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May 5, 2022

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

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

Dear Secretary Chiavetta:

On behalf of the Bessemer & Lake Erie Railroad Company in the above referenced matter, enclosed please find for electronic filing with the Commission, the B&LE's Reply Brief in Support of Main Brief and reply to the responses of the BIE and PennDOT. Copies of the Reply Brief are being served in accordance with the attached Certificate of Service.

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

Very truly yours,

John M. Steidle

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

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO.: I-2019-3012769

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

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REPLY BRIEF FOR BESSEMER AND LAKE ERIE RAILROAD COMPANY ("B&LE") IN SUPPORT OF MAIN BRIEF AND MOTION FOR SUMMARY JUDGMENT

Respectfully submitted pursuant to March 2, 2022 Briefing Order

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

AND NOW, here comes BESSEMER AND LAKE ERIE RAILROAD COMPANY ("B&LE"), by and through its counsel, BURNS WHITE LLC and files the within Reply Brief in support of B&LE's Main Brief and Motion for Summary Judgment pursuant to the Administrative Law Judge's Briefing Order dated March 2, 2022 as follows:

I. Brief Introduction

The relevant facts of this matter are undisputed: (1) B&LE has not conducted any operations at the SR0268 crossing in over twenty (20) years; (2) B&LE has no ownership interest in the SR0268 crossing (or the adjacent 394 acres of land), because the same was conveyed by B&LE to the Western Allegheny Landowners Association ("WALA") on October 24, 2002 via quitclaim deed; (3) B&LE did not reserve any right of way interest in the SR0268 crossing; and, therefore, (4) B&LE has had no right of access to or control over the SR0268 crossing since October 24, 2002.[1] Consequently, it is beyond contestation that B&LE is <u>not</u> a "concerned party" to whom any costs of, *inter alia*, abolition, repair, removal and/or future maintenance of the tunnel located at the SR0268 may be assessed.[2]

1 These facts have been public knowledge since the quitclaim deed conveying the SR0268 crossing (and surrounding lands) to WALA was recorded in the Butler County, Pennsylvania Recorder of Deeds Office on November 8, 2002.
2 *See* 66 Pa.C.S. §§ 2702(a), 2704(a); *see also Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013); *Pittsburgh Railways Co. v. Pennsylvania Pub. Util. Comm'n*, 237 A.2d 602, 606 (Pa. 1967).

The Pennsylvania Public Utility Commissions' Bureau of Investigation and Enforcement ("BIE") and the Commonwealth of Pennsylvania Department of Transportation ("DOT") both advocate in their Main Briefs that the Pennsylvania Public Utility Commission ("PAPUC" or the "Commission") should blatantly disregard Pennsylvania Supreme Court precedent and the plain language of Section 2704(a) of the Public Utility Code by allocating such costs to B&LE. The Commission has no discretion to deviate from this binding legal authority.

The Pennsylvania Supreme Court made it clear in *Norfolk Southern* that whether a public utility is a "concerned party" for purposes of the Commissions' cost allocation authority under Section 2704(a) is a threshold issue and a matter of statutory construction. The Commission must first determine who is a "concerned party" relative to the SR0268 crossing before it has any discretion whatsoever under Section 2704(a) to assess costs. Only after the "concerned party" issue is ruled upon may the Commission then proceed to exercise its discretion and consider the equities of the matter in assessing costs to "concerned parties" in "proper proportions". Indeed, the equities of the matter are irrelevant as the "concerned party" issue raised by B&LE presents a legal question – <u>not</u> an equitable question.

The Commission has discretion to allocate costs to "concerned parties", but it has no discretion to select who is a "concerned party". Instead, where the Commonwealth's highest court has prescribed a legal definition for the term "concerned party" based upon its interpretation of the General Assembly's legislative intent, the Commission is bound by the Pennsylvania Supreme Court's definition.

Pursuant to the Pennsylvania Supreme Court's plainly worded and unambiguous definition, B&LE is not a "concerned party" to whom costs may be assessed. For this reason and

for all of the reasons that follow, B&LE respectfully requests that it be dismissed from this matter and that no costs relative to the SR0268 crossing be assessed to B&LE.

II. Argument

A. DOT's and BIE's tortured interpretation of binding Pennsylvania Supreme Court precedent and Section 2704 of the Public Utility Code should not be adopted by the Commission

DOT argues that the Pennsylvania Supreme Court in *Norfolk Southern*:

> [D]id not impose a minimum requirement of usage where a railroad does not own the property, in order for a non-owner railroad to be assessed costs or maintenance of a crossing as a "concerned party." Rather, the Court was satisfied that the facts and circumstances of the case ***as well as equitable factors***, including usage by the non-owner railroad, ***supported its assessment of costs and maintenance***. Had the Court intended to set usage as a mandatory threshold for concerned party status, it would have expressly indicated as much.

See DOT Main Brief at pg. 6 (emphasis added) (internal citation omitted). DOT's argument and BIE's related argument fly in the face of the *Norfolk Southern* court's explicit holding in addition to the plain language of the Public Utility Code.

Contrary to DOT's erroneous assertion, the *Norfolk Southern* court specifically noted that it did <u>not</u> address "the equities associated with the Commission's decision to assess costs against Norfolk, as this is not among the issues selected for review here."[3] *Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619, 632, n.11 (Pa. 2013).

3 Rather, the prior holding of the Commonwealth Court, "that the Commission may not allocate costs to a transportation utility which regularly uses a crossing site in railroad operations but does not own real property or facilities there" was presented for the Pennsylvania Supreme Court's consideration. 77 A.3d at 620. The *Norfolk Southern* court ultimately disagreed with the Commonwealth Court's interpretation of the term "concerned party" and, therefore, vacated the Commonwealth Court's order and remanded the case for consideration of "issues which were obviated by the intermediate court's adoption of an ownership litmus." *Id.* at 633. *Inter alia*, the issues for consideration on remand included the equities associated with the Commission's discretion to assess costs.

In sum, the Pennsylvania Supreme Court in *Norfolk Southern*: (1) did <u>not</u> analyze the "equitable factors" related to the Commission's authority to assess costs under Section 2704(a), and (2) did <u>not</u> assess costs of maintenance to the Norfolk Southern Railway Company. DOT's assertion to the contrary is mistaken.

The *Norfolk Southern* court instead held that a ruling regarding whether a public utility is a "concerned party" must be made in the first instance before the Commission may exercise its discretion under Section 2704(a) for determining the "proper proportions" in which costs should be allocated amongst concerned parties. *Id.* at 628-29 (*citing* 66 Pa.C.S. § 2704(a)). Indeed, whether B&LE is a "concerned party" is a threshold issue for the Commission's consideration. *Id.* (holding that the PAPUC's "position that concerned party status is entirely discretionary with the Commission is not a sound one"; rather, it is "fundamentally correct" based upon the "plain text of Section 2704(a)" that the Commission cannot "select the parties who will be subject to allocation on a discretionary basis").[4]

The initial determination of whether B&LE is a concerned party or not is subject to plenary review by appellate courts as a "matter of statutory construction" and requires an interpretation of what the General Assembly meant by the phrase "public utilities . . . concerned". *Norfolk S. Ry. Co.*, 77 A.3d at 628. Accordingly, where the Pennsylvania Supreme Court has previously defined the term "concerned party" based upon its interpretation of the General Assembly's legislative intent, the holding of the Commonwealth's highest court in this regard is <u>not</u> subject to the Commission's discretion. *Id.*

The *Norfolk Southern* court ultimately rejected ownership as a litmus test for "concerned party" status but also made it clear that ownership still plays a central role in the analysis. *Id.* at 633. The *Norfolk Southern* court noted that Norfolk Southern Railway Company's "argument that the salient 'concern' derives from ownership of facilities at the crossing site is also a

4 "[E]ither a party is 'concerned' (and thus subject to discretionary cost allocation) or it is not (and therefore the Commission lacks discretion to allocate costs to such party). Once concerned-party status is confirmed, the Commission's decision-making is tethered by the requirements of sound factual and legal bases." *Norfolk S. Ry. Co.*, 77 A.3d at 632 (*citing Greene Twp. Bd. of Sup'rs v. Pennsylvania Pub. Util. Comm'n*, 668 A.2d 615, 618 (Pa. Commw. Ct. 1995)).

plausible one, particularly as it is ***tethered*** to a core class of utilities as to which a substantial portion of the substantive content of Sections 2702 and 2704 seems to be directed". *Id*. at 629 (emphasis added). "Norfolk's construction has the advantage of avoiding the sort of overbreadth envisioned in the motor-carrier example related in *City of Chester*." *Id*. Without question, the *Norfolk Southern* court refused to afford an interpretation to the term "concerned party" that is not directly tied to the plain language of Sections 2702 and 2704 of the Public Utility Code for fear of overbreadth.

The Commission's authority related to ordering the abolition of a crossing applies to public utilities[5] "engaged in the transportation of passengers or property". *See* 66 Pa.C.S. § 2702(a). Similarly, ordering compensation for damages "which the owners of adjacent property taken, injured, or destroyed may sustain in the . . . abolition of any crossing" relates to crossing facilities[6] "which are used in any kind of public utility service". *Id*. at § 2704(a). Taken together, these provisions of the Public Utility Code expressly contemplate that a public utility must be presently engaged in providing transportation services and using the relevant crossing facility in order to be a "concerned party."

If the Pennsylvania General Assembly had intended for a public utility which was previously engaged in providing transportation services or which previously used a railroad crossing facility to be subject to the Commission's discretionary cost assessment authority, Section 2704(a) would have been written in the past tense. It is not. Moreover, the definitions section of

5 The term "public utility" is defined as, "[a]ny person or corporations . . . ***owning and operating*** in this Commonwealth equipment or facilities for . . . (iii) Transporting passengers or property as a common carrier". 66 Pa.C.S. § 102 (emphasis added).

6 The term "facilities" is defined as including plant and equipment "***owned, operated***, leased, licensed, ***used***, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." 66 Pa.C.S. § 102 (emphasis added).

the Public Utility Code, *see* 66 Pa.C.S. § 102, supports this conclusion by expressly qualifying the terms "public utilities" and "facilities" with the words "ownership", "operating", "use", and "control".

The *Norfolk Southern* court's holding is consistent with the statutory text of these sections of the Public Utility Code. The Pennsylvania Supreme Court explicitly stated as a matter of first impression that:

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

See 77 A.3d 619, 633 (Pa. 2013) (emphasis added).[7] Neither BIE nor DOT quote this principle holding of the *Norfolk Southern* court in their Main Briefs and instead appear content to avoid the same.

The *Norfolk Southern* court's principle holding is plain and unambiguous. Where a railroad does <u>not</u> own the facilities at a rail-highway crossing, does <u>not</u> conduct regular operations at the crossing and cannot enforce an easement-based right of way, the railroad is <u>not</u> a "concerned party" to whom costs of repair, maintenance and/or abolition may be assessed. Indeed, a railroad which does not own, operate at or have any right of way interest in a rail-highway crossing does not by any stretch of the imagination have "a substantial interest in" the same "beyond that which is coterminous with members of the general public at large (such as the interests of motor common

7 Norfolk Southern Railway Company maintained its easement based right of way "attained through a succession in interest dating to the original track owner, and which is enforced through ongoing operating agreements with Amtrack pertaining to track segments owned by the latter". *Norfolk S. Ry. Co.*, 77 A.3d at 632, n.11. Here, B&LE does not have a right of way interest nor does it enjoy any type of operating agreement analogous to the one referenced in *Norfolk Southern*.

carriers merely using the public highway at a crossing for deliveries, i.e., the *City of Chester* example)." *Id*. at 631.

As demonstrated *supra*, the Commission has no discretion to alter the *Norfolk Southern* court's definition of the term "concerned party", nor may the Commission consider the equities argued by DOT or BIE before deciding the threshold issue – *i.e.*, is B&LE a "concerned party"? The answer is obviously no.

Here, there is no material dispute of fact that B&LE conveyed all of its property interests in the SR0268 crossing and surrounding land on October 24, 2002 to WALA. Accordingly, B&LE has not owned, operated on, used, had access to or had control over the SR0268 crossing for approximately the last twenty (20) years. B&LE does not have a "substantial interest" in the SR0268 crossing. Instead, B&LE's interests in the SR0268 crossing, if any, are arguably less than that of the general public at large, because B&LE does not use the public highway at the SR0268 crossing for any purpose – not even to the extent of the motor common carrier example analyzed in *City of Chester*. *See City of Chester v. Pennsylvania Pub. Util. Comm'n*, 798 A.2d 288 (Pa. Commw. Ct. 2002), *abrogated by Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013).

For these reasons and for all of the reasons previously asserted by B&LE in its Motion for Summary Judgment and Main Brief, B&LE respectfully requests that the Commission find that B&LE is not a concerned party to this proceeding and, therefore, no costs related to the SR0268 crossing may be assessed to B&LE.

B. Alternatively, a balancing test of the equities favors B&LE's position that no costs related to the SR0268 crossing should be assessed to B&LE

Once a ruling as to concerned party status is made, Section 2704(a) vests the Commission with authority to subsequently determine which concerned parties shall bear the costs associated with *inter alia* constructing, repairing, maintaining and/or abolishing the relevant rail-highway

crossing. *See* 66 Pa.C.S. § 2704(a). Section 2704(a) gives the Commission discretion to determine the "proper proportions" in which such costs should be allocated amongst the concerned parties. *Id*.; *see also Greene Twp. Bd. of Sup'rs v. Pennsylvania Pub. Util. Comm'n*, 668 A.2d 615, 618 (Pa. Commw. Ct. 1995) (*citing Borough of South Greensburg v. Pennsylvania Public Utility Commission*, 544 A.2d 82 (Pa. Commw. Ct. 1988)).

The Commission's authority to allocate costs is not "unfettered"; rather, the Commission's exercise of its discretion must be "based upon some sound legal or factual basis and not just the Commission's policy." *See Greene Twp. Bd. of Sup'rs*, 668 A.2d at 618 (*citing Port Authority of Allegheny County v. Pennsylvania Public Utility Commission*, 217 A.2d 810 (Pa. Super. Ct. 1966)). In *Greene Twp. Bd. Of Sup'rs*, the Commonwealth Court of Pennsylvania explained:

> While there is no Pennsylvania case law or statutory law clearly delineating the factors that are relevant to the allocation of costs among the parties, a review of the numerous cases involving challenges to the reasonableness of the Commission's decisions indicates that several factors have consistently been viewed as relevant. They include:
>
> 1. The party that originally built the crossing. Related to this factor is the issue of whether the road existed before or after 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 that has led to the need for its repair, replacement or removal[]; and
>
> 5. The relative benefit that each party will receive from the repair, replacement or removal of the crossing.

Greene Twp. Bd. of Sup'rs v. Pennsylvania Pub. Util. Comm'n, 668 A.2d at 619 (*citing Pittsburgh and Lake Erie Railroad Co. v. Pennsylvania Public Utility Commission*, 556 A.2d 944

(Pa.Cmwlth.1989); *Department of Transportation v. Pennsylvania Public Utility Commission*, 469 A.2d 1149 (Pa.Cmwlth.1983); *Department of Transportation v. Pennsylvania Public Utility Commission*, 464 A.2d 645 (Pa.Cmwlth.1983); and *Department of Transportation v. Pennsylvania Public Utility Commission*, 346 A.2d 371 (Pa.Cmwlth.1975)).

Here, B&LE concedes that its predecessor in interest originally built the crossing and that B&LE did receive an initial benefit from the construction of the SR0268 crossing. However, the remaining factors all favor B&LE. Therefore, the constellation of relevant facts favor a finding that B&LE should not be assessed any costs of repair, maintenance or abolition in relationship to the SR0268 crossing.

Factor 2 – Ownership and Maintenance Responsibilities Do Not Belong to B&LE

It is beyond dispute that B&LE has not owned the SR0268 crossing or the surrounding 394 acres of land since it conveyed the same to WALA on October 24, 2002. The conveyance to WALA was in fee simple absolute and B&LE reserved no right of way interest in the SR0268 crossing. *See* B&LE Ex. 5. WALA was represented by competent counsel of its choosing for purposes of this conveyance. *Id*.; *see also* Jan. 18, 2022 H.T. at pg. 228. Neither WALA nor its counsel negotiated maintenance responsibilities for the SR0268 crossing with B&LE and, therefore, WALA assumed the same of its own volition. *See* B&LE Ex. 5.

Based upon the foregoing, B&LE has had no ownership interest in, right of access to or control over the SR0268 crossing since 2002. The SR0268 crossing became the private property of WALA and then subsequent grantees within the same chain of title. *See* B&LE Ex. 6-9. Consequently, ownership and maintenance responsibilities belong to the private property owners as a matter of law. The ownership/maintenance factor favors B&LE.

Factor 4 – Deterioration Responsibility Does Not Belong to B&LE

BIE acknowledges in its Main Brief – as it must – that B&LE inspected the SR0268 crossing (inclusive of the tunnel) in 2001. *See* BIE Main Brief at pg. 23. Accordingly, B&LE observed its responsibility to ensure the SR0268 crossing did not deteriorate prior to its conveyance of the same to WALA on October 24, 2002.[8] Furthermore, WALA (as represented by competent counsel of its own choosing) had a full and fair opportunity to inspect the property it was purchasing, including the SR0268 crossing, prior to the October 24, 2002 conveyance. If WALA had found issues with the condition of the SR0268 crossing at that time, it could have avoided the conveyance altogether. WALA chose to go through with the transaction upon the advice of its counsel, which suggests that WALA found no issues with the condition of the SR0268 crossing prior to or as of October 24, 2002.

As of the October 24, 2002 conveyance, WALA and its subsequent grantees within the same chain of title assumed maintenance responsibilities for the SR0268 crossing. *See* B&LE Ex.5. B&LE has had no legal right to use or enter upon the private property of WALA for any purpose since October 24, 2002 let alone for the purposes of inspecting, altering, maintaining

8 Counsel for BIE cites to testimony of Ms. Sherwin for the proposition that representatives of B&LE made certain oral representations regarding maintenance responsibility for the SR0268 crossing and tunnel prior to the October 24, 2002 conveyance. *See* BIE Main Brief at pg. 23. Ms. Sherwin's testimony is not credible as she cannot remember any particulars regarding her purported interactions with representatives of B&LE. *See* Jan. 18, 2022 H.T. at pp. 224, 226-27. For example, Ms. Sherwin cannot even remember if the person she spoke with was a man or woman stating, "I have no idea." *Id*. at pg. 224.

Additionally, the October 24, 2002 Quitclaim Deed is a completely integrated document. Therefore, Pennsylvania's parol evidence rule bars any consideration of Ms. Sherwin's testimony. Evidence of oral representations made prior to or contemporaneously with the transaction may not be introduced as substantive evidence that would materially alter the terms of the October 24, 2002 Quitclaim Deed. *See Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436 (Pa. 2004) (emphasis added) (*quoting Gianni v. Russell & Co.*, 126 A. 791, 792 (Pa. 1924)).

Moreover, Pennsylvania law does not permit claims of fraud in the inducement as an exception to the parol evidence rule's operation. *See e.g., Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 206 (Pa. 2007); *see also Berardine v. Weiner*, 198 F. Supp. 3d 439, 444 (E.D. Pa. 2016) (emphasis added) (*citing HCB Contractors v. Liberty Place Hotel Assocs.*, 652 A.2d 1278, 1279 (Pa. 1995)). Similarly, Pennsylvania's two-year statute of limitations operates to time-bar any assertion of fraud in the execution. *See* 42 Pa.C.S. § 5524(7).

and/or repairing the SR0268 crossing. Since B&LE has had no right of control over the SR0268 crossing since October 24, 2002, it was not in a position to prevent or correct any deterioration that has occurred. Therefore, B&LE is not responsible for any ameliorative waste that has occurred.

Indeed, it cannot be meaningfully argued that B&LE (*i.e.*, a party with no legal right to inspect, alter, maintain, repair or access the SR0268 crossing) caused any deterioration to the SR0268 crossing that occurred over the last twenty years when B&LE no longer possessed the same. At all relevant times, either WALA or subsequent grantees within the same chain of title were in possession of the SR0268 crossing. It logically follows then that either WALA or its subsequent grantees caused any deterioration to the SR0268 crossing that has occurred since October 24, 2002. Deterioration responsibility belongs to WALA – not B&LE. Therefore, this factor favors B&LE's position that it should not be assessed any costs relative to the SR0268 crossing.

Factor 5 – The Benefit of Abolishing or Removing the SR0268 Crossing

There is absolutely zero benefit that would be conferred upon B&LE from abolishing or removing the SR0268 crossing. B&LE no longer owns, uses or has any right of access to the SR0268 crossing or any of the adjacent land. The parties who would benefit from abolishment or removal are the private property owners and DOT. Without question, this final factor also favors B&LE's position that it should not be assessed any costs relative to the SR0268 crossing.

Doctrine of Laches

In addition to the factors cited by the Commonwealth Court in *Greene Twp. Bd. Of Sup'rs*, B&LE also asserts the doctrine of laches as an equitable defense to the assessment of any costs.[9]

9 B&LE incorporates by reference herein as if the same were set forth fully and at length its recitation of the rule and its rule explanation for the doctrine of laches as stated in its Main Brief. *See* B&LE Main Brief at pp. 13-15.

It has been approximately twenty (20) years since B&LE: (1) put the Commission, DOT and other parties on notice of its intent to dispose of the SR0268 crossing, as evidenced by the then negotiations between DOT and B&LE for the same, (2) conveyed its property interests in the SR0268 crossing and surrounding land to WALA, and (3) put the entire world on record notice that it no longer owned, had access to or had any right of control over the SR0268 crossing. *See* B&LE Ex. 3, 5. Furthermore, it has been approximately ten (10) years since the Commission sent notice to "ALL PARTIES" regarding B&LE's Application to Abolish the SR0268 crossing and advising all parties that: "All work has been completed" and "CLOSED" the case. *See* B&LE Ex. 16.

It was not until October 3, 2019 that the Commission instituted an investigation relative to the safety and abolition of the SR0268 crossing. Apparently, the matter "fell through the cracks" or "off the radar screens" of the concerned parties to this proceeding. Regardless, BIE, DOT and the private property owners of SR0268 crossing slept on their rights, if any, for almost two decades and did not timely challenge B&LE's status as a purported "concerned party" or assert any alleged responsibility for B&LE to pay for the maintenance, repair or abolishment of the SR0268 crossing.

B&LE would suffer great prejudice if the costs of abolition and/or deterioration of the SR0268 crossing and tunnel were assessed in any amount to B&LE. B&LE properly maintained and inspected the SR0268 crossing and tunnel prior to conveying the same to WALA. The October 24, 2002 conveyance and deed does not impose any legal obligation upon B&LE to inspect or maintain the SR0268 crossing. WALA was represented by competent counsel for purposes of this transaction and, yet, WALA did not negotiate maintenance responsibilities as part of the conveyance. Accordingly, B&LE changed its position in reliance upon the validity of the October 24, 2002 fee simple conveyance and stopped inspecting and/or maintaining the SR0268 crossing.

Any deterioration that has occurred since B&LE has been out of possession is the direct and proximate result of the private property owners's and/or DOT's failure to properly maintain the SR0268 crossing consistent with their legal obligations to do so.

BIE, DOT and the private property owners did not act with the vigilance that the law requires of similarly situated parties. The SR0268 crossing is an open and obvious facility and any deterioration that was occurring thereto over the last twenty (20) years happened in an open and obvious manner for the whole world to see. The private property owners knew or should of known from the relevant sales agreement and quitclaim deed as soon as the October 24, 2002 conveyance was finalized and publicly recorded that they retained maintenance responsibilities for the SR0268 crossing and tunnel. Furthermore, all parties knew or should have known from the Commission's February 1, 2012 closing letter and the Commission's April 30, 2002 Secretarial letter that the SR0268 crossing's prospective abolishment fell through the cracks. *See* B&LE Ex. 3, 16.

The passage of twenty (20) years has made any claims of BIE, DOT, or the private property owners against B&LE stale. These parties failed to exercise due diligence and, therefore, they should not be surprised to awake to the consequence that any rights they had to advocate for an assessment of costs against B&LE have disappeared.

In summation, it would not be just and reasonable for the Commission to assess any costs to B&LE relative the SR0268 crossing. An objective balancing of the equities reveals that the majority of relevant factors favors B&LE's position. Therefore, B&LE respectfully requests in the alternative that it not be assessed any costs relative to the SR0268 crossing.

C. BIE's Argument that "Genuine Issues of Material Fact Exist with Regard to Whether B&LE Abandoned its Public Right-Of-Way" lacks credibility

It cannot be meaningfully contested that B&LE successfully applied for and received approval in January of 2001 from the federal Surface Transportation Board ("STB") to abandon and discontinue service on a portion of its Western Allegheny Branch spanning approximately 20.1 miles in Butler County and Armstrong County, Pennsylvania. *See* B&LE Ex. 1-2. Thereafter, on October 24, 2002, B&LE conveyed all of its interests in the SR0268 crossing and the surrounding 394 acres of land to WALA and did not reserve any right of way interest in the same. *See* B&LE Ex. 5.

B&LE also engaged in the affirmative act of removing its tracks, ties, and signal equipment consistent with the permission granted by the STB. *See e.g.*, BIE Main Brief at pg. 4 (stating "the railroad track and ties were removed from the structure at some point in the past"); and Jan. 18, 2022 H.T. at pp. 137-38. Accordingly, for BIE to suggest that B&LE took no affirmative act to demonstrate its intent to abandon its rail line is an incredible statement apparently designed to mislead the Commission into thinking a disputed issue of material fact exists. It does not. Therefore, since there are no disputes as to any material fact and the "concerned party" issue is clear and free from all doubt as demonstrated *supra*, summary judgment should be entered in B&LE's favor.

III. Conclusion

For all of the foregoing reasons and for all of the reasons previously stated in B&LE's Main Brief, Motion for Summary Judgment and brief in support thereof (all of which are expressly incorporated herein by reference as if set forth fully and at length), B&LE respectfully requests that judgment be entered in its favor and that no costs of any kind be assessed to B&LE relative to the tunnel located at the SR0268 grade crossing.

Respectfully submitted,

BURNS WHITE LLC

By: _____

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Reply Brief** dated May 5, 2022, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (related to service by a party).

Service by Electronic Mail Only:

Honorable Mary D. Long
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