

**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 : I-2019-3012769
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 :

RECOMMENDED DECISION

Before
Mary D. Long
Administrative Law Judge

INTRODUCTION

In 2019 the Commission instituted an investigation and directed an examination of the safety of two public crossings, one an at-grade crossing referred to below as the Brady's Bend Crossing, and a tunnel referred to in this decision as the Blackburn Tunnel. The Commission directed an investigation to determine 1) the safety of the crossings; 2) the future disposition of the crossings upon their abolition; 3) what work shall be performed at these crossings; and 4) the allocation of the costs of any work ordered.

On the eve of hearing the railroad filed a motion for summary judgment on the grounds that the Commission did not have jurisdiction to direct the railroad to perform work or pay costs related to the crossings. The motion for summary judgment is denied.

Following a hearing and after a full consideration of the evidence I conclude that the Blackburn Tunnel crossing is not safe and requires prompt remediation. I recommend that 1) the Blackburn Tunnel should be filled and the work should largely be performed by the railroad; 2) the initial costs should be assigned to the railroad; and 3) upon completion of the work to the satisfaction of the Commission, the crossings should be formally abolished. I recommend that the Commission assign final costs and future maintenance responsibilities at a future hearing, in the event the parties cannot reach an agreement on their own. I further recommend that the Joint Stipulation regarding the Brady's Bend Crossing is reasonable and appropriate and should be approved without modification. The Brady's Bend Crossing should be abolished.

HISTORY OF THE PROCEEDINGS

By order entered October 3, 2019, the Pennsylvania Public Utility Commission (Commission) instituted an investigation for the purpose of determining all matters relating to the abolition and safety of two crossings on an abandoned line of the Bessemer and Lake Erie Railroad (BLE). One crossing is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by State Route SR0268 (Blackburn Tunnel).¹ The other crossing is located in Brady's Bend Township, Armstrong County, where SR0068 crosses, below grade, the track (Brady's Bend Crossing).² The Commission made BLE, Pennsylvania Department of Transportation (PennDOT), Fairview Township, Brady's Bend Township and Armstrong County parties to the investigation.³

The investigation was assigned to the Office of Administrative Law Judge on January 31, 2020. On June 3, 2020, the Bureau of Investigation and Enforcement (I&E) entered an appearance. PennDOT entered an appearance on June 22, 2020.

¹ This tunnel was referred to as "the Blackburn Tunnel" by a local resident, Ann Marie Sherwin. Tr. 224-25. The name is used here as a convenience to the reader.

² As explained below, the other crossings along this line were abolished by Secretarial Letter dated April 30, 2002, Docket A-00117858.

³ The exclusion of Butler County as a party appears to be an oversight. Butler County was later notified of the proceeding.

By notice dated October 5, 2020, the investigation was assigned to Deputy Chief Administrative Law Judge Mark Hoyer and scheduled for a prehearing conference on November 10, 2020. On November 2, 2020, I&E identified three landowners affected by the disposition of the crossings. The investigation was reassigned to me, and the hearing notice and prehearing conference order were re-served to include the additional landowners.

The prehearing conference convened as scheduled on November 10, 2020. Counsel for I&E and PennDOT appeared as well as two engineers from the I&E's Rail Safety Division. Notice of the conference had been mailed by first class mail to the offices of BLE in Michigan, but no representative of the railroad appeared. Conditions at the subject crossings were discussed. I concluded that an engineering study is clearly required, but that conducting such a study would be difficult without the participation of the railroad. Accordingly, a further prehearing conference was scheduled for December 1, 2020 in order to provide an opportunity to locate counsel for BLE.

On November 24, 2020, Fairview Township entered an appearance.

A further prehearing conference was scheduled for December 1, 2020. Counsel for I&E, PennDOT, BLE and Fairview Township appeared. Additionally, landowners Anna Sherwin and William and Kay Barnhardt appeared. Nick Andreassi, owner of Andreassi Gas Company appeared as well. Because counsel for BLE, John M. Steidle, Esquire, had only recently been retained, the parties requested additional time to discuss an engineering study of the crossings. A further prehearing conference was scheduled for December 30, 2020.

The December 30, 2020 conference convened as scheduled. Counsel for I&E, PennDOT, BLE, and Fairview Township appeared. Ms. Sherwin and Ms. Barnhardt also appeared. The parties agreed that an engineering study of the tunnel at the crossing in Fairview Township, Butler County was appropriate. The parties also noted the possibility that the crossing in Brady's Bend Township, Armstrong County could be resolved by a stipulation.

By interim order entered January 4, 2021, BLE was directed, at its initial cost and expense, to prepare and submit to the Commission and all parties of record for examination, an engineering report detailing the current condition of the tunnel structure at the crossing located in Fairview Township, Butler County. A further prehearing conference was scheduled for August 16, 2021, to discuss the initial study and develop a further procedural schedule for the investigation. The parties were also directed to address the Questions and Procedures of the Commission's Bureau of Technical Utility Services, Rail Safety Division, which were attached to the order.

On January 11, 2021, counsel for Butler County entered an appearance.

BLE completed the report and filed the report on July 30, 2021 (AECOM Report). A further prehearing conference was held on August 16, 2021. Counsel for I&E, PennDOT, BLE, and Fairview Township appeared. The parties agreed to a litigation schedule which included dates for the filing of written testimony and an evidentiary hearing on January 18, 2022.

On November 12, 2021, the parties filed a Joint Stipulation of Settlement regarding the disposition of the Brady's Bend Crossing.

BLE, I&E and PennDOT filed written direct and rebuttal testimony. On January 3, 2022, less than 20 days before the evidentiary hearing,⁴ BLE filed a motion for summary judgment which argued that BLE was not a "concerned party" within the meaning of the Public Utility Code and that Commission did not have jurisdiction because the action by the Surface Transportation Board (STB) pre-empted Commission jurisdiction. BLE argued in the alternative that it was not concerned because it no longer owned the property that included the Blackburn Tunnel.

The evidentiary hearing convened as scheduled on January 18, 2022. BLE, I&E, PennDOT, Fairview Township and Anna Marie Sherwin appeared. BLE offered the testimony

⁴ Commission regulations permit the opposing parties 20 days to respond to a motion for summary judgment. 52 Pa. Code § 5.103(c).

of Michael J. Barron, Esq., and Daniel Paul Radle, P.E. along with BLE Exhibits 1-16. The Direct Written Testimony of Mr. Barron (BLE St. 1) was admitted into the record. Mr. Barron's Rebuttal Written Testimony (BLE St. 2) was not admitted into the record. Mr. Radle's Direct and Rebuttal Testimony (BLE St. 3 and 4) and BLE Exhibits 1-16 were admitted into the record without objection.

I&E offered the testimony of Daniel R. Helfrich, P.E. and offered his Direct Written (I&E St. 1) and Rebuttal Testimony (I&E St. 2), which were admitted into the record.

PennDOT offered the testimony of Charles Keilman, P.E. and Alicia Kavulic, P.E. The Direct Written Testimony of Mr. Keilman (PennDOT St. 1) and Ms. Kavulic (PennDOT St. 2), along with PennDOT Exhibits A-C were admitted into the record.

Ms. Sherwin was self-represented and offered her own testimony. However, her proposed exhibit was not admitted into the record.⁵

At the conclusion of the hearing the parties discussed the motion for summary judgment filed by BLE on January 3, 2022. I waived Section 5.103(c), which required I&E and PennDOT to respond to the motion for summary judgment in 20 days. Instead, I&E and PennDOT were directed to include their response to the motion in their main briefs. BLE was granted leave to include any reply to I&E and PennDOT's response to the motion for summary judgment in its reply brief.⁶

The transcript was filed by the court reporter on March 1, 2022.⁷ By interim order entered March 2, 2022, the parties were directed to file main briefs on April 15, 2022, and

⁵ Tr. 221, 236.

⁶ 52 Pa. Code § 1.2.

⁷ There are 261 transcript pages for this proceeding. However, the transcript pages are not sequentially numbered. All transcript citations in this Recommended Decision refer to the electronic version of the transcript for the January 18, 2022 hearing unless otherwise noted.

reply briefs on May 5, 2022. BLE, I&E and PennDOT filed main briefs on April 15, 2022. BLE and I&E filed reply briefs on May 5, 2022. By interim order the record was closed on May 9, 2022.

FINDINGS OF FACT

1. BLE acquired the Western Allegheny Branch Line which included the Blackburn Tunnel and the Brady's Bend Crossing from the Western Allegheny Railroad Company in 1967. BLE St. 1 at 2; Ex. 10.

2. BLE discontinued operation of rail service on the Western Allegheny Branch around 1998 and in 2000 filed a notice with the Surface Transportation Board (STB) to abandon service along approximately 20 miles in Butler and Armstrong Counties. BLE St. 1 at 3; BLE Ex. 1.

3. The STB authorized the abandonment of rail service on the Western Allegheny Branch Line on January 17, 2001. BLE Ex. 2.

4. On May 31, 2001, BLE filed an application with the Commission which sought authorization to abandon 28 grade crossings and one tunnel on the Western Allegheny Branch Line, a total of 29 crossings. BLE Ex. 4.

5. The application listed the grade crossings in Exhibit A and identified the tunnel in Paragraph 5 of the application. BLE Ex. 4.

6. The Commission docketed the application at A-00117858. BLE Ex. 4.

7. By Secretarial Letter dated April 30, 2002, the Commission granted BLE's application to abolish 27 of the at-grade and below-grade crossings. BLE Ex. 3; PennDOT Ex. B.

8. The Commission did not grant the application to abolish the Blackburn Tunnel or the Brady's Bend Crossing, a below-grade crossing. BLE Ex. 3; PennDOT Ex. B.

9. BLE sold the property which includes the tunnel to the Western Allegheny Landowner's Association (WALA) on October 24, 2022. BLE St. 1 at 5.

10. Sometime after the sale to WALA, BLE removed the railroad track and ties at the Blackburn Tunnel. BLE St. 3 at 4; I&E St. 1 at 2; Tr. 231-33.

11. WALA subsequently conveyed the property to four individuals, including Ann Marie Sherwin. BLE St. 1 at 5; Tr. 235.

12. BLE commissioned a limited site inspection of the Blackburn Tunnel which took place on January 19, 2021. BLE St. 3 at 4; BLE Ex. 14 (AECOM Report).

13. The Blackburn Tunnel is 744 feet long. BLE St. 3 at 3.

14. The Blackburn Tunnel is a "bare rock cut" structure with timber bent supports that was originally constructed in 1906. BLE St. 3 at 3-4; I&E St. 1 at 2; PennDOT St. 1 at 3.

15. The tunnel interior was lined with a corrugated metal liner for the entire length in 1975. BLE St. 3 at 4; I&E St. 1 at 2.

16. It is not likely that the corrugated metal liner is a structural component of the tunnel. BLE St. 3 at 7.

17. Forty-one feet of the Blackburn Tunnel passes under State Route 268 in a roughly perpendicular direction. BLE St. 3 at 3.

18. At the east portal of the tunnel, the rock above the tunnel is visibly cracked and deteriorated. BLE St. 3 at 4.
19. There is evidence of a complete collapse of the tunnel at a location approximately 100 feet inside the eastern entrance. BLE St. 3 at 4; PennDOT St. 2 at 3.
20. The BLE inspection team did not enter the tunnel because the collapse made entering the tunnel too dangerous. Tr. 136.
21. At the west portal the rock above the tunnel is also visibly cracked and deteriorated. BLE St. 3 at 4.
22. Portions of the corrugated steel liner are deformed which could indicate a degree of structural failure in that area. BLE St. 3 at 4-5.
23. There are areas of ponding water where the track had been removed. BLE St. 3 at 5.
24. Weathering of the exposed rock immediately above the portals showed some “raveling” or “sluffage” of the portal embankment, which has exposed the timber bents at the portal ends. BLE St. 3 at 5.
25. The timber bents on the timber roof structure appeared to be in poor condition from what could be observed from the outside of the tunnel. Tr. 136.
26. The land directly over the tunnel shows no obvious signs of subsidence. BLE St. 3 at 5.
27. The tunnel structure likely does not have the structural integrity to prevent future collapsing or subsidence of State Route 268 where it runs above the tunnel. BLE St. 3 at 7; see Tr. 154-55; PennDOT St. 2 at 2.

28. There is ponding water in areas where the tracks and ties have been removed. BLE St. 3 at 5.

29. The January 19, 2021 investigation was not a complete structural inspection but rather a site investigation to obtain a general understanding of the condition of the current structure, determine if there were any visible signs of structural failure and to assess the drainage conditions at the tunnel approaches. BLE St. 3 at 4.

30. The BLE site investigation did not include bore drilling. Tr. 136, 140, 145.

31. I&E witness Daniel Helfrich visited the Blackburn Tunnel on March 31, 2021. I&E St. 1 at 3.

32. Mr. Helfrich observed heavy vegetation and standing water, which limited his access to the tunnel portals. I&E St. 1 at 3.

33. Mr. Helfrich did not observe any surface subsidence. I&E St. 1 at 3.

34. Further investigation is necessary to confirm the structural integrity of the tunnel. BLE St. 3 at 7.

35. Water in the tunnel is a safety concern because it can wash away more support material and can potentially cause or exacerbate flooding. PennDOT St. 2 at 2.

36. The roadway above the Blackburn Tunnel is open for public use and has an average traffic volume of 1,454 vehicles per day. PennDOT St. 1 at 3-4.

37. BLE developed two alternative solutions to preserve the structural integrity of the tunnel: 1) the placement of bulkheads and backfilling a portion of the tunnel; or 2) the construction of an at-grade bridge to carry State Route 268 over the tunnel. BLE St. 3 at 8-9; BLE Ex. 14, Appendices A and C.

38. This proposal would include the construction of concrete bulkheads placed approximately 50 feet laterally from the edge of the roadway, to create a barrier that will be filled in with foam sand to fill the tunnel. BLE St. 3 at 8-9; PennDOT St. 2 at 4.

39. A preliminary cost estimate to partially fill the tunnel is approximately \$856,000. BLE St. 3 at 9.

40. A more in-depth engineering investigation is necessary to develop a complete cost estimate of the remediation work necessary to make the crossing safe. Tr. 146; *see also* Tr. 151, 156-57, 159-60.

41. The cost estimate to fill the tunnel does not include engineering and other associated construction costs. BLE St. 3 at 9.

42. A preliminary cost estimate to build an at-grade bridge for Route 268 is \$876,000. BLE St. 3 at 9.

43. Neither of the BLE cost estimates included the costs associated with pre-construction costs, such as erosion and sedimentation controls. Tr. 200.

44. BLE did not provide a recommendation to prevent subsidence outside the highway right-of-way. BLE St. 1 at 6; Tr. 158.

45. There is no credible evidence that the collapse of the tunnel was caused by mining in the area. I&E St. 2 at 2-5.

46. State Route 268 does not lie over the area of the tunnel collapse and there are no apparent signs of failure of the roadway due to underground subsidence. BLE St. 3 at 5.

47. Mr. Dittman, a local resident, informed PennDOT on February 22, 2018, that a portion of the Blackburn Tunnel had collapsed. PennDOT St. 1 at 3.

48. The Blackburn Tunnel is accessible by both pedestrians and all-terrain vehicles (ATVs) from both the east and west entrances. PennDOT St. 2 at 2; Tr. 233-34.

49. The tunnel is not clear for passage through from one end to the other because of the collapsed portion. PennDOT St. 2 at 2; Tr. 234.

50. The ponding of water at the Blackburn Tunnel crossing was not present when rail service was active. Tr. 137, 229.

51. Generally, grade-separated crossings increase safety for the travelling public. Tr. 180, 209.

52. Building a tunnel was more cost-efficient for the railroad than building up the rail bed to meet the roadway and create an at-grade crossing would have been. Tr. 201.

53. There are currently no Commission orders assigning maintenance responsibilities at the Blackburn Tunnel crossing. PennDOT St. 1 at 4.

54. PennDOT owns a 50-foot right of way from the centerline of State Route 268. PennDOT St. 1 at 4.

55. The PennDOT right-of-way does not extend to the tunnel openings. PennDOT St. 1 at 6.

JOINT STIPULATION TERMS OF BRADY'S BEND CROSSING⁸

1. The parties now submit this Joint Stipulation for the Commission's consideration regarding the public crossing where State Route SR0068 crossed, below grade, a former track of BLE in Brady's Bend Township, Armstrong County.

⁸ With slight non-substantive modifications, the following stipulations are adopted in substantially the same wording and format as that contained within the Joint Stipulation filed by the parties on November 12, 2019.

2. Bessemer & Lake Erie Railroad is a class II common carrier by rail.
3. Bessemer & Lake Erie Railroad is the former owner and operator of the line of track which crossed over SR0068. The track was formerly a part of the Western Allegheny Branch line.
4. Bessemer & Lake Erie Railroad received approval from the Surface Transportation Board in January 2001 to discontinue service and abandon service on the Western Allegheny Branch line, which included the subject crossing over SR0068, under docket number Ab-88 (Sub No. 10X).
5. Bessemer & Lake Erie Railroad initially sought approval with the Commission to abolish the subject crossing in addition to 27 other crossings and one tunnel on this line, A-00117858, but the SR0068 crossing was not included in the Secretarial Letter approving the abolishment of the other crossings.
6. The railway bridge carried a single track for BLE over SR0068 and contained substandard horizontal and vertical clearances that hindered safe passage of the traveling public and created a bottleneck, resulting in an area prone to accidents.
7. PennDOT, with permission from BLE, removed the SR0068 crossing structure in 2004 to realign the roadway at its sole cost and expense.
8. The removal of the bridge in its entirety opened up the crossing area and allowed it to meet both horizontal and vertical clearance designs, while reducing the likelihood of fixed object accidents. The roadway was also realigned which improved the sight distance and overall safety of the traveling public.
9. The parties agree that the SR0068 public crossing should be abolished and request that the Commission issue an Opinion and Order effectuating the abolishment of the SR0068 crossing in Brady's Bend Township, Armstrong County.
10. PennDOT agrees to maintain the roadway within its right-of-way at the subject crossing at its sole cost and expense.
11. The benefits and obligations of this Joint Stipulation shall be binding upon the successor and assigns of the parties to this Joint Stipulation.

Joint Stipulation, pp. 2-4.

DISCUSSION

The Commission is authorized to institute an investigation “whenever it may be necessary in the performance of its duties, [to] investigate and examine the condition and management of any public utility . . .”⁹ Section 2702 of the Public Utility Code vests the Commission with the exclusive jurisdiction to determine the points at which, and the manner in which, rail-highway crossings are to be constructed, altered, relocated, suspended or abolished, as well as the manner and conditions under which rail-highway crossings shall be maintained, operated and protected.¹⁰ The Commission also has the exclusive authority to determine and order which parties should perform such work at the crossings and which parties should maintain the crossings in the future, all to effectuate the prevention of accidents and the promotion of the safety of the public.¹¹

In accordance with this responsibility and authority, on October 3, 2019, the Commission instituted this investigation and directed an examination of the safety of the public crossing where there is a tunnel overlain by SR0268 (State Route 268) in Fairview Township, Butler County (Blackburn Tunnel) and a crossing in Brady’s Bend Township, Armstrong County (Brady’s Bend Crossing). The Commission directed an investigation to determine 1) the safety of the crossings; 2) the future disposition of the crossings upon their abolition; 3) what work shall be performed at these crossings; and 4) the allocation of the costs of any work ordered.

BLE filed a motion for summary judgment on the grounds that the Commission did not have jurisdiction to direct the railroad to perform work or pay costs related to the crossings. For the reasons set forth below, the motion for summary judgment is denied.

⁹ 66 Pa.C.S. § 331(a).

¹⁰ 66 Pa.C.S. § 2702; *Pa. Dep’t of Transp. v. Pa. Pub. Util. Comm’n*, 440 A.2d 657 (Pa. Cmwlth. 1982).

¹¹ 66 Pa.C.S. § 2702(b); *SEPTA v. Pa. Pub. Util. Comm’n*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (1992); *see also*, *Pa. Game Comm’n v. Pa. Pub. Util. Comm’n*, 651 A.2d 596 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (1995) (the Commission is empowered to order the work performed upon such reasonable terms and conditions it prescribes).

I recommend that 1) the Blackburn Tunnel should be filled and the work should largely be performed by the Bessemer and Lake Erie Railroad; 2) that the initial costs should be assigned to BLE; and 3) that upon completion of the work to the satisfaction of the Commission, the crossings should be formally abolished. I recommend that the Commission assign final costs and future maintenance responsibilities at a future hearing, in the event the parties cannot reach an agreement on their own. I further recommend that the Joint Stipulation regarding the Brady's Bend Crossing is reasonable and appropriate and should be approved without modification. The Brady's Bend Crossing should be abolished.

Background of the Crossings

BLE acquired the line, known as the Western Allegheny Branch, which included the Blackburn Tunnel and the Brady's Bend Crossing, from the Western Allegheny Railroad Company in 1967. BLE discontinued operation of rail service on the Western Allegheny Branch around 1998 and in 2000 filed a notice with the Surface Transportation Board (STB) to abandon service along approximately 20 miles of rail line in Butler and Armstrong Counties. The STB authorized the abandonment of rail service on January 17, 2001.

On May 31, 2001, BLE filed an application with the Commission which sought authorization to abandon 28 grade crossings and one tunnel. The application listed the grade crossings in Exhibit A and identified the tunnel in Paragraph 5 of the application. The Commission docketed the application at A-00117858.

By Secretarial Letter dated April 30, 2002, the Commission granted BLE's application to abolish 27 of the grade crossings. The Commission did not authorize BLE to abolish the Blackburn Tunnel or the Brady's Bend Crossing.¹² The April 30, 2002 Secretarial Letter further directed BLE and other parties to perform certain work necessary to abolish the 27 crossings, set deadlines for the work and assigned costs. The April 30, 2002 Secretarial Letter

¹² These two crossings were identified in Paragraph 1 of the April 30, 2002 Secretarial Letter as Crossing Nos. 27(a)(Blackburn Tunnel) and 28 (Brady's Bend Crossing).

stated that Blackburn Tunnel and the Brady's Bend Crossing would be addressed with a future secretarial letter or formal hearing. The Commission noted that PennDOT was in the process of planning the removal of the railroad bridge at Brady's Bend in connection with a roadway improvement project. The Commission further observed that BLE and PennDOT were negotiating at disposition of the Blackburn Tunnel.¹³

On October 24, 2002, BLE conveyed the property containing the Blackburn Tunnel to the Western Allegheny Landowner's Association (WALA).

Sometime in 2004, PennDOT, with BLE's permission, removed the railway bridge that carried the BLE track over SR0068, Brady's Bend Crossing, and realigned the roadway.¹⁴

Although the Commission issued subsequent secretarial letters at Docket A-00117858, there was no specific mention of either the Blackburn Tunnel or the Brady's Bend Crossing. These letters, perhaps imprecisely, addressed the Commission's response to the requests of various parties to alter the work order or deadlines set by the Commission in connection with the abolished crossings identified in the April 30, 2002 Secretarial Letter.¹⁵

The final secretarial letter that was presented for the record was dated February 1, 2012. That letter stated that BLE had been directed to abolish "various crossings" in Armstrong and Butler Counties and noted that "[a]ll work has been completed." The letter then provided "since all work has been completed, the case be "CLOSED."¹⁶ Neither the Blackburn Tunnel nor the Brady's Bend Crossing were specifically mentioned.¹⁷

¹³ April 30, 2002 Secretarial Letter at p. 4.

¹⁴ See Joint Stipulation, Para. 9.

¹⁵ See PennDOT Ex. B.

¹⁶ Mr. Helfrich testified that he could not find any records in the Rail Safety files except for the application and the April 30, 2002 Secretarial Letter. I&E St. 1 at 4.

¹⁷ PennDOT Ex. B.

No further Commission action was taken at Docket A-00117858. In 2018, the Commission was contacted by PennDOT concerning the disposition of the two crossings. An informal investigative field conference was held on June 26, 2018, and attended by the Rail Safety Division, PennDOT, BLE and six local homeowners located near the Blackburn Tunnel.¹⁸ Thereafter, as noted above, the Commission instituted an investigation on October 3, 2019, regarding the disposition of the Blackburn Tunnel and the Brady's Bend Crossing.¹⁹

Current Conditions of the Crossings

The Brady's Bend Crossing was resolved by the removal of the bridge which carried BLE's tracks over SR0068 and the realignment of the roadway. According to the Joint Stipulation, PennDOT removed the bridge in its entirety which opened up the crossing area and allowed it to meet both horizontal and vertical clearance designs, while reducing the likelihood of fixed object accidents. The roadway was also realigned which improved the sight distance and overall safety of the traveling public.²⁰ As discussed below, I recommend the Commission abolish this crossing.

The Blackburn Tunnel is 744 feet long. It is a bare rock cut structure with timber bent supports that was originally constructed in 1906. The tunnel interior was lined with a corrugated metal liner for the entire length in 1975. BLE removed the railroad track and ties sometime in 2002. At the east portal of the tunnel, the rock above the tunnel is visibly cracked and deteriorated. The exposed rock immediately above the portal showed some "raveling" or "sluffage" of the portal embankment, which has exposed the timber bents at the portal ends. At the west portal the rock above the tunnel is also visibly cracked and deteriorated.

There is evidence of a complete collapse of the tunnel at a location approximately 100 feet inside the eastern entrance. Portions of the corrugated steel liner are deformed which

¹⁸ Joint Stipulation, p. 3. *See also* PennDOT St. 2 at 3.

¹⁹ There is also nothing in the record which indicates that the Commission was aware that PennDOT had completed the project at the Brady's Bend Crossing.

²⁰ PennDOT St. 1 at 3.

could indicate a degree of structural failure in that area. The land directly over the tunnel shows no obvious signs of subsidence. State Route 268 does not lie over the area of the tunnel collapse and there are no apparent signs of failure of the roadway due to underground subsidence.

There are areas of ponding water where the track had been removed. The tunnel is accessible by both pedestrians and all-terrain vehicles from both the east and west entrances. The tunnel is not clear for passage through from one end to the other because of the collapsed portion.

Positions of the Parties

1. BLE

BLE's central contention in both its motion for summary judgment and its brief on the merits, is that the Commission has no jurisdiction to require BLE to do any work or assess any costs on BLE regarding the Blackburn Tunnel because it is no longer a "concerned party" within the meaning of the Public Utility Code. According to BLE, the sale of the railroad property to WALA divested the Commission of jurisdiction, relying on the court decisions of *Norfolk Southern*²¹ and the *City of Chester*.²²

BLE rejects the suggestion by I&E and PennDOT at the evidentiary hearing that its failure to comply with the requirements in Section 2709 of the Public Utility Code,²³ which mandates that rail utilities who intend to dispose of property must provide written notice to certain local governments and state agencies, may void the sale of BLE's property to WALA. BLE further contends that the local governments and PennDOT at least had constructive notice of its intent to dispose of the property, but failed to act on any rights they may have had. BLE

²¹ *Norfolk Southern Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013) (*Norfolk Southern*).

²² *City of Chester v. Pub. Util. Comm'n*, 798 A.2d 288 (Pa. Cmwlth. 2002) (*City of Chester*).

²³ 66 Pa.C.S. § 2709.

explains that the doctrine of laches and the three-year statute of limitations in the Public Utility Code forecloses voiding the sale of the property to WALA.

Alternatively, BLE contends that Section 2702 of the Public Utility Code²⁴ is preempted by the Interstate Commerce Termination Act. According to BLE, the specific language of Section 10501(b) of Interstate Commerce Commission Termination Act of 1995 (ICCTA)²⁵ evidences federal intent to preempt state regulation of railroads; therefore, the abandonment by the STB forecloses the exercise of authority by the Commission.

Relying on these legal arguments, BLE is of the view that no work or costs can be assigned to BLE.

2. I&E

I&E disputes BLE's view that the Commission has no jurisdiction to require BLE to perform work to remediate the conditions at the Blackburn Tunnel or assess costs on BLE. First, I&E explains that the ICCTA regulates rail service, but nothing in the federal statute preempts the Commonwealth's police powers to protect public safety by ensuring the safety of railroad crossings.

Next, I&E argues that the sale of the property which includes the Blackburn Tunnel does not divest the Commission of jurisdiction. According to I&E, BLE remains a "concerned party" as that term has been interpreted by the Pennsylvania Supreme and Commonwealth Courts. According to I&E, even where a railroad does not own property at a public crossing, it may be considered a concerned party where the railroad has a "substantial interest . . . beyond that which is coterminous with members of the general public."²⁶ Here, BLE or its predecessor constructed the tunnel and BLE failed to abolish the tunnel as required by the

²⁴ 66 Pa.C.S. § 2702.

²⁵ 49 U.S.C. § 10501(b).

²⁶ I&E Main Brief at 16 (*citing Norfolk Southern*).

Public Utility Code. Therefore, I&E argues, BLE remains a concerned party subject to the Commission's jurisdiction.

I&E goes on to argue that the Blackburn Tunnel is hazardous to the public, relying on BLE's engineering report and the testimony of I&E's expert witness, Daniel Helfrich. In addition to the collapsed portion of the tunnel there are pools of water located in and around the tunnel which pose a hazard, according to Mr. Helfrich. Mr. Helfrich also testified that the ponding water and collapse of the tunnel was not caused by mining activities in the area. The collapse of the tunnel was caused by structural failure, which may worsen if not addressed. Mr. Helfrich testified that in his opinion the tunnel portal areas should be permanently sealed with concrete or grouted rock bulkheads, and the tunnel filled with a suitable material to fill the entire space.

Finally, I&E advocates assessing all of the costs to make the tunnel safe to BLE. I&E points out that the courts have held that ownership of the property is not the controlling factor considered in allocating costs. According to I&E, the current condition of the tunnel is due to BLE's neglect. Further, BLE operated through the tunnel for decades and therefore benefited the most from the crossing.

3. PennDOT

PennDOT echoes many of the arguments articulated by I&E. Specifically, PennDOT contends that BLE's preemption argument must be rejected. According to PennDOT well-established precedent demonstrates that STB jurisdiction and Commission jurisdiction are distinct and nothing in the ICCTA preempts the Commission's authority to regulate the safety of rail highway crossing.

Similarly, PennDOT agrees with I&E that the sale of the property which includes the Blackburn Tunnel does not divest the Commission of jurisdiction to assign work and assess costs. PennDOT argues that the Commission never approved BLE's request to abolish the

crossing. BLE should not be allowed to simply remove the rails and sell the property to avoid Commission authority to ensure that the crossing is safe.

Finally, PennDOT also contends that all of the costs related to the remediation of the conditions at the Blackburn Tunnel should be assessed on BLE. PennDOT argues that BLE (or its predecessor) constructed the tunnel, used the tunnel during its operation and is responsible for the deterioration and collapse of the tunnel by failing to maintain it. PennDOT argues that it would not be fair to assess any costs to PennDOT because BLE should not benefit from failing to fill the tunnel and properly abolish the crossing which would have protected the integrity of SR0268.

Analysis

1. Jurisdiction – Pre-emption

In 1996, as part of the deregulation of the transportation industry, Congress established the STB under ICCTA. The ICCTA states that, in regulating the railroad industry, it is the policy of the federal government to minimize the need for federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.²⁷ The express language of the ICCTA granted the STB jurisdiction over "transportation by rail carriers ... with respect to rates, classifications, rules ... practices, routes, services, and facilities of such carriers," as well as "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." The STB's remedies "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."²⁸

In its motion for summary judgement, BLE argues that the Commission has no jurisdiction as a matter of law because this proceeding is preempted by the ICCTA. Indeed,

²⁷ 49 U.S.C. § 10101(2).

²⁸ 49 U.S.C. § 10501(b)(1) and (2).

there is no dispute that the STB authorized BLE to abandon service on the portion of the rail line that includes the two crossings at issue in this investigation. However, the Commonwealth Court definitively disposed of this identical argument in *Wheeling & Lake Erie Railway Company v. Public Utility Commission* and ruled that federal law regulating rail service does not pre-empt the Commission's authority to regulate rail-highway crossings and to allocate costs related to the safety and maintenance of rail-highway crossings.²⁹

In *Wheeling & Lake Erie Railway*, the railroad challenged a Commission order which directed it to reconstruct a bridge and take responsibility for certain maintenance tasks at the railroad's sole cost and expense. Like BLE, *Wheeling & Lake Erie* argued that the definition of "rail transportation" in the ICCTA includes rail-highway crossings within the railroad right-of-way. The Commonwealth Court rejected this argument. The court first observed that pre-emption of state police power is generally disfavored. In order to conclude that state police powers are pre-empted, the intent of Congress must be "clear and manifest."³⁰ The court went on to analyze the legislative history of the ICCTA and concluded that the ICCTA does not preempt the Commonwealth's traditional police power of the safety of rail-highway crossings:

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 [STB] to economically regulate the rail carriers under the [ICCTA] and the states' authority to regulate the public safety of the rail-highway crossing, which is also part of the public highway.^[31]

²⁹ 778 A.2d 785 (Pa. Cmwlth. 2001)(*Wheeling & Lake Erie Railway*).

³⁰ 778 A.2d at 791 (citing *Dep't of Rev. v. ACF Ind.*, 510 U.S. 332 (1994) and *Fl. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)).

³¹ 778 A.2d at 792.

The judicial precedent explaining the distinction between the jurisdiction of the STB and the Commission is well-settled. BLE does not distinguish the court’s decision in *Wheeling & Lake Erie Railway*, nor does BLE point to any precedent overruling that decision. BLE’s motion for summary judgement on the issue of preemption of Commission jurisdiction by the STB is denied.

2. Jurisdiction – Effect of the Sale of the Property

BLE also argues in its motion for summary judgment that the Commission is divested of jurisdiction by virtue of the sale of the railroad property. According to BLE, since it does not own the property or provide rail service at the tunnel, and does not have access to the Blackburn Tunnel, it is not a “concerned party.” According to BLE, the Commission does not have the authority to direct BLE to remediate the Blackburn Tunnel or pay any costs related to the remediation.

The Commission is vested with exclusive powers to determine and prescribe the manner in which rail-highway crossing may be constructed, altered, relocated, suspended or abolished.³² Accordingly, no rail-highway crossing may be “altered, relocated, suspended or abolished” without Commission authorization.³³ The Commission may “order the work of construction, relocation, alternation, 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 . . .”³⁴ The costs associated with any work ordered “shall be borne and paid, as provided in this section, by the public utilities or municipal corporations *concerned*, or by the Commonwealth, in such proportions as the Commission may, after due notice and

³² 66 Pa.C.S. § 2702(b).

³³ 66 Pa.C.S. § 2702(a).

³⁴ 66 Pa.C.S. §2702(c)(emphasis added).

hearing, determine . . .”³⁵ The Commission’s power regarding rail-highway crossings endures until the Commission issues an order authorizing the abolition of the crossing.³⁶

There is no dispute that the Commission had not authorized BLE to abolish the Blackburn Tunnel crossing in 2002 when BLE sold the property to WALA. BLE filed its application to abolish crossings, with the Commission on May 31, 2001.³⁷ The Commission issued a Secretarial Letter on April 30, 2002 which explicitly stated that the Blackburn Tunnel would be the subject future Commission action in view of the representation to the Commission that BLE and PennDOT were negotiating the final disposition of the tunnel.³⁸ Nevertheless, six months later, BLE conveyed the property that included the Blackburn Tunnel to WALA on October 24, 2002. BLE did not offer any evidence that it received authorization from the Commission to abolish the Blackburn Tunnel after the April 30, 2002 Secretarial Letter and before it conveyed the property.

According to BLE, the Pennsylvania Supreme Court’s decision in *Norfolk Southern*,³⁹ holds that in order to be a concerned party within the meaning of Section 2704 of the Public Utility Code, a rail utility must either own the facilities or “be presently engaged in providing transportation services and using the relevant crossing facility . . .”⁴⁰

The *Norfolk Southern* decision is not as narrow as BLE describes. In that case, the court considered a narrow question of whether a lack of property ownership by a rail utility divests the Commission of jurisdiction to allocate costs. Rejecting an earlier decision of the Commonwealth Court which held that property ownership was required, the Pennsylvania

³⁵ 66 Pa.C.S. §2704(a)(emphasis added).

³⁶ *City of Pittsburgh v. Pa. Pub. Util. Comm’n*, 404 A.2d 786 (Pa. Cmwlth. 1979).

³⁷ BLE Ex. 4; BLE St. 1 at 4.

³⁸ April 30, 2002 Secretarial Letter, p. 4.

³⁹ *Norfolk Southern Ry. Co. v. Pub. Util. Comm’n*, 77 A.3d 619 (Pa. 2013).

⁴⁰ BLE Reply Brief at 5.

Supreme Court held that Section 2704 of the Public Utility Code does not include an “ownership litmus” in determining whether a public utility is “concerned.”⁴¹ Indeed the court noted that “[i]n many respects, the statutory scheme for cost allocation associated with rail-highway crossing projects is an ambiguous one as to which refinement . . . would have been desirable. Most relevant here, the Legislature has provided, at most, implicit guidance concerning the range of utilities which may be “concerned,” for purposes of 2704(a), with a rail-highway project.”⁴²

The Supreme Court did *not* conclude that the statute included the bright line test advocated by BLE. To determine whether it was reasonable for the Commission to interpret Section 2704 to extend to a rail utility that used but did not own the facilities at the crossing, the court considered the principles of statutory construction and common law and concluded that “the overarching intent of the Legislature relative to the administrative cost allocation . . . 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 . . .”⁴³ The court held that the Commission’s interpretation of whether a utility is concerned is entitled to deference where that interpretation is reasonable. A party must have some “substantial interest” in the crossing beyond the interest of the general public in order to be “concerned.” Thus, the Court explained, motor carriers who simply use the crossing to get from one place to another are not adequately “concerned” for the purpose of cost allocation. But it is a reasonable interpretation of the statute for the Commission to conclude that a non-owner railroad that regularly conducts operations at the crossing is “concerned” even though it does not own the property at the crossing. Notably, the Court did not limit the Commission’s ability to determine that a rail utility is concerned for the purpose of allocating costs by holding that a rail utility must *either* own the property at the crossing *or* use the facilities at the crossing in order to be concerned.⁴⁴

⁴¹ *Norfolk Southern*.

⁴² 77 A.3d at 629.

⁴³ *Id.* at 631.

⁴⁴ *Id.* at 633.

The Commission has held railroads accountable in other cases where a railroad fails to secure Commission authorization to abolish a crossing but sells the property.⁴⁵ The Commission's decision in *Bronder* involves a similar fact-pattern to those presented here. In that case, several individuals filed complaints with the Commission alleging that a railroad bridge structure, the former Clarion Secondary track of Conrail over State Route 1003 in Templeton, Armstrong County, was dangerous. Conrail had been authorized to abandon service by the STB and had filed an application to abolish the crossing along with several other crossings with the Commission. The Commission had authorized abandonment of other crossings on the line, but had not authorized abandonment of the bridge at issue. Conrail sold the property to the Allegheny Valley Land Trust. The Commission held that the sale of the property did not divest the Commission of jurisdiction to direct the abolition of the crossing or the allocation of costs to Conrail and other parties.

The policy underpinning the conclusion that the sale of the property does not prevent the Commission from directing BLE to perform work and underwrite costs is consistent with the reasoning articulated by the Commonwealth Court in concluding that abandonment of service by the STB does not divest the Commission of jurisdiction. The court noted:

[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 [STB] 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.^[46]

Neither the language of Section 2704 of the Public Utility Code nor the Pennsylvania Supreme Court's decision in *Norfolk Southern* requires a different result.

⁴⁵ *Bronder v. Armstrong Cnty. Rails to Trails*, Docket C-00956690 (Opinion and Order entered November 6, 1996) (*Bronder*); *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991).

⁴⁶ *CSX Transp., Inc. v. Pa. Pub. Util. Comm'n*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989) (quotation omitted).

BLE's connection to the Blackburn Tunnel is clearly more substantial than that of a motor carrier that simply uses the crossing to get from one place to another. There is no question that, but for the sale of its property which include the tunnel, BLE would be a "concerned" party even though it no longer operated rail service through the Blackburn Tunnel. BLE cannot escape from its responsibilities for the safety of rail crossings by simply abandoning service at the STB and selling the property. Such a conclusion would fly in the face of the Commission's well-recognized authority to ensure the safety of the public at rail-highway crossings and reward BLE for deliberately failing to comply with its statutory and regulatory obligations.

At the evidentiary hearing, both I&E and PennDOT elicited testimony on whether BLE had notified PennDOT that it intended to sell the Blackburn Tunnel property, as required by Section 2709 of the Public Utility Code. In anticipation of this argument in briefing, BLE argues in its main brief that Section 2709 does not require the Commission to void the sale of the property. Thus, according to BLE, the argument regarding Section 2709 is a "red herring."⁴⁷ In reply, I&E agrees that the application of Section 2709 is "of tangential importance."⁴⁸ I agree.

Section 2709(a) provides rail utilities must notify municipalities and PennDOT in writing:

(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. Notifications shall be in writing.^[49]

⁴⁷ BLE Main Brief at 9.

⁴⁸ I&E Reply Brief at 5.

⁴⁹ 66 Pa.C.S. § 2709(a).

Section 2709(c) provides that in the event a rail utility fails to provide proper written notice, the disposition of the property is “voidable.”⁵⁰

There is no evidence in the record that BLE provided the written notice required by Section 2709(a). Yet, neither I&E nor PennDOT argue that the Commission should void the sale. As explained above, the sale of the Blackburn Tunnel property to WALA does not deprive the Commission of jurisdiction. Therefore, at this time, it is not necessary for the Commission to determine whether the sale of the Blackburn Tunnel property to WALA should be voided.

In sum, BLE is not relieved of its responsibility for the Blackburn Tunnel by selling the property. To allow BLE to immunize itself from Commission jurisdiction in this way would do violence to the Commission’s critical mandate to protect public safety. BLE sold the property a mere six months after the issuance of the April 30, 2002 Secretarial Letter which clearly stated that the Blackburn Tunnel and the Brady Bend Crossing were *not* abolished. BLE cannot now argue that it should be exempt from responsibility imposed by the Public Utility Code when it chose to convey the property without receiving permission from the Commission to abolish the crossing. Moreover, in the event that BLE is not able to secure access to the private property to do the work that will be ordered below, BLE may petition the Commission to temporarily appropriate access to the property.⁵¹ BLE’s motion for summary judgment is denied.

3. Condition of the Blackburn Tunnel

All of the parties agree that the condition of the Blackburn Tunnel is deteriorated and is dangerous to the public because a portion of the tunnel is collapsed. The tunnel is also dangerous because access to the tunnel is unrestricted and there is evidence that pedestrians have used the tunnel as well as individuals on ATVs. There is no evidence of any benefit to repairing the tunnel in such a way as to allow access from one end to the other.

⁵⁰ 66 Pa.C.S. § 2709(c).

⁵¹ 66 Pa.C.S. § 2702(b); *see also* Tr. 165-66.

I&E and PennDOT argue that the Blackburn Tunnel is hazardous and should be remediated. The crossing should then be abolished. BLE does not contest these assertions. I agree with I&E and PennDOT that the Blackburn Tunnel presents a significant hazard to the public.

As described above, the Blackburn Tunnel is well over 100 years old, and a portion of the tunnel has collapsed. There is no evidence of any inspection or maintenance activities before this investigation, although there was at least a field visit noted in the April 30, 2002 Secretarial Letter. Until the collapse, local residents either walked through the tunnel or have utilized off-road vehicles such as ATVs. The roadway above the subject tunnel is open for public use and has an average traffic volume of 1,454 vehicles per day.

BLE's consulting engineer firm, AECOM, conducted a site investigation and prepared a preliminary engineering report on the subject tunnel. The engineering report noted that the existing tunnel structure has isolated failures and shows signs of distress.⁵² The east portal of the tunnel is visibly cracked and deteriorated above the tunnel and AECOM could see evidence of the complete collapse at approximately 100-feet inside the tunnel entrance. The west portal is also visibly cracked and deteriorated, and portions of the corrugated steel liner were deformed, which could indicate some degree of structural failure in that area. While AECOM only completed a visual review of the subject tunnel, its visual review was more than sufficient to determine that the tunnel does not have the structural integrity to prevent future collapse or potential roadway subsidence and that corrective action is necessary. Specifically, the report stated, "it has been determined that this structure does not have the structural integrity to prevent future collapsing or any subsidence in the roadway above."⁵³

The significant ponding of water in and around the tunnel poses a safety hazard in and of itself. Witnesses for I&E and PennDOT stated that the poor surface drainage in the areas near the tunnel portals is undesirable and may be considered dangerous if the water is deep

⁵² See generally BLE Ex. 14.

⁵³ BLE Exh 14 at 1. See also BLE St. 3 at 7; Tr. 154-55; PennDOT St. 2 at 2.

enough to constitute a hazard, such as drowning.⁵⁴ Moreover, unrestricted access to the tunnel and tunnel portal areas can be an inviting site for trespassers who may not know of the potentially dangerous conditions within the tunnel or the area of the portals.⁵⁵ The combination of ponding in and around the tunnel and the potential for the tunnel to collapse is dangerous to the public.⁵⁶

Recommended Disposition of the Crossings

1. Remediation of the Blackburn Tunnel

The Commission is vested with the exclusive jurisdiction to order the construction, reconstruction, alteration, repair, protection, suspension, or abolition of railroad/highway crossings. It also has the exclusive jurisdiction to determine and order which party shall perform work at such a crossing, and which party shall maintain the crossing in the future for the prevention of accidents and protection of the public. Additionally, the Commission has the authority to order that the work be performed with such reasonable terms and conditions as it may prescribe.⁵⁷

The Commission also has broad authority to assess the costs of any work it orders and to determine the proportions of the costs that will be paid by the parties.⁵⁸ The Commission is not limited to any fixed rule but may take all relevant factors into consideration.⁵⁹ Traditionally, the Commission has considered: (1) which party built the crossing and whether

⁵⁴ I&E St. 1 at 8; *see also* PennDOT St. 2 at 3.

⁵⁵ I&E St. 1 at 8.

⁵⁶ I&E St. 1 at 8; PennDOT St. 2 at 2.

⁵⁷ 66 Pa.C.S. § 2702; *SEPTA v. Pa. Pub. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (Pa. 1992); *Pa. Game Comm'n v. Pa. Pub. Util. Comm'n*, 651 A.2d 596 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (Pa. 1995).

⁵⁸ *Norfolk Southern*.

⁵⁹ *Norfolk Southern*.

the roadway existed before or after the construction of the crossing ; (2) the party that owned and maintained the crossing; (3) the relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which 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. Other factors, the Commission has considered include: (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. This list of considerations is not exhaustive, nor is the Commission limited to these factors. Courts will not disturb the Commission’s determination, so long as the Commission’s cost allocation “is just and reasonable and has a sound legal and factual basis”⁶⁰

Both I&E and PennDOT recommend the Blackburn Tunnel be permanently closed and the crossing abolished. Michael J. Barron, BLE’s witness, testified that BLE would defer to I&E and PennDOT regarding the final disposition of the tunnel from an engineering standpoint.⁶¹

BLE’s engineering expert, Daniel Radle, offered two alternatives based on the preliminary site report AECOM prepared following its January 2021 site investigation: 1) the placement of bulkheads and backfilling of the tunnel; or 2) the construction of an at-grade bridge to carry State Route 268 over the tunnel.⁶²

According to Mr. Radle, a preliminary cost estimate to fill the tunnel is approximately \$856,000. This proposal would include the construction of concrete bulkheads placed approximately 50 feet laterally from the edge of the roadway, to create a barrier that will be filled in with foam sand to fill the tunnel. Mr. Radle explained that a more in-depth engineering investigation is necessary to develop a complete cost estimate of the remediation

⁶⁰ *Id.* at 550.

⁶¹ BLE St. 1 at 11.

⁶² BLE Ex. 14.

work necessary to make the crossing safe. The cost estimate to fill the tunnel does not include engineering and other associated construction costs. Further, the preliminary designs presented in the AECOM were not designed to address the conditions of the tunnel from portal to portal or address potential subsidence outside the highway right-of-way, but were focused on the portion of the tunnel which lies beneath State Route 268.

Mr. Radle's alternative recommendation was the construction of an at-grade bridge. A preliminary cost estimate to build an at-grade bridge is \$876,000.

Neither of Mr. Radle's proposals included cost estimates for costs associated with pre-construction activities, such as erosion and sedimentation controls. The AECOM report also did not address the pools of water located in and around the subject tunnel as observed by all parties involved and showcased in BLE's exhibits.

PennDOT contends that the better solution to the remediation of the tunnel is to permanently close the tunnel and restrict access from both ends. PennDOT's engineering expert, Alicia Kavulic testified that PennDOT does not have a conceptual concern with AECOM's proposal, but testified that she was not familiar with the use of foam sand because PennDOT generally uses flowable backfill to fill a void. She was also concerned that the proposal lacked detail regarding the ability of the foam sand to displace water that is present in the tunnel area.

PennDOT opposes the construction of an at-grade bridge because it would impose additional maintenance responsibilities and would eventually have to be replaced.⁶³

I&E agrees with PennDOT that the tunnel should be permanently closed. I&E argues that the tunnel should be permanently sealed with a bulkhead and filled with a suitable material to fill the entire space from portal to portal.⁶⁴ Daniel Helfrich, I&E's expert, explained that this solution is superior to only filling a portion of the tunnel because it would eliminate

⁶³ PennDOT St. 2 at 4.

⁶⁴ I&E St. 1 at 9.

access to the tunnel and remove the potential for trespassing. It was also his view that this alternative was the safest option for the workers completing the work because they will not be inside the structurally deficient tunnel or exposed to potentially unsafe air quality.⁶⁵ Further, the partial fill proposed by BLE would leave the property owners with remaining liability of the remaining structure and would not address the drainage issues at the site.⁶⁶

Regarding costs and maintenance responsibilities, for the reasons described above, BLE argues that it should not be responsible for any remediation or costs associated with the Blackburn Tunnel. I&E and PennDOT both contend that BLE should carry the full burden of the remediation and costs necessary for the safe abolition of the crossing. Specifically, PennDOT contends that even though a portion of the tunnel runs below a state road, it would not be fair to impose any burden on PennDOT for costs because the failure of the tunnel is due solely to BLE's neglect. None of the municipalities which were named parties to this proceeding participated or offered any position on these issues.

In my view, it is not necessary or desirable to make a determination concerning the final allocation of costs at the crossing because the development of additional facts in the record will result in a more just and reasonable final cost allocation. It is far more important, given the conditions at the Blackburn Tunnel, to proceed with the remediation and permanent closure of the tunnel. BLE's AECOM study is only preliminary and only addresses the collapsed portion of the tunnel with a view to preventing subsidence to State Route 268. It does not address the integrity of the portions of the tunnel that have not yet collapsed, nor does it address the ponding water at the site. Accordingly, the cost estimates in the record for the project are also preliminary and not inclusive of the costs of all the work that needs to be done. No party offered evidence describing what future maintenance might be required after the tunnel is filled. Neither BLE nor PennDOT offered any testimony regarding common practice in allocating work and costs if the Blackburn Tunnel had not collapsed, which may be relevant to a final just and reasonable cost allocation. For these reasons, I recommend the Commission order the full

⁶⁵ I&E St. 1 at 7 and 9.

⁶⁶ I&E St. 1 at 7-8.

closure of the Blackburn Tunnel, but reserve the final allocation of costs for a later proceeding.⁶⁷ For the reasons explained in more detail below, BLE will be assigned the responsibility to fill and permanently close the tunnel at BLE's initial cost and expense.

BLE's predecessor built the tunnel over 100 years ago. No party offered evidence regarding the creation of State Route 268, but logic would suggest that the presence of the road dictated the railroad's decision to construct the tunnel. It is generally accepted that grade-separated crossings create an inherent benefit to railroads.⁶⁸ Some of these benefits include relief from the liability for accidents, reduced insurance costs, and the elimination of the need for safety features such as signals.⁶⁹ Similarly, BLE benefitted from the crossing because the tunnel permitted the transportation of freight unimpeded by the public safety constraints that are created by the maintenance of an at-grade crossing.

PennDOT admits that it enjoyed some benefit from the grade-separated crossing because the use of the tunnel by the railroad eliminated the risk of train and vehicle accidents. Like the railroad, PennDOT also benefitted because it was not assigned any responsibility for safety infrastructure which may have been required for an at-grade crossing. Similarly, the municipalities benefitted by the reduced risks to citizens using the roadway and reduced potential for liability for accidents.

BLE also benefitted from the cost savings resulting from its failure to maintain the crossing. There is no evidence of any inspection or maintenance of the tunnel before the Commission initiated the present investigation. The parties have inferred that there was an inspection at the time BLE filed its application to abandon the crossing in 2001, but none of that documentation was produced by BLE. The April 30, 2002 Secretarial Letter mentions a site visit with a Commission engineer, but does not mention the condition of the tunnel at that time.

⁶⁷ I also recommend that the parties work collaboratively to attempt to negotiate a final cost allocation without resort to a hearing and consider utilizing the services of the Office of Administrative Law Judge Mediation Unit to facilitate these negotiations.

⁶⁸ E.g., *Consol. R.R. Corp. v. Pa. Pub. Util. Comm'n*, 671 A.2d 248, 251 (Pa. Cmwlth. 1995).

⁶⁹ *Pittsburgh & Lake Erie R.R. Co. v. Pa. Pub. Util. Comm'n*, 556 A.2d 944 (Pa. Cmwlth. 1989).

BLE attempts to deflect from its failure to maintain a record of its care of its crossing by stating that WALA was represented by counsel at the time that BLE sold the property, implying that if the tunnel was in poor condition at that time, it was incumbent upon WALA to raise that issue. This argument is both speculative and frankly irresponsible. BLE was aware that the Commission was under the impression that BLE was negotiating with PennDOT regarding the final disposition of the tunnel. BLE did not follow up with the Commission when it apparently decided to change strategies and negotiate the sale of the property to WALA a scant few months later. It cannot now attempt to shift the responsibility for the deterioration of the structure by suggesting that counsel for WALA may have failed in due diligence.

In sum, BLE failed to secure Commission authority to abandon the Blackburn Tunnel and failed to ensure the integrity of the structure. The consequence of BLE's decision to sell the property without fulfilling its regulatory responsibility is that the cost to safely abandon the crossing is no doubt more expensive and involved than it may have been in 2002. The failure of the structure is now more dangerous to remediate than it would have been in 2002 before the ceiling collapse occurred. BLE cannot now complain that it did not maintain the tunnel because it did not have access to private property. BLE is entirely responsible for that situation. Further, there is nothing in the record that BLE made any attempt to secure access to the property after the sale but was unable to do so. The factor weighs most heavily in my conclusion that it is just and reasonable to direct BLE to remediate the tunnel at its initial cost and expense. PennDOT will be assessed certain other costs related to any traffic control that may be necessary as set forth in the ordering paragraphs below.

2. The Joint Stipulation Regarding the Brady Bend Crossing

The parties filed a Joint Stipulation regarding the Brady Bend Crossing. PennDOT has already removed the railway bridge in its entirety at the crossing and has realigned State Route 68 at its sole cost and expense. The parties agree that this realignment improved the sight distance and overall safety of the travelling public. PennDOT agrees to maintain the

roadway within its right-of-way at the crossing at its sole cost and expense. The parties agree that the crossing should now be abolished by the Commission.

The Joint Stipulation is not styled as a settlement per se. However, there do not appear to be any disputes regarding the safety of the Brady Bend Crossing after the work completed by PennDOT, nor do there appear to be any outstanding cost allocation issues for the Commission to resolve. I agree that it is just and reasonable to abolish the Brady Bend Crossing and to assign future maintenance costs to PennDOT as agreed in the Joint Stipulation. I therefore recommend that the Commission approve the Joint Stipulation without modification.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter to this proceeding. 66 Pa.C.S. § 2702.
2. The Commission's authority to authorize and set conditions for the abolition of rail-highway crossings is distinct from the STB's exclusive jurisdiction to regulate rail service or transportation, and is therefore not pre-empted by Federal authority. *Wheeling & Lake Erie Ry. Co. v. Pa. Pub. Util. Comm'n*, 778 A.2d 785 (Pa. Cmwlth. 2001).
3. The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition or alteration of railroad facilities that cross any other public utility or a public highway either at grade or above or below grade as well as the authority to determine and order which concerned parties should perform such work, in order to prevent accidents and promote the safety of the public. 66 Pa.C.S. § 2702.
4. The Commission is not deprived of jurisdiction to assign work and allocate costs to BLE because BLE sold its property to a private organization. *City of Pittsburgh v. Pa. Pub. Util. Comm'n*, 404 A.2d 786 (Pa. Cmwlth. 1979); *Bronder v. Armstrong Cnty. Rails to Trails*, Docket C-00956690 (Opinion and Order entered November 6, 1996); *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991).

5. The Commission, while not limited to any fixed rule, has consistently relied upon certain relevant factors for the allocation of highway-rail maintenance responsibilities, repair and replacement, and costs: the party that originally built the crossing; the party that owned and maintained the crossing; the relative benefit conferred on each party with the construction of the crossing; whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal, and; the relative benefit that each party will receive from the repair, replacement, or removal of the crossing. *Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013).

6. It is just and reasonable that BLE, at its initial cost and expense, furnish all material and do all work necessary to fill and permanently close the Blackburn Tunnel. 66 Pa.C.S. §§ 2702, 2704.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the motion for summary judgment filed by Bessemer & Lake Erie Railroad is denied.
2. That Bessemer & Lake Erie Railroad, at its initial cost and expense, shall furnish all materials and perform all work required to alter the public crossing at State Route 268 by dewatering the subject tunnel structure and portals areas, constructing permanent portal bulkheads, and completely filling the entire tunnel structure, from portal to portal, with suitable material in accordance with the approved plans and this Order.
3. That Bessemer & Lake Erie Railroad, at its initial cost and expense and within six (6) months of an entry of an order approving the work described herein, shall submit

to all parties of record for review and to the Commission for approval, complete detailed construction plans for the work proposed to permanently dewater, seal, and fill the entire subject tunnel structure at State Route 268, from portal to portal.

4. That Bessemer & Lake Erie Railroad, if an amicable construction easement with the property owners could not be obtained, at its sole cost and expense, shall promptly prepare and submit to all parties for review and to the Commission for approval, all right-of-way plans and property descriptions necessary to be taken and appropriated temporarily, for use during the construction period only, to facilitate construction of the project as necessary.

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

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

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

8. That any relocation of, changes in and/or removal of any adjacent structures, equipment, or other facilities of any non-carrier public utility company or municipal authority located beyond the limits of the highway but within the Commission's jurisdiction,

which may be required as incidental to the execution of the crossing project, be made by said public utility company or municipal authority, and in such a manner as will not interfere with the construction of the project.

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

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

11. That all work necessary to complete the alteration of the subject crossing at State Route 268 be done in a manner satisfactory to this Commission within 12 months of the entry of an Order approving the work described herein, and that on or before said date, Bessemer & Lake Erie Railroad shall report to this Commission in writing the date of actual completion of the work.

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

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

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

15. That upon completion of the construction, each non-carrier public utility company and municipal authority, at its sole cost and expense, shall furnish all material and perform all work necessary thereafter to maintain its respective facilities, existing or altered, located within the limits of the improvement.

16. That the work ordered herein be completed in a manner satisfactory to the Commission, and upon completion of the construction project, each of the involved Parties report to the Commission the actual date of completion of its respective work ordered herein and at the earliest practicable time after the said date of completion, submit to the Commission a detailed statement of the actual costs incurred in furnishing material and performing work in accordance with this order.

17. That upon completion of the construction project, and upon a written request by any party hereto, this proceeding be scheduled for a hearing at a time and a place assigned by this Commission, upon due notice to all parties, to receive evidence relative to the allocation of initial costs incurred, assignment of future maintenance responsibilities and costs, and any other matters relevant to this proceeding.

18. Regarding the final allocation of costs and future maintenance responsibilities, the parties are encouraged to confer and attempt to reach an amicable resolution of these issues for approval by the Commission and may request referral to the Office of Administrative Law Judge Mediation Unit.

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

20. That, if no party seeks reimbursement of its costs and no further hearing is necessary to determine the final allocation of costs or any other issue relevant to the construction project, a Secretarial Letter will be issued officially abolishing the crossing at SR0268.

