



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

May 5, 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 Reply Brief

Dear Secretary Chiavetta:

Enclosed please find the **Reply 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

KLR/jfm
Enclosures

cc: As 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 : Docket No. I-2019-3012769
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 :

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

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

Dated: May 5, 2022

I. PROCEDURAL HISTORY

The Bureau of Investigation and Enforcement (“I&E”) incorporates the procedural history as set forth in its Main Brief submitted on April 15, 2022, on pages 1 through 3. A Main Brief was also submitted by Bessemer & Lake Erie Railroad Company (“B&LE”) on April 14, 2022 and the Pennsylvania Department of Transportation (“PennDOT”) on April 15, 2022. Pursuant to the procedural schedule established in the March 2, 2022 Briefing Order and in accordance with Commission regulations at Sections 5.501- 5.502, I&E now submits this Reply Brief.¹

II. STATEMENT OF THE CASE

I&E herein references and incorporates the Statement of the Case section as set forth in its Main Brief submitted on April 15, 2022, on pages 4 through 5, as well as Appendix A – I&E’s Proposed Findings of Fact. I&E’s Main Brief and accompanying appendices include an extensive discussion of the facts that are supported by the record in a substantial and credible manner.

To reiterate, 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 1906.²

¹ 52 Pa. Code §§ 5.501-5.502; *see also* Briefing Order, dated March 2, 2022.

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

III. BURDEN OF PROOF

As stated in I&E's Main Brief, 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.³ "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 other party."⁴ As evident in the record of this case and as supported by I&E's Main Brief and this Reply 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

As discussed in more detail below, B&LE spent a good portion of their brief discussing Section 2709 of the Public Utility Code.⁵ While Section 2709 and B&LE's lack of compliance with it are important, a finding of whether Section 2709 was violated is not the ultimate issue in this matter nor will it change the status quo because noncompliance renders the land sale transaction *voidable*, not void. I&E is not suggesting or arguing that the sale to WALA should be voided. Instead, I&E's questioning related to Section 2709 further showcased B&LE's inability to follow the rules and regulations of the Commission. As a public utility in the Commonwealth of Pennsylvania, B&LE is required to follow the Code and Commission's regulations to ensure the safety of the public at all public highway

³ 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).

⁴ *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

⁵ 66 Pa.C.S. § 2709.

crossings, and other areas which the Code and regulations cover, i.e., clearances⁶ and reporting accident or incidents.⁷ B&LE's attempts to bypass the Commission's jurisdiction, or not even acknowledge it, should not be rewarded. In short, as the tunnel has not been formally abolished by the Commission, the obligations of B&LE remain. B&LE should not be permitted to wash its hands of its obligations by simply selling the surrounding land.

V. ARGUMENT

A. THE IMPACT OF SECTION 2709

Section 2709 of the Public Utility Code (the "Code") provides:

(a) Notice. Before a public utility engaged in a railroad business disposes of real property previously used as a roadbed right-of-way, it must notify the county, city, borough, incorporated town or township in which the real property is located, and it must notify the Department of Transportation, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission and the Department of Environmental Resources.⁸ **Notifications shall be in writing.**

(b) Procedure after notice.

(1) If a municipality or any authority created by a municipality or group of municipalities makes an offer to purchase the real property within 60 days of receiving notice under subsection (a), the public utility shall accept or reject the offer.

(2) If a municipality or any authority created by a municipality or group of municipalities does not make an offer to purchase the real property within 60 days of receiving notice under subsection (a) or if the public utility rejects the offer of a municipality, the administrative agencies specified in subsection (a) have 60 days to decide on making an offer for the real property. If an administrative agency makes an offer under this paragraph, the public utility shall consider the offer and make a decision on the offer before making other disposition of the property. If more than one administrative agency makes an offer, the public utility shall consider the offers in the following order: the Department of Transportation, the Department of Environmental Resources, the

⁶ See generally 52 Pa. Code §§ 33.121- 33.129.

⁷ See generally 52 Pa. Code §§ 33.11- 33.14.

⁸ Please note that pending legislation would modify "the Department of Environmental Resources" to "the Department of Conservation and Natural Resources." See generally P.A. H.B. 1792, P.N. 2734 (Regular Session 2021-2022).

Pennsylvania Game Commission and the Pennsylvania Fish and Boat Commission.

(c) Violation. If a public utility engaged in a railroad business disposes of real property previously used as a roadbed right-of-way without complying with this section, **the disposition is voidable.**

(d) Compliance. The notification requirements of this section shall be deemed to have been complied with **if the executed, notarized and recorded deed conveying the property contains a recital affirming that the notifications required under this section were made.** A copy of each notice shall be appended to the deed when it is recorded.⁹

Thus, if a railroad intends to dispose of real property which was used as a right-of-way, then written notice must be provided to the parties outlined in Section 2709(a). The record is clear that B&LE did not provide written notice pursuant to Section 2709 prior to selling the land surrounding the tunnel to WALA.¹⁰ Instead, B&LE attempts to argue that notice should be *inferred* from the attendance by *some* of the parties at a field conference in the prior matter at Docket No. A-00117858.¹¹ To the contrary, the April 30, 2002 Secretarial Letter cited by B&LE only proves that PennDOT, Concord Township, Fairview Township, and Bradys Bend Township were aware of B&LE's application to abolish 29 crossings, not that B&LE was intending to sell any land related to or near the 29 crossings.

⁹ 66 Pa.C.S. § 2709 (emphasis added).

¹⁰ N.T. pg. 20 (Atty. Barron: "I have no direct knowledge if they did."); N.T. pg. 21 (Atty. Barron: "I am not aware of any intention provided to Pennsylvania DOT to sell the land."); N.T. pg. 22 (Atty. Barron: "I am not aware of any notice provided to the Pennsylvania Game Commission.") N.T. pg. 22 (Atty. Barron: "I'm unaware of any notice being sent specifically to the Pennsylvania . . . Fish & Boat Commission.").

¹¹ *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.

Additionally, B&LE again wants the Commission to infer that B&LE's negotiations with PennDOT regarding the tunnel included notice of its intention to sell the land.¹² Even if B&LE's negotiations with PennDOT did include written notice of B&LE's intention to sell the land, notice to PennDOT does not equate to notice to the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, or the Department of Environmental Resources. Furthermore, the copies of the deeds in B&LE's exhibits do not include "a recital affirming that the notifications required" were made. Moreover, the burden is not on I&E to prove the non-existence of the written notice, but rather on B&LE to prove that it provided written notice of its intention to sell the land to the appropriate parties. Thus, B&LE has not provided any proof of written notice as required by Section 2709.¹³

While the impact of Section 2709 is only of tangential importance here, the crux of this matter is B&LE's position that the mere sale of the surrounding land, in and of itself, proves complete and unequivocal abandonment of the tunnel. As argued in I&E's Main Brief, the tunnel cannot be abandoned until the Commission formally approves a request for abolishment. Indeed, this issue of abandonment has been discussed in prior cases:

In this case, while Conrail petitioned for and received approval from the ICC to abandon its rail line and subsequently, by quitclaim deed, conveyed its interest in the property to a salvage company, that alone is not sufficient to establish abandonment. Because a conclusion that abandonment has occurred is so severe because it forever extinguishes the right-of-way, even a certificate approving

¹² I&E notes that Mr. Charles Keilman testified at the hearing that, to the best of his knowledge, PennDOT did not receive notice of B&LE's intention to sell the land. N.T. pg. 120.

¹³ B&LE argued that the 3-year statute of limitations found in Section 3314 is applicable. 66 Pa.C.S. § 3314. This argument is flawed and incorrect as I&E has not instituted an action seeking a civil penalty or prosecuting B&LE for a violation of Section 2709. Thus, the 3-year limitation pursuant to Section 3314 is inapplicable to this proceeding. Nevertheless, I&E's questioning related to Section 2709 was intended to cast doubt on B&LE's claim that the sale of the land created the absurd and irrational result of B&LE unequivocally relinquishing its responsibility and obligations to the tunnel. As stated in I&E's Main Brief, to allow B&LE's argument to stand would allow a railroad to wash its hands of its obligation to public crossing and public safety by simply selling the land surrounding or containing the public crossing, and would render the Commission's exclusive jurisdiction over public crossings moot.

abandonment or that the rail line has not been used or has been transferred to a non-railroad entity is not sufficient. *See e.g. Birdsboro Municipal Authority v. Reading Company and Wilmington & Northern Railroad*, 2000 PA Super 231, 758 A.2d 222 (Pa. Superior 2000); *Burnier; Quarry Office Park Associates; Lawson v. Simonsen*, 490 Pa. 509, 417 A.2d 155 (1980); *Lacy*.¹⁴

Additionally, it could be argued that B&LE implicitly reserved a right of entry to the property based upon Mrs. Anna Marie Sherwin's testimony.¹⁵ It is undisputed that B&LE removed the railroad track and ties at some point after receiving approval to abandon and discontinue service through the Surface Transportation Board in or around January 2001. Mrs. Sherwin's uncontested testimony stated that B&LE removed the railroad track and ties *after* the property was sold to WALA.¹⁶ Mrs. Sherwin continued to explain that it was stipulated that B&LE had control over the tunnel and were responsible for removing the track and ties.¹⁷ Thus, the record is clear that B&LE did not abandon the tunnel nor its right-of-way, and is still responsible for the tunnel.

The case law is clear that B&LE did not divest itself of its obligations and responsibilities to the railroad tunnel by simply selling the land where the tunnel is located. Rather, only the Commission can order and determine the disposition of the tunnel, which includes maintenance responsibilities, work to be completed to make the tunnel safe, and the abolishment of the tunnel as a public crossing.¹⁸ The Commission has not issued an order or secretarial letter either determining the final disposition of the tunnel or extinguishing

¹⁴ *Buffalo Twp. v. Jones*, 778 A.2d 1269, 1274 (Pa. Cmwlth. 2001).

¹⁵ I&E also notes that the October 24, 2002 Quit claim Deed included at B&LE Exhibit 5 states that the transfer is subject to all legal highways, rights of way, and easements affecting the tracts of land. *See generally* B&LE Exhibit 5.

¹⁶ N.T. pgs. 149-150.

¹⁷ N.T. pgs. 150-151.

¹⁸ Section 2702 of the Public Utility 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. 66 Pa.C.S. § 2702.

B&LE's responsibilities to the tunnel. As such, the tunnel remains an active public crossing and B&LE remains liable for the tunnel's maintenance and whatever work the Commission may order to make the tunnel safe.

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 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,



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

Dated: May 5, 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 : Docket No. I-2019-3012769
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

CERTIFICATE OF SERVICE

I hereby certify that I have this day, May 5, 2022, served a true copy of the foregoing **Reply 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:

Honorable Mary D. Long
Administrative Law Judge
Pennsylvania Public Utility Commission
301 Fifth Avenue
Suite 220, Piatt Place
Pittsburgh, PA 15222
malong@pa.gov

Armstrong County Commissioners
Armstrong County Courthouse
450 East Market Street
Kittanning, PA 16201
aspoole@co.armstrong.pa.us

Bradys Bend Township Supervisors
1004 State Route 68
East Brady, PA 16028
bbtownship@gmail.com

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

John M. Steidle, Esquire
Edwin B. Palmer, Esquire
Burns White LLC
48 26th Street
Pittsburgh, PA 15222
jmsteidle@burnswhite.com
ebpalm@burnswhite.com

*Counsel for
Bessemer & Lake Erie Railroad*

H. William 'Wil' White, III, Esquire
Butler County Commissioners' Office
124 West Diamond Street
P.O. Box 1208
Butler, PA 16003-1208
wwhite@co.butler.pa.us
Solicitor for the County of Butler

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

Ann Marie Sherwin
1276 Kittanning Pike
Chicora, PA 16025
tooams@zoominternet.net

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



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