



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

Bureau of Investigation and Enforcement's Answer in Opposition to the Motion for Summary Judgment of the Bessemer & Lake Erie Railroad Company

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's ("I&E") **Answer in Opposition to the Motion for Summary Judgment of the Bessemer & Lake Erie Railroad Company** in the above-referenced matter.

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

KLR/jfm
Enclosures

cc: Per Certificate of Service
Daniel R. Helfrich, P.E. (via email - 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. :

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT OF BESSEMER
& LAKE ERIE RAILROAD COMPANY**

NOW COMES, the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) by and through its prosecuting attorneys, and files this Answer in Opposition to the Motion for Summary Judgment of the Bessemer & Lake Erie Railroad Company (“B&LE” or “Bessemer & Lake Erie”), pursuant to 52 Pa. Code § 5.102(b) and the March 2, 2022 Briefing Order.

I. ARGUMENT IN SUPPORT OF I&E’S ANSWER OPPOSING BESSEMER & LAKE ERIE’S MOTION

Bessemer & Lake Erie’s Motion for Summary Judgment (“Motion”) is predicated upon a misrepresentation and misinterpretation of the long-standing and well-settled case law as it relates to public railroad crossings, and therefore should be denied as a matter of law.

Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Pa. State Univ. v. County of Centre*, 532 Pa. 142, 144-45 (1992). An entry of summary judgment may be granted only in cases where the right is clear and free from doubt. *Davis v. Brennan*, 698 A.2d 1382 (Pa. Cmwlth. 1997). The moving party has the burden of proving the non-existence of any genuine issue of material fact. *Id.* The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Schnupp v. Port Auth. of Allegheny County*, 710 A.2d 1235 (Pa. Cmwlth. 1998).

A. Genuine Issues of Material Fact Exist with Regard to Whether B&LE Abandoned its Public Right-Of-Way

The Commission retains jurisdiction over a crossing until permission to abandon operation of the tracks is sought and granted by the Commission.¹ In reviewing a similar matter where a railroad company received approval to abandon and discontinue service through the Interstate Commerce Commission (“ICC”)² and attempted to bypass its responsibilities to its public crossings, the Commonwealth Court stated:

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.³

¹ *City of Pittsburgh v. Pennsylvania Pub. Util. Comm’n*, 404 A.2d 786, 790 (Pa. Cmwlth. 1979).

² The Interstate Commerce Commission Termination Act abolished the ICC in January 1996 and replaced it with the Surface Transportation Board which performs many of the functions of the former ICC. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified generally at 49 U.S.C. §§ 10101-16106).

³ *CSX Transp., Inc. v. Pennsylvania Pub. Util. Comm’n*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989).

Furthermore, pursuant to Section 2709, before a railroad company disposes of real property used as a right-of-way, the railroad company must first notify “the county, city, borough, incorporated town or township in which the real property is located, and it must notify the Department of Transportation, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission and the Department of Environmental Resources [the Department of Environmental Resources was split into two agencies, the agency applicable to this notice provision is the Department of Conservation and Natural Resources].”⁴ The notifications must be in writing, and if this procedure is not followed, the disposition is voidable.⁵ Bessemer & Lake Erie has presented no evidence to indicate that Section 2709 had been followed, and thus the disposition of the property is voidable. Accordingly, a genuine issue of material fact remains as to whether Bessemer & Lake Erie followed the procedures set forth in Section 2709.

Moreover, Bessemer & Lake Erie has not sought nor received Commission approval to abolish the public crossing, and subsequently the public right-of-way. The estate of a railroad does not terminate until there has been an actual abandonment.⁶ Mere nonuse of a railroad right-of-way by a railroad does not amount to abandonment⁷ and failure to maintain

⁴ 66 Pa.C.S. § 2709(a).

⁵ 66 Pa.C.S. § 2709(a) and (c).

⁶ *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa. Super. 1951).

⁷ *Buffalo Township v. Jones*, 813 A.2d 659, 664 (Pa. 2002); *see also Borough of Downingtown v. Friends of Kardon Park*, 55 A.3d 163, 175 (Pa. Cmwlth. 2012); *In re Appeal of Moyer*, 468 A.2d 536, 537 (Pa. Cmwlth. 1983) (for an abandonment to occur, there must be an intent to abandon the property coupled with external acts to achieve that end; mere non-use or lapse of time is not an abandonment.); *see also Birdsboro Municipal Auth. v. Reading Co. and Wilmington & Northern R.R.*, 758 A.2d 222, 227 (Pa. Super. 2000) (holding the mere failure to maintain and repair existing tracks did not amount to an intent to abandon); *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.*, 612 A.2d 450, 454 (Pa. Super. 1992) (the court held that evidence that the railroad entered into salvage agreements and quitclaimed its interest in the subject property should be submitted for the fact finder to resolve the railroad’s intent to abandon).

a railroad or allowing brush to grow is not considered an affirmative act.⁸ It has been held that application with a federal authority for the right to abandon is some evidence of intent, but it is not sufficient to establish abandonment.⁹ Further, even securing a certificate from the Commission to abolish rail-highway crossings does not constitute abandonment.¹⁰ Instead, it is for the **factfinder to determine** if the railroad intended to abandon the right-of-way.¹¹ Thus, since Bessemer & Lake Erie has not received approval to abolish the public railroad tunnel crossing, the railroad crossing remains active at the time of this proceeding.

II. I&E's ANSWER IN OPPOSITION OF BESSEMER & LAKE ERIE'S MOTION FOR SUMMARY JUDGMENT

I. B&LE's Statement of the Case

1. Denied. By way of further response, the instant matter was initiated by the Commission through an October 3, 2019 Order. Specifically, 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 and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 crosses, below grade, a track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County, as well as the future disposition of the crossings, what work shall be performed at the crossings, and allocation of the cost of any work ordered.”¹²

⁸ *Quarry Office Park Assoc. v. Philadelphia Electric Co.*, 576 A.2d 358 (Pa. Super. 1990); *Sabados v. Kiraly*, 393 A.2d 486 (Pa. Super. 1978).

⁹ *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa. Super. 1951).

¹⁰ *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.*, 612 A.2d 450 (Pa. Super. 1992).

¹¹ *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.*, 612 A.2d 450, 454 (Pa. Super. 1992).

¹² *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 (Order entered October 3, 2019).

2. Admitted in part, Denied in part. It is admitted 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.¹³ To the extent that the averment states a conclusion of law to which no response is required, it is specially denied.

3. Denied. The averment states a conclusion of law to which no response is required. By way of further response, Bessemer & Lake Erie is a “concerned party” pursuant to Section 102 (definition of a “public utility”) and Section 2702 (Construction, relocation, suspension and abolition of crossings.).¹⁴ It is well settled that the Commission determines which parties are “concerned” or “interested” within the meaning of 66 Pa.C.S. §& 2702(c) and 2704(a).¹⁵

4. Denied. The averment states a conclusion of law to which no response is required. By way of further response, it is well established that the Commission’s jurisdiction over the public crossings is not preempted by federal law, which is explained in more detail *infra* in Paragraph 60.¹⁶ In interpreting 49 U.S.C. 10501(b)(1) and (2), the

¹³ 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.

¹⁴ 66 Pa.C.S. §§ 102, 2702

¹⁵ *County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979).

¹⁶ *Applications of Southeastern Pennsylvania Transportation Authority for an exemption from the provisions of Subchapter C of the 52 Pa. Code contained in 33.122(b) and (c) and to exercise the rights contained in 52 Pa. Code 33.122(f) to permit the construction of two (2) partial high level platforms associated with the renovated and/or reactivated Baldwin, Chester Transportation Center, Overbrook, Radnor and Strafford Railroad Stations*, Docket Nos. A-00115203; A-00116166; A-00116169; A-00116170; A-00116171 (Opinion and Order dated June 14, 2000); *see also 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).

Surface Transportation Board (“STB”) itself determined that while the Interstate Commerce Commission Termination Act (“ICCTA”) preempts state municipal planning regulations, it does not pre-empt state safety regulations. According to the STB, states retain “. . . certain police powers and may apply non-discriminatory regulations to protect public health and safety . . .” so long as this exercise of power does not “have the effect of foreclosing or restricting the railroad’s ability to conduct its operations or otherwise unreasonably burdening interstate commerce.”¹⁷ As such, since Bessemer & Lake Erie received approval from the STB to abandon and discontinue service at this line, any action on the part of the Commission to protect public health and safety will not restrict the railroad’s ability to conduct its operations or unreasonably burden interstate commerce.

5. Denied. I&E is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph and, therefore, they are denied and strict proof thereof is demanded.

6. Admitted upon information and belief.

7. Admitted. By way of further response, the Application filed in Docket No. A-00117858 speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

8. Admitted. By way of further response, the April 30, 2002 Secretarial Letter speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

¹⁷ *Borough of Riverdale Petition for Declaratory Order v. The New York, Susquehanna and Western Railway Corp.*, 1999 W.L. 715272 (I.C.C.) (STB decided September 10, 1999) at p. 16; *see also Benton v. CSX Transportation Inc.*, 2021 U.S. Dist. LEXIS 136871 (E.D. Pa., July 21, 2021)(citing *CSX Transportation, Inc.* No. FIN 34662, 2005 STB LEXIS 675, 2005 WL 1024490, at *6 (STB May 3, 2005)(The Board has ruled that a state’s “traditional authority over the safety of roads and bridges at grade separated rail/highway crossings” is not preempted by the ICCTA if those regulations don’t impose an unreasonable burden on a railroad.).

9. Admitted.

10. Admitted. By way of further response, the October 3, 2019 Order speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

11. Admitted in part, Denied in part. By way of further response, it is admitted that a Joint Stipulation was submitted for the SR0068 crossing. In light of the absence of a final order or recommended decision, it is denied that the SR0268 crossing is the only remaining issue in this proceeding.

12. Admitted in part, Denied in part. By way of further response, it is admitted upon information and belief that Bessemer & Lake Erie sold a tract of land. I&E is without knowledge or information sufficient to form a belief as to the specifics of the sale, and therefore they are denied.

13. Denied. I&E is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph and, therefore, they are denied.

14. Denied. The averment states a conclusion of law to which no response is required. By way of further response, I&E is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph and, therefore, they are denied.

15. Denied. The averment states a conclusion of law to which no response is required. By way of further response, I&E is without knowledge or information sufficient to form a belief as to the truth of the averments in this Paragraph and, therefore, they are denied.

16. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further

response, the Commission retains jurisdiction over a crossing until such time as permission to abandon the crossing is obtained from the Commission.¹⁸ Bessemer & Lake Erie has not obtained approval from the Commission to abolish the public crossing located at SR 0268, and thus still is an interested party and retains its obligations to the public crossing until the final disposition of the public crossing is determined.

17. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, the Commission retains jurisdiction over a crossing until such time as permission to abolish the crossing is obtained from the Commission.¹⁹ Bessemer & Lake Erie has not obtained approval from the Commission to abolish the public crossing located at SR 0268, and thus is a concerned party.²⁰

18. Denied. The averment states a conclusion of law and request for relief to which no response is required. To the extent a response is deemed to be required, it is denied.

II. B&LE's Argument

A. Standard for Entering Summary Judgement

19. Admitted. By way of further response, Section 5.102(a) speaks for itself, and any interpretation, quotation, or characterization thereof is denied. Section 5.102(a) specifically provides “[a]fter the pleadings are closed, but within a time so that the

¹⁸ City of Pittsburgh v. Pa. P.U.C., 404 A.2d 786 (Pa. Cmwlth. 1979).

¹⁹ City of Pittsburgh v. Pa. P.U.C., 404 A.2d 786 (Pa. Cmwlth. 1979).

²⁰ 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 (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.)

hearing is not delayed, a party may move for judgment on the pleadings or summary judgment.”²¹ I&E notes that the timing of Bessemer & Lake Erie’s Motion is concerning as it was filed only fifteen (15) days before the evidentiary hearing was scheduled to occur on January 18, 2022.

20. Admitted. By way of further response, Section 5.102(d)(1) speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

21. Admitted. By way of further response, Section 5.102(d)(1) speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

22. Admitted upon information and belief. By way of further response, *United Transp. Union v. Pennsylvania Pub. Util. Comm’n*, 68 A.3d 1026 (Pa. Cmwlth. 2013) speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

B. B&LE is a concerned party in this proceeding

23. Admitted. By way of further response, Section 2704(a) speaks for itself, and any interpretation, quotation, or characterization thereof is denied. Moreover, the proper section which relates to this matter is Section 2702 as Section 2704 relates to compensation for damages occasioned by construction, relocation or abolition of crossings.²²

24. Admitted. By way of further response, Section 2704(a) speaks for itself, and any interpretation, quotation, or characterization thereof is denied.

²¹ 52 Pa. Code § 5.102(a) (emphasis added).

²² 66 Pa.C.S. § 2702(c)(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. In determining the plans and specifications for any such crossing, the commission may . . . abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth . . .).

25. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, the Pennsylvania Supreme Court noted the limited applicability of the *City of Chester* when it held:

Looking to the common-law history, however, *City of Chester* contains only some relevant information. *See City of Chester*, 798 A.2d at 293-94 (quoting *City of Phila.*, 676 A.2d at 1305-06). At most, the decision (and the underlying opinion in *City of Philadelphia*, from which *City of Chester* took the common-law history), offered a one-dimensional thumbnail of the relevant common law landscape. For example, *City of Chester* and *City of Philadelphia* referenced only the common law as it concerned railroads which created crossings over existing highways. *See City of Chester*, 798 A.2d at 293 (discussing situations in which, at common law, “a private corporation constructed a railroad which made a bridge necessary at the crossing of a highway . . .”). A different legal overlay applied, however, holding the government primarily liable for maintenance, where a highway was built to intersect an existing railroad. *See Reed v. Allegheny Cnty.*, 330 Pa. 300, 304-05, 199 A. 187, 190 (1938) (explaining that where a railway line had a right of way, “the duty of maintenance is upon the corporation or the public acquiring an easement across a way previously existing”). Since Section 2704(a) covers both scenarios, a full and fair assessment of the relevant common law would encompass the entire legal landscape; *neither City of Chester* nor *City of Philadelphia*, however, provided such an overview.²³

The instant matter does not contain the same facts as presented in either cases cited by *Bessemer & Lake Erie* or as distinguished by the Supreme Court in *Norfolk S. Ry. Co. v. PUC*. Instead, the facts of this matter are that *Bessemer & Lake Erie* owned the subject railroad tunnel and operated its trains through the subject tunnel for a period of time before receiving permission from the STB to abandon and discontinue service. Thus, *Bessemer &*

²³ *Norfolk S. Ry. Co. v. PUC*, 77 A.3d 619, 629-630 (Pa. 2013).

Lake Erie benefited from the tunnel and should be responsible for the tunnel's final disposition. This rationale is consistent with the Supreme Court when it held:

Nevertheless, the 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 carriers merely using the public highway at a crossing for deliveries, i.e., the City of Chester example). Local governments and the Commonwealth obviously share the requisite sort of interest, as they are by nature concerned with the public safety of their residents.²⁴

26. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *City of Chester v. Pennsylvania Public Utility Comm'n*, 798 A.2d 288 (Pa. Cmwlth. 2002) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

27. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

28. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

29. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

²⁴ *Norfolk S. Ry. Co. v. PUC*, 77 A.3d 619, 631 (Pa. 2013).

30. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

31. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

32. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. Accordingly, Bessemer & Lake Erie's attempt to force "used in any kind of public utility service" as a barrier to assess costs is misguided.

33. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

34. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

35. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

36. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

37. Denied. The averment states a conclusion of law to which no response is required. By way of further response, *Norfolk S. Ry. Co. v. Public Utility Comm'n*, 77 A.2d 619 (Pa. 2013) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

38. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. As explained *supra*, the facts of this matter do not align with any of the facts presented in prior cases, and thus Bessemer & Lake Erie's "logic" is flawed.

39. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

40. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, the facts in *Pittsburgh Railways*²⁵ are not analogous to the facts presented in this case. First, the Port Authority of Allegheny County ("Port Authority") is not a public utility whereas Bessemer & Lake Erie is a public utility. Second, the Port Authority did not use the bridge which was the subject of the proceeding while Bessemer & Lake Erie owned and utilized the subject tunnel. Third, the bridge in *Pittsburgh Railways* was *abolished* by

²⁵ *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967).

Railways pursuant to a Commission Order dated 1961 and prior to the Port Authority's acquisition of Railways' property in 1964.²⁶ Here, Bessemer & Lake Erie did not receive Commission approval to abolish the tunnel. Notably, the Supreme Court held "[t]he transportation utilities concerned for purposes of assessment under § 411 are those whose facilities *are constructed* or located at such crossing."²⁷

41. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

42. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

43. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

44. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

45. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

²⁶ See generally *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967).

²⁷ *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602, 606 (Pa. 1967)(emphasis added).

46. Denied. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied. Rather, the holding relates to the intention of the Port Authority Act, the extent of the Commission's jurisdiction as it relates to assigning costs to the Port Authority, and the legal question of whether the Port Authority owned the subject bridge (which was abandoned through the Commission prior to the Port Authority's acquisition of the transportation system) and could be assessed costs. Bessemer & Lake Erie's attempt to compare the facts of *Pittsburgh Railways* with this case to argue a similar disposition is misguided.

47. Admitted upon information and belief. By way of further response, *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602 (Pa. 1967) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

48. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

49. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

50. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

51. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied that the holdings of *Norfolk Southern* and *Pittsburgh Railways* control the cost allocation. Rather, the factors which the Commonwealth Court noted as relevant to the assignment of costs and

maintenance responsibilities 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;
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.²⁸

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.²⁹ However, while the Commission has considered the foregoing factors to be relevant in the past, this in no way limits the factors that it can consider.³⁰ The Commission's decision must be "just and reasonable" and have a sound legal and factual basis.³¹

52. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

53. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

²⁸ *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995); *see also AT&T v. Pa. Pub. Util. Comm'n*, 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).

²⁹ *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981).

³⁰ *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996).

³¹ *Greene Township Bd. of Supervisors v. Pennsylvania Pub. Util. Comm'n*, 668 A.2d 615 (Pa. Cmwlth. 1995).

54. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

55. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. Specific proof demanded.

56. Denied. The averment states a conclusion of law and request for relief to which no response is required. To the extent a response is deemed to be required, it is denied.

C. The proceeding is not preempted by Federal Law

57. Admitted. By way of further response, 49 U.S.C § 10501(b) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

58. Admitted. By way of further response, 49 U.S.C § 10501(b) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

59. Admitted. By way of further response, 49 U.S.C § 10102(9)(A) speaks for itself and any interpretation, quotation, or characterization thereof is denied.

60. Admitted upon information and belief. By way of further response, *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) speaks for itself and any interpretation, quotation, or characterization thereof is denied. In interpreting 49 U.S.C. 10501(b)(1) and (2), the STB itself determined that while ICCTA preempts state municipal planning regulations, it does not preempt state **safety** regulations. According to the STB, states retain “. . . certain police powers and may apply non-discriminatory regulations to protect public health and safety . . .” so long as this exercise of power does not “have the effect of foreclosing or restricting the railroad’s ability to conduct its operations or otherwise

unreasonably burdening interstate commerce.”³²

Moreover, the Pennsylvania Commonwealth Court has rendered a decision on whether the ICCTA preempts the Commission’s jurisdiction in *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785 (Pa. Cmwlth. 2001). The Commonwealth Court explained:

It has been consistently held that the states have the traditional police power reserved by the Constitution to regulate the public safety of the rail-highway grade crossings and allocate the costs of constructing, maintaining and improving such crossings. *See, e.g., Atchison, T. & S. F. Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346, 98 L. Ed. 51, 74 S. Ct. 92 (1953); *Lehigh Valley R. Co. v. Board of Public Utility Commissioners*, 278 U.S. 24, 73 L. Ed. 161, 49 S. Ct. 69 (1928); *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U.S. 394, 65 L. Ed. 322, 41 S. Ct. 169 (1921); *Chicago, B. & Q. R. Co. v. State of Nebraska*, 170 U.S. 57, 42 L. Ed. 948, 18 S. Ct. 513 (1898); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897); *Southern Ry. Co. v. City of Morristown*, 448 F.2d 288 (6th Cir. 1971), *cert. denied*, 405 U.S. 922, 30 L. Ed. 2d 792, 92 S. Ct. 958 (1972); *American Trucking Ass’n v. United States*, 242 F. Supp. 597 (D.D.C. 1965), *aff’d*, 382 U.S. 373, 15 L. Ed. 2d 422, 86 S. Ct. 543 (1966); *CSX Transportation, Inc. v. Pennsylvania Public Utility Commission*, 125 Pa. Commw. 528, 558 A.2d 902 (Pa. Cmwlth. 1989), *appeal denied*, 523 Pa. 651, 567 A.2d 654 (1989).

³² *Borough of Riverdale Petition for Declaratory Order v. The New York, Susquehanna and Western Railway Corp.*, 1999 W.L. 715272 (I.C.C.) (STB decided September 10, 1999) at p. 16; *see also New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) which provided:

Because the Act’s subject matter is limited to deregulation of the railroad industry, *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir.2001), courts and the Board have rightly held that it does not preempt all state regulation affecting transportation by rail carrier. *See Green Mountain* 2d Cir., 404 F.3d at 643; *J.P Rail, Inc. v. N.J. Pinelands Comm’n*, 404 F.Supp.2d 636, 652 n. 31 (D.N.J.2005); *Vill. of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 163 N.J. 446, 750 A.2d 57, 63 (2000); *Riverdale*, 1999 WL 715272, at *5 (“[S]tate or local regulation is permissible where it does not interfere with interstate rail operations....”).

...

Soon after Congress enacted the Termination Act, the newly created Surface Transportation Board ruled that, while broad, the Act’s preemption clause “does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads,” so long as those regulations do not interfere with or unreasonably burden railroading. *King County*, 1996 WL 545598, at *3–4 (S.T.B.1996).

Our review of the language in Section 10501(b) of the ICC Termination Act demonstrates that the Act expressly grants the Surface Transportation Board the exclusive jurisdiction to regulate rail transportation with respect to “rates, classifications, rules ..., practices, routes, services, and facilities,” and “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,” even where the railroad tracks are located entirely within the state. Section 10501(b), however, does not expressly preempt the states’ traditional police power over the public safety of the “rail-highway crossings.”

Further, the legislative history of the ICC Termination Act also indicates that the Congress did not intend to preempt the states’ traditional authority to regulate the rail-highway crossings within their borders:

Conforming changes are made to reflect the direct and complete pre-emption of *State economic regulation of railroads*. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or sidetracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of *economic regulation of the interstate rail transportation system*. Although States retain the police powers reserved by the Constitution, the Federal scheme of *economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive.

H.R. Rep. No. 104-311, 104th Cong. Ist. Sess. 95-96 (1995) (emphasis added).

Thus, it is clear that in Section 10501(b) of the ICC Termination Act, the Congress intended to preempt only the states’ previous authority to economically regulate the rail transportation within their borders with respect to such matters as the operation, rates, rules, routes, services, tracks, facilities and equipment, and reserve the states’ police power to regulate the safety of the rail-highway crossing.

Moreover, there is no conflict between the exclusive jurisdiction of the Surface Transportation Board to economically regulate the rail carriers under the ICC Termination Act and the states' authority to regulate the public safety of the rail-highway crossing, which is also part of the public highway. *See CSX Transportation, Inc. v. City of Plymouth*, 92 F. Supp. 2d 643 (E.D. Mich. 2000) (a state has the authority to regulate the railroads on the local, as opposed to national, safety issues, so long as the regulation is not in conflict with the federal statute and does not unduly burden the interstate commerce).

Hence, we conclude that the PUC's authority under the Code to regulate the safety of the subject bridge and allocate the costs of its reconstruction has not been preempted, either explicitly or implicitly, by the ICC Termination Act.³³

61. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further response, while Bessemer & Lake Erie may have included the subject tunnel in its Application filed on or about May 29, 2001, Docket No. A-00117858, the final disposition of the tunnel was not addressed in the April 30, 2002 Secretarial Letter and Bessemer & Lake Erie never filed a subsequent application to abolish the public crossing.³⁴

62. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

63. Denied. The averment states a conclusion of law to which no response is required. By way of further response, the ICCTA does not preempt the Commission's

³³ *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785, 791-792 (Pa. Cmwlth. 2001).

³⁴ Mr. Daniel Helfrich explained at the evidentiary hearing on January 18, 2022 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. N.T. pgs. 93, 107-108.

jurisdiction as it relates to public safety at railroad crossings, as fully explained *supra* in Paragraph 60.

64. Denied. The averment states a conclusion of law to which no response is required. By way of further response, the ICCTA does not preempt the Commission's jurisdiction as it relates to public safety at railroad crossings, as explained *supra* in Paragraph 60. The Commission's ability to authorize and set conditions for the abolition of rail-highway crossings is distinct from the STB's exclusive jurisdiction to regulate rail service.³⁵

III. B&LE's Conclusion

65. Denied. The averment states a conclusion of law and request for relief to which no response is required. To the extent a response is deemed to be required, it is denied.

WHEREFORE, for all the foregoing reasons, the Bureau of Investigation and Enforcement respectfully requests that the Motion for Summary Judgment of the Bessemer & Lake Erie Railroad Company be denied.

Respectfully submitted,



Kayla L. Rost

Prosecutor

PA Attorney ID No. 322768

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Dated: April 15, 2022

³⁵ *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa.Cmwlth. 2001).

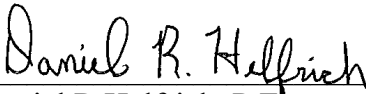
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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. :

VERIFICATION

I, Daniel R. Helfrich, P.E. of the Pennsylvania Public Utility Commission, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect that Complainant will be able to prove same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Date: April 15, 2022



Daniel R Helfrich, P.E.
Pennsylvania Public Utility Commission
Bureau of Technical Utility Services
Rail Safety Section

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's :
motion into matters pertaining to the proper :
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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 **Answer in Opposition to the Motion for Summary Judgment of the Bessemer & Lake Erie Railroad Company** upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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