subject tunnel, but coal mining did occur within the general vicinity of the subject tunnel.<sup>32</sup>

50. Mr. Helfrich opined that past strip mining did not occur in close proximity to the subject tunnel due to the depth of the Upper Freeport Coal Seam, the lack of another coal seam near the surface, and the lack of other supporting evidence to the contrary.<sup>33</sup>

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<sup>29</sup> I&E Statement No. 2, pg. 2; B&LE Exhibit 15.

<sup>30</sup> I&E Statement No. 2, pgs. 2-3; B&LE Exhibit 15.

<sup>31</sup> I&E Statement No. 2, pg. 3; B&LE Exhibit 15.

<sup>32</sup> I&E Statement No. 2, pg. 3.

<sup>33</sup> I&E Statement No. 2, pg. 4.

51. Based upon his engineering expertise, past experience, and the evidence he reviewed for this case, Mr. Helfrich credibly opined that the Kincade Mine does not have any bearing on the structural integrity of the subject tunnel because the mine complex terminates approximately 300-feet west of the subject tunnel.<sup>34</sup>

52. Mr. Helfrich noted that the Upper Freeport Coal Seam is still present under the subject tunnel, and credibly opined that the coal seam does provide support under the subject tunnel but does not affect the structural integrity of the subject tunnel itself, and that mine subsidence is not anticipated or expected below the subject tunnel.<sup>35</sup>

53. Mr. Helfrich credibly and unequivocally opined that the Kincade Mine would not affect the long-term integrity or safety of the subject tunnel.

54. Mr. Helfrich credibly and unequivocally opined that the presence of the Upper Freeport Coal Seam would not affect the long-term integrity or safety of the subject tunnel if the tunnel were to be completely filled.<sup>36</sup>

55. Based upon his engineering expertise, experience, and the evidence he reviewed for this case, Mr. Helfrich opined that if future subsidence or sinkholes would affect the roadway or property above the subject tunnel, the cause of the future subsidence or sinkholes would most likely be the result of the subject tunnel's structural failure and would not be related to past mining in the area.<sup>37</sup>

56. Mr. Helfrich's primary safety concern at the subject tunnel is the lack of structural integrity necessary for the prevention of roadway or land subsidence. His position is supported by the July 30, 2021 Report which states that "With this being considered, it has

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<sup>34</sup> I&E Statement No. 2, pg. 4.

<sup>35</sup> I&E Statement No. 2, pgs. 4-5.

<sup>36</sup> I&E Statement No. 2, pg. 5.

<sup>37</sup> I&E Statement No. 2, pg. 5.

been determined that this structure does not have the structural integrity to prevent future collapsing or any subsidence in the roadway above.”<sup>38</sup>

57. Mr. Helfrich’s other safety concerns at the subject tunnel include public access to the tunnel portals and interior and the poor surface drainage in the area near the tunnel portals.<sup>39</sup>

58. Unrestricted access to the tunnel and tunnel portal areas can be an inviting site for trespassers who may not know of the potentially dangerous conditions within the tunnel or the area of the portals.<sup>40</sup>

59. The rock above both portals has the potential to collapse and be dangerous to anyone in the area at the time of the failure.<sup>41</sup>

60. The confined space of the tunnel interior may be an oxygen deficient environment where any potential access could be dangerous.<sup>42</sup>

61. The poor surface drainage in the areas near the tunnel portals is undesirable and may be considered dangerous if the water is deep enough to constitute a hazard.<sup>43</sup>

62. Mr. Helfrich opined that the subject tunnel portal areas should be permanently sealed with a concrete or grouted rock bulkhead, and the tunnel filled with suitable material such as foam sand, flowable fill, or other acceptable material to encompass the whole void space within the entire limits of the subject tunnel. This solution would prevent potential subsidence over the entire length of the tunnel, eliminate potential access to the tunnel, and remove the potential for trespassing.<sup>44</sup>

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<sup>38</sup> I&E Statement No. 1, pg. 8; B&LE Exhibit 14, pg. 1.

<sup>39</sup> I&E Statement No. 1, pg. 8.

<sup>40</sup> I&E Statement No. 1, pg. 8.

<sup>41</sup> I&E Statement No. 1, pg. 8.

<sup>42</sup> I&E Statement No. 1, pg. 8.

<sup>43</sup> I&E Statement No. 1, pg. 8.

<sup>44</sup> I&E Statement No. 1, pg. 9.

63. Additionally, filling the entire tunnel would also be the safest option for the workers completing the work since they will not be inside the structurally deficient tunnel.<sup>45</sup>

64. Mr. Helfrich also opined that this work should be completed by B&LE at its sole cost and expense.<sup>46</sup>

65. Mr. Helfrich explained that, under normal construction procedures, the entity responsible for the design and construction of work ordered by the Commission would first try to work with the property owners to secure a temporary construction agreement or easement to complete the work. If the entity was unsuccessful in securing permission from the landowner, the Commission has the authority to order a temporary construction easement during the time of construction to ensure that the safety measures are addressed. After the construction was completed, the easement would expire.<sup>47</sup>

66. Mr. Helfrich is aware of numerous occasions where the Commission appropriated property in a temporary condition for construction to be completed.<sup>48</sup>

67. Mr. Helfrich opined that the work should be completed as soon as feasible due to the public safety concerns mentioned throughout his testimony, including the poor structural condition of the tunnel and the potential for structural failure and subsidence above the highway and private property. He opined that work should be completed within one (1) year from the date of a Commission Order which resolves the disposition of the entire tunnel structure.<sup>49</sup>

68. PennDOT presented the testimony of Charles Keilman, IV and Alicia Kavulic.

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<sup>45</sup> I&E Statement No. 1, pg. 9.

<sup>46</sup> I&E Statement No. 1, pg. 9.

<sup>47</sup> N.T. pgs. 83-84.

<sup>48</sup> N.T. pg. 84.

<sup>49</sup> I&E Statement No. 1, pg. 9.

69. Mr. Keilman is a Senior Civil Engineer Supervisor and Grade Crossing Engineer in PennDOT's District 10-0. Mr. Keilman is a registered professional engineer in Pennsylvania.<sup>50</sup>

70. The crossing consists of State Route 268 and the Bessemer & Lake Erie tunnel. State Route 268 consists of two (2) lanes of traffics over the tunnel.<sup>51</sup>

71. The average daily traffic volume for State Route 268 is 1,454 vehicles per day with 9% being classified as trucks. The roadway is classified as a rural minor arterial and there is little pedestrian traffic. However, PennDOT did not complete a pedestrian traffic study for this crossing.<sup>52</sup>

72. PennDOT acquired and owns a 50-foot right of way (25-feet in each direction) from the center line of State Route 268 (formerly known as State Route 251) in or around the early 1930s. Prior to the acquisition of the 50-foot right of way, PennDOT owned a 33-foot right of way according to pamphlet laws dated May 1, 1861.<sup>53</sup>

73. PennDOT's right of way does not extend to the tunnel portals/openings.<sup>54</sup>

74. In reviewing the documents available to PennDOT, Mr. Keilman noted that the crossing was created in 1906 when B&LE created a timber bend support tunnel under the existing State Route 268. The railway line was operated by B&LE and its predecessor until January 2001. B&LE attempted to abolish this crossing in April 2002, but the crossing was not abolished.<sup>55</sup>

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<sup>50</sup> PennDOT Statement No. 1, pgs. 1-2.

<sup>51</sup> PennDOT Statement No. 1, pg. 2.

<sup>52</sup> PennDOT Statement No. 1, pg. 3.

<sup>53</sup> PennDOT Statement No. 1, pgs. 4-5; PennDOT Exhibit C.

<sup>54</sup> PennDOT Statement No. 1, pg. 5.

<sup>55</sup> PennDOT Statement No. 1, pg. 3.

75. PennDOT was advised of the partial tunnel collapse at the subject crossing when a local resident stopped by the Karns City Stockpile on February 22, 2018. The local resident provided a picture of the collapsed section of the tunnel and stated that his grandson took the picture while driving a 6-wheeler through the tunnel.<sup>56</sup>

76. State Route 268 is still open to the public and PennDOT did not close or detour the road as a result of the collapse.<sup>57</sup>

77. Mr. Keilman testified that it is PennDOT's position that B&LE should be financially responsible for the stabilizing and remediation of the crossing. In support of this position, Mr. Keilman explained that B&LE, or its predecessor, built the tunnel for the railroad's benefits under an existing legal state route. While the railroad abandoned the line in 2001, it was not successful in abolishing it with the Commission. B&LE should have continued to maintain the tunnel until there was an agreed upon disposition that provided for the safety of the traveling public and the crossing was abolished. Since that did not happen and the tunnel is collapsing, it should be B&LE's responsibility to ensure the tunnel is properly stabilized.<sup>58</sup>

78. It is PennDOT's position that B&LE should be assigned future maintenance of the crossing since it is their facility and the existence of the tunnel does not benefit PennDOT in any way.<sup>59</sup>

79. Mr. Keilman explained that since the Secretarial Letters in Docket No. A-00117858 which stated that B&LE owns and is responsible for the tunnel were not amended

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<sup>56</sup> PennDOT Statement No. 1, pgs. 3-4.

<sup>57</sup> PennDOT Statement No. 1, pg. 4.

<sup>58</sup> PennDOT Statement No. 1, pgs. 5-6.

<sup>59</sup> PennDOT Statement No. 1, pg. 6; N.T. pg. 119.

or changed, that B&LE is still responsible for the tunnel.<sup>60</sup>

80. PennDOT is in favor of the crossing being abolished after all safety issues have been addressed. The safety issues include access being restricted from both ends and the tunnel being filled with appropriate fill to permanently support the traveling public on State Route 268.<sup>61</sup>

81. PennDOT challenges the estimated costs provided in the Report, noting that the estimate does not include preconstruction or engineering studies, remediation work, or stormwater, erosion, and sedimentation controls that will need to be implemented.<sup>62</sup>

82. To the best of his knowledge, Mr. Keilman stated that PennDOT did not receive any notice of the STB proceedings related to the tunnel.<sup>63</sup>

83. Ms. Alicia Kavulic is a District Geotechnical Engineer for PennDOT. She is a registered professional engineer in Pennsylvania.<sup>64</sup>

84. Ms. Kavulic noted that the present defects at the tunnel include the collapsed section of the tunnel approximately 100-feet in from the east end. There are indications that all-terrain vehicles were using the tunnel and the tunnel collapse creates a dangerous situation for anyone entering the tunnel and possibly becoming trapped.<sup>65</sup>

85. While there is no current impact to the roadway, further deterioration of the tunnel and movement of the material above it could eventually cause settlement or a sinkhole under or adjacent to the roadway.<sup>66</sup>

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<sup>60</sup> N.T. pgs. 121, 123-124.

<sup>61</sup> PennDOT Statement No. 1, pg. 6.

<sup>62</sup> N.T. pg. 118.

<sup>63</sup> N.T. pg. 120.

<sup>64</sup> PennDOT Statement No. 2, pg. 1.

<sup>65</sup> PennDOT Statement No. 2, pg. 2.

<sup>66</sup> PennDOT Statement No. 2, pg. 2.

86. The tunnel is accessible from both the east and west entrances, both pedestrians and all-terrain vehicles can access the tunnel. However, due to the collapsed portion, the tunnel is not clear for passage from one end to the other.<sup>67</sup>

87. Ms. Kavulic opined that the deterioration of the tunnel roof allowed water and soil from above to fall through and into the tunnel. This created loose material above the tunnel and allowed fill material to shift, causing a sinkhole at the surface above.<sup>68</sup>

88. Ms. Kavulic noted the water inside the tunnel and expressed her concern that as more water enters the tunnel the more soil material that can be washed away or eroded. Also, if the water is trapped, it could build up and release all at once, causing a dangerous situation for anyone who is nearby. Last, deep water is a drowning hazard for anyone who would try to access the tunnel.<sup>69</sup>

89. Ms. Kavulic reviewed the July 30, 2021 report performed by AECOM and opined that the report is an overview of field observances and research information. It is not comprehensive enough to determine exact conditions. Ms. Kavulic explained that core boring at the site is required to obtain information on the type of fill material above and adjacent to the tunnel, as well as the density and moisture of the soil. Core boring may also find voids that have been created from the erosion of fill material.<sup>70</sup>

90. Ms. Kavulic stated that core borings also need to be taken near the roadway and that a report needs to be prepared to present boring logs. The information provided in the logs will be required to determine the best solution, including the sequence of operations and

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<sup>67</sup> PennDOT Statement No. 2, pg. 2.

<sup>68</sup> PennDOT Statement No. 2, pg. 2.

<sup>69</sup> PennDOT Statement No. 2, pg. 3.

<sup>70</sup> PennDOT Statement No. 2, pgs. 3-4.

the finalization of any plans.<sup>71</sup>

91. PennDOT does not agree with the Report's suggestion of constructing a new bridge over the tunnel to carry State Route 268 because this would require the construction of a new structure that would need to be maintained and eventually replaced.<sup>72</sup>

92. PennDOT prefers the Report's suggestion of concrete bulkheads and foam sand fill.<sup>73</sup>

93. PennDOT District 10-0 has not used foam sand fill before, instead it uses flowable back fill. Flowable back fill is a mixture of cement and aggregate.<sup>74</sup>

94. While PennDOT does not have experience with foam sand fill, it does not have any concerns with using the foam sand if the railroad is comfortable using it and it is approved by the appropriate environmental agencies.<sup>75</sup>

95. Ms. Kavulic noted the significant water in the tunnel and opined that it is possible that the tunnel will need to be dewatered prior to filling. However, dewatering depends on whether the foam sand will displace the water when it is placed.<sup>76</sup>

96. Mrs. Anna Marie Sherwin testified on her own behalf as a landowner of the property surrounding the subject tunnel.<sup>77</sup>

97. During a meeting with B&LE regarding the sale of the land, Ms. Sherwin stated that B&LE told her that they were responsible for the tunnel and that they would fulfill the requirements of the PUC regarding the tunnel.<sup>78</sup>

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<sup>71</sup> PennDOT Statement No. 2, pg. 4.

<sup>72</sup> PennDOT Statement No. 2, pg. 4.

<sup>73</sup> PennDOT Statement No. 2, pg. 4.

<sup>74</sup> PennDOT Statement No. 2, pgs. 4-5.

<sup>75</sup> PennDOT Statement No. 2, pg. 5.

<sup>76</sup> PennDOT Statement No. 2, pg. 5.

<sup>77</sup> N.T. pgs. 137-138.

<sup>78</sup> N.T. pg. 140.

98. Ms. Sherwin was also advised by B&LE representatives that her and the other landowners have no right to the tunnel and that B&LE was going to fill the tunnel.<sup>79</sup>

99. Ms. Sherwin stated that B&LE removed the rails and then graded down the area surrounding the rails. She further explained that when B&LE graded the area, they took the hump out of the tunnel, which was a raised-up area carrying the tracks into the tunnel, and removed the drainage ditches alongside the hump, and that is why the area is currently ponded. Ms. Sherwin personally watched the work being done by B&LE.<sup>80</sup>

100. Ms. Sherwin confirmed that the water did not pond at the portals when the line was active and in service by B&LE.<sup>81</sup>

101. Ms. Sherwin clarified that the railroad ties and track were removed after the land was sold to the group, the Western Allegheny Landowners Association (“WALA”). She stated that B&LE stipulated in the land agreement that they had control over the tunnel and that they would remove the railroad ties and tracks.<sup>82</sup>

102. Ms. Sherwin is personally aware of people who enter the tunnel and either walk through it or use ATVs. She has personally walked through the tunnel prior to the collapse.<sup>83</sup>

103. Bessemer & Lake Erie presented the testimony of Michael Barron and Daniel Radle.

104. Mr. Daniel Radle is a Civil Engineer employed by AECOM. His company, AECOM, was asked by B&LE to conduct an inspection of the tunnel and prepare a report of

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<sup>79</sup> N.T. pgs. 141-142.

<sup>80</sup> N.T. pgs. 143, 148-149.

<sup>81</sup> N.T. pgs. 147, 150-151.

<sup>82</sup> N.T. pgs. 149-150.

<sup>83</sup> N.T. pg. 151.

his findings, which resulted in the creation of the July 30, 2021 Report.<sup>84</sup>

105. In preparing the Report, Mr. Radle reviewed the historical engineering drawings of the tunnel, a survey map of the location of the tunnel, various deeds and real estate records, and historical records regarding surface mining on the Freeport Coal Seam.<sup>85</sup>

106. Mr. Radle did not personally visit the tunnel to complete the study but rather sent a team of individuals from AECOM.<sup>86</sup>

107. On January 19, 2021, AECOM's structures team conducted a cursory site investigation to observe the condition of the tunnel, the former railway roadbed, the associated drainage at each portal, and the existing roadway/ground surface over the tunnel. The team did not complete a structural inspection.<sup>87</sup>

108. Mr. Radle acknowledged that while additional studies such as bore holes or core samplings could provide more information, he opined that his team's cursory review of the tunnel was more than sufficient to determine that the tunnel liner does not have the structural integrity to prevent future collapse or subsidence and that corrective action would be necessary.<sup>88</sup>

109. The AECOM team only completed a visual review of the tunnel, and thus was unable to determine whether other collapses were present inside the tunnel other than the obvious collapse located near the east portal.<sup>89</sup>

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<sup>84</sup> B&LE Statement No. 3, pgs.1-2; B&LE Exhibit 14.

<sup>85</sup> B&LE Statement No. 3, pg. 2; B&LE Exhibit 14.

<sup>86</sup> N.T. pg. 53.

<sup>87</sup> B&LE Statement No. 3, pgs. 3-4; B&LE Exhibit 14; N.T. pg. 53.

<sup>88</sup> B&LE Statement No. 4, pg. 4.

<sup>89</sup> N.T. pgs. 53-54.

110. Mr. Radle described the tunnel as a 744-foot long structure that has approximately 41-feet which passes under State Route 268 in a roughly perpendicular direction.<sup>90</sup>

111. Mr. Radle noted that the tunnel was originally built in 1906 with timber bent support. A three-gauge corrugated steel gasketed tunnel liner was installed below the timber bent with 12-inches of material placed in the annular void in 1975.<sup>91</sup>

112. Mr. Radle stated that all the track and ties in the area had been removed. The east portal of the tunnel was visibly cracked and deteriorated above the tunnel and the team could see evidence of the complete collapse at approximately 100-feet inside the tunnel entrance.<sup>92</sup>

113. The west portal was also visibly cracked and deteriorated, and the team could see portions of the corrugated steel liner were deformed, which could indicate some degree of structural failure in that area.<sup>93</sup>

114. Mr. Radle explained that completing a full structural investigation or inspection of the tunnel is not necessary because the tunnel already experienced a failure of the liner. He stated that geotechnical investigations would be more appropriate to determine the final disposition of the tunnel and the best way to complete that disposition.<sup>94</sup>

115. The AECOM team noted ponding of water at the areas where the tracks and ties have been removed both inside and outside the tunnel. The grading of the railroad right of way after removal of the track and ties caused significant ponding with depths varying

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<sup>90</sup> B&LE Statement No. 3, pg. 3.

<sup>91</sup> B&LE Statement No. 3, pg. 4.

<sup>92</sup> B&LE Statement No. 3, pg. 4; B&LE Exhibit 14.

<sup>93</sup> B&LE Statement No. 3, pgs. 4-5; B&LE Exhibit 14.

<sup>94</sup> N.T. pgs. 63, 69-70, 74.

from a few inches to 3-feet deep.<sup>95</sup>

116. Mr. Radle opined that there is a reasonable presumption that the significant ponding of water showcased in the Report pictures did not exist when the railroad line was active.<sup>96</sup>

117. Mr. Radle noted that weathering of the exposed rock immediately above the portal showed signs of some raveling, also known as sluffage, of the portal embankment, which in turn exposed the timber bents at the portal ends. The land over the tunnel showed no obvious signs of subsidence, however the area surrounding the tunnel are wooded and were snow covered at the time of the visit. The team did not observe any apparent signs of failure of the roadway due to the underground subsidence.<sup>97</sup>

118. The team noted that there are locally used trails and possible abandoned access roads in the area of the tunnel.<sup>98</sup>

119. Mr. Radle reviewed historical records from DEP regarding the Freeport Coal Seam. The tunnel is located in the vicinity of the Freeport Coal Seam and a nearby Kincaid Mine was operational from 1911 until approximately World War II, which the last mining operations occurring prior to 1935.<sup>99</sup>

120. Mr. Radle concluded that there are signs of isolated failures and signs of distress in the tunnel structure. He concluded that the tunnel liner is most likely not a structural component of the tunnel, and that the tunnel likely does not have the structural integrity to prevent future collapses or subsidence.<sup>100</sup>

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<sup>95</sup> B&LE Statement No. 3, pg. 5; B&LE Exhibit 14, Appendix D.

<sup>96</sup> N.T. pgs. 54-55.

<sup>97</sup> B&LE Statement No. 3, pg. 5.

<sup>98</sup> B&LE Exhibit 14, Appendix.

<sup>99</sup> B&LE Statement No. 3, pg. 6; B&LE Exhibit 15.

<sup>100</sup> B&LE Statement No. 3, pg. 7; B&LE Exhibit 14.

121. Mr. Radle proposed two alternatives to preserve the structural integrity of the tunnel: (1) place concrete bulkheads inside the tunnel about 50-feet from the edges of the roadway and backfill the approximately 130-foot section with foam sand or (2) build an at-grade bridge carrying State Route 268 over the tunnel. Mr. Radle recommended filling a 130-foot section of the tunnel based upon the assumption of an approximately 25-foot roadway width and 35-foot of cover over the tunnel.<sup>101</sup>

122. Mr. Radle opined that the tunnel does not need to be dewatered because the foam sand material is expected to displace any existing water as it is pumped into the tunnel.<sup>102</sup>

123. Mr. Radle testified that it is unclear if additional water entering the tunnel where foam sand was placed would provide an impact on the foam sand.<sup>103</sup>

124. Mr. Radle focused his recommendations on the necessity to preserve the structural integrity of the tunnel for the travelling public utilizing State Route 268. He suggested the use of barriers or collapsing the tunnel portals to prevent access to the tunnel.<sup>104</sup>

125. Mr. Radle agreed that the public at large and not just the private owners could access the tunnel portals.<sup>105</sup>

126. Mr. Radle opined that it is clear from the tunnel collapse that an action needs to be taken to address the tunnel's structural disposition.<sup>106</sup>

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<sup>101</sup> B&LE Statement No. 3, pgs. 8-9; B&LE Exhibit 14; B&LE Statement No. 4, pgs. 2-3.

<sup>102</sup> B&LE Statement No. 4, pg. 3.

<sup>103</sup> N.T. pg. 61.

<sup>104</sup> B&LE Statement No. 4, pgs. 3-4; N.T. pgs. 75-76.

<sup>105</sup> N.T. pg. 76.

<sup>106</sup> N.T. pgs. 72-73.

127. Mr. Michael Barron is a partner in the law firm of Fletcher & Sippel located in Chicago, Illinois. Attorney Barron has provided legal advice to B&LE concerning real estate matters and state and federal regulatory matters since 2004.<sup>107</sup>

128. Even though Attorney Barron has been providing legal services to B&LE since 2004, he has only reviewed the Public Utility Code “on occasion.”<sup>108</sup>

129. Attorney Barron is not licensed to practice law in Pennsylvania.<sup>109</sup>

130. Attorney Barron reviewed historical records, business records, and legal documents to provide his testimony on behalf of B&LE.<sup>110</sup>

131. Attorney Barron noted that the tunnel is located on the former Western Allegheny Branch Line of B&LE where the tracks run through the tunnel beneath State Route 268.<sup>111</sup>

132. B&LE ceased operating on the Western Allegheny Branch Line around 1998 and subsequently filed an application with the Surface Transportation Board (“STB”) to abandon and discontinue service. B&LE was authorized by the STB to abandon and discontinue service on October 10, 2000 and January 17, 2001.<sup>112</sup>

133. B&LE submitted an application, Docket No. A-00117858, with the Commission on or about May 31, 2001 to abolish, in addition to various other crossings, the tunnel which is the subject of this proceeding. The final disposition of the tunnel was not decided in that proceeding/application, instead an April 30, 2002 Secretarial Letter stated that the tunnel “will be the subject of future Secretarial letters or formal hearing.”<sup>113</sup>

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<sup>107</sup> B&LE Statement No. 1, pg. 1; N.T. pg. 13.

<sup>108</sup> N.T. pg. 19.

<sup>109</sup> N.T. pg. 19.

<sup>110</sup> B&LE Statement No. 1, pg. 2.

<sup>111</sup> B&LE Statement No. 1, pg. 2.

<sup>112</sup> B&LE Statement No. 1, pgs. 3-4.

<sup>113</sup> B&LE Statement No. 1, pg. 4; B&LE Exhibit 3 and 4; N.T. pgs. 32, 37.

134. B&LE has not inspected the tunnel since either 2001 or 2002.<sup>114</sup>

135. B&LE acquired the tract of land from the Western Allegheny Railroad company by certain special warranty deed dated December 21, 1967.<sup>115</sup>

136. B&LE conveyed property containing the tunnel to the Western Allegheny Landowners Association (“WALA”) via quit claim deed on October 24, 2002.<sup>116</sup>

137. Attorney Barron has no knowledge of whether B&LE provided notice of its intention to dispose of real property to PennDOT, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, and the Department of Environmental Resources/Department of Conservation and Natural Resources pursuant to Section 2709.<sup>117</sup>

138. Attorney Barron was not counsel to B&LE or involved in the STB proceeding or the land sale to WALA.<sup>118</sup>

139. B&LE holds the position that it should not bear any portion of any future maintenance or inspection costs of the tunnel because it does not derive a benefit from the tunnel and has no ownership interest. B&LE also challenges whether it is a concerned party in this matter, and submits that PennDOT, Butler County, and Fairview Township should be responsible for maintaining the tunnel.<sup>119</sup>

140. B&LE defers to either I&E or PennDOT on their recommendations for the disposition of the tunnel from an engineering standpoint.<sup>120</sup>

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<sup>114</sup> B&LE Statement No. 1, pg. 5.

<sup>115</sup> B&LE Statement No. 1, pg. 6.

<sup>116</sup> B&LE Statement No. 1, pg. 5.

<sup>117</sup> N.T. pgs. 20, 21-22, and 23.

<sup>118</sup> N.T. pg. 29.

<sup>119</sup> B&LE Statement No. 1, pgs. 9-10.

<sup>120</sup> B&LE Statement No. 1, pg. 11.

**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. :

**PROPOSED CONCLUSIONS OF LAW**

1. The Pennsylvania Public Utility Commission (“Commission”) has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. §§ 2702 and 2704.
2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and 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 and 2704.
3. The Commission’s Bureau of Investigation and Enforcement, the Pennsylvania Department of Transportation, Bessemer & Lake Erie Railroad, Fairview Township, Bradys Bend Township, and Ms. Anna Marie Sherwin are all concerned parties within the meaning of 66 Pa.C.S. §§ 2702 and 2704.

4. Pursuant to Section 315 of the Public Utility Code, Bessemer & Lake Erie Railroad bears the burden of proving that the two public crossings located at State Route 68 and State Route 268 are adequate, efficient, safe, and reasonable.<sup>1</sup>

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<sup>1</sup> Section 315 of the Public Utility Code, 66 Pa. C.S. § 315, provides that “[i]n any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.”



property descriptions necessary to be taken and appropriated temporarily, for use during the construction period only, to facilitate construction of the project as necessary.

4. That Bessemer & Lake Erie Railroad, at its sole cost and expense, shall furnish all material and perform all work which may be required as incidental to the performance of the proposed work, including furnish construction engineering and inspection service to meet all Federal and State Occupational, Safety, and Health requirements as a result of the proposed work.

5. That Pennsylvania Department of Transportation, at the sole cost and expense of Bessemer & Lake Erie Railroad, shall furnish all material and do all work necessary to establish and maintain any detours or traffic controls that may be required to properly and safely accommodate highway traffic during the time the project is being constructed.

6. That any relocation of, changes in or removal of any adjacent structures, equipment, or other facilities of any non-carrier public utility company or municipal authority located within the limits of the highway and within this Commission's jurisdiction, which may be required as incidental to the execution of the crossing project, be made by said public utility company or municipal authority at its initial cost and expense, and in such manner as will not interfere with the construction of the project.

7. That any relocation of, changes in and/or removal of any adjacent structures, equipment, or other facilities of any non-carrier public utility company or municipal authority located beyond the limits of the highway but within the Commission's jurisdiction, which may be required as incidental to the execution of the crossing project, be made by said public utility company or municipal authority, and in such a manner as will not interfere with the construction of the project.

8. That Bessemer & Lake Erie Railroad, at its sole cost and expense, shall furnish all material and do all work necessary to complete the remainder of the crossing alteration project and any other ancillary features of the project, all generally in accordance with the approved plans and this Order.

9. That Bessemer & Lake Erie Railroad shall cooperate with the Pennsylvania Department of Transportation to complete the construction project in a safe manner.

10. That all work necessary to complete the alteration of the subject crossing at State Route 268 be done in a manner satisfactory to this Commission within eighteen (18) months of the entry of an Order approving the work described herein, and that on or before said date, Bessemer & Lake Erie Railroad shall report to this Commission in writing the date of actual completion of the work.

11. That Bessemer & Lake Erie Railroad, at least thirty (30) days prior to the start of work, notify all parties in interest of the actual date on which work will begin.

12. That Bessemer & Lake Erie Railroad shall pay all compensation for damages, if any, due to owners of property taken, injured, or destroyed by reason of the construction of the crossing alteration directed herein in accordance with this Order.

13. That upon completion of the construction, the Pennsylvania Department of Transportation, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain the highway and any other ancillary features of the highway right of way in accordance with the provisions of this Order.

14. That upon completion of the construction, each non-carrier public utility company and municipal authority, at its sole cost and expense, shall furnish all material and

perform all work necessary thereafter to maintain its respective facilities, existing or altered, located within the limits of the improvement.

15. That upon completion of the construction project, the Commission shall affirm the transfer of real property from Bessemer & Lake Erie Railroad to the private property owners and to the Pennsylvania Department of Transportation.

16. That upon completion of the construction project, and upon a written request by any party hereto, this proceeding be scheduled for a hearing at a time and a place assigned by this Commission, upon due notice to all parties, to receive evidence relative to the allocation of initial costs incurred, if any, by the non-carrier public utility companies and municipal authorities, and any other matters relevant to this proceeding.

17. That upon written notice of the completion of the construction project, the Commission's Bureau of Technical Utility Services, Rail Safety, will complete a final inspection to determine if the work was completed satisfactorily and in accordance with the directives herein.

18. That in accordance with the Joint Stipulation file on November 12, 2021, the Commission affirms the Pennsylvania Department of Transportation's removal of the State Route 68 crossing in its entirety, at its sole cost and expense, to realign the state highway and improve sight distance and overall safety of the traveling public.

19. That upon completion of the construction project and a final inspection by Rail Safety, a Secretarial Letter will be issued officially abolishing the crossings at State Route 68 and State Route 268 and closing this matter.

**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, April 15, 2022, served a true copy of the foregoing **Main Brief of the Bureau of Investigation and Enforcement**, 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](mailto:malong@pa.gov)

Melissa J. Noyes, Esquire  
Pennsylvania Department of Transportation  
Office of Chief Counsel  
P.O. Box 8212  
Harrisburg, PA 17105-8212  
[mnoyes@pa.gov](mailto:mnoyes@pa.gov)

Armstrong County Commissioners  
Armstrong County Courthouse  
450 East Market Street  
Kittanning, PA 16201  
[aspoole@co.armstrong.pa.us](mailto:aspoole@co.armstrong.pa.us)

Bradys Bend Township Supervisors  
1004 State Route 68  
East Brady, PA 16028  
[bbtownship@gmail.com](mailto:bbtownship@gmail.com)

John M. Steidle, Esquire  
Edwin B. Palmer, Esquire  
Burns White LLC  
48 26th Street  
Pittsburgh, PA 15222  
[jmsteidle@burnswhite.com](mailto:jmsteidle@burnswhite.com)  
[ebpalm@burnswhite.com](mailto: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](mailto:wwhite@co.butler.pa.us)  
*Solicitor for the County of Butler*

Ann Marie Sherwin  
1276 Kittanning Pike  
Chicora, PA 16025  
[tooams@zoominternet.net](mailto:tooams@zoominternet.net)

Matthew F. Marshall, Esquire  
Dillon McCandless King Coulter &  
Graham, LLP  
600 Cranberry Woods Drive, Suite 175  
Cranberry Twp., PA 16066  
[mmarshall@dmkcg.com](mailto:mmarshall@dmkcg.com)  
*Counsel for Fairview Township*

**Service by First Class Mail Only**

Tracy Miller, General Manager  
CN/Bessemer & Lake Erie Railroad Co.  
2800 Livernois Road, Suite 220  
Troy, MI 48083

William and Kay Barnhart  
136 Boosel Road  
Chicora, PA 16025

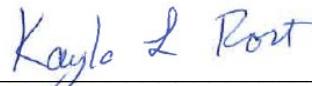
Maria Thomas  
Planning Department  
P.O. Box 1208  
124 West Diamond Street  
5th Floor County Government Center  
Butler, PA 16003

Ronald and Madeline Stitt  
1281 Kittanning Pike  
Chicora, PA 16025

Bruce and Rebecca Rodgers  
P.O. Box 429  
Chicora, PA 16025

Paul R. Dorr, Chairman  
Fairview Township Supervisors  
1571 Hooker Road  
Karns City, PA 16041

Dean and Patricia Tascarella  
1270 Kittanning Pike  
Chicora, PA 16025



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Kayla L. Rost  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 322768  
(717) 787-1888  
[karost@pa.gov](mailto:karost@pa.gov)