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August 19, 2022

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

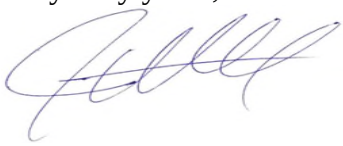
Re: Investigation upon the Commission's motion into matters pertaining to the Proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer And Lake Erie Railroad in Fairview Township, Butler County and where State 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
BW File No.: 10684-272312

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, Exceptions of Bessemer & Lake Erie Railroad Company to the Recommended Decision. As evidenced by the attached Certificate of Service, the Exceptions are being served on all parties of record.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,



John M. Steidle

JMS/cap
Enclosures
cc: All Interested Parties of Record (per attached service list)
Administrative Law Judge Mary D. Long
Commission's OSA

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 Fairfield Township, Butler County and where State Route SR0068 formally crosses, below grade, the tracks of Bessemer and Lake Erie Railroad in Brady's Bend Township, Armstrong County	:	**Docket No. I-2019-3012769** **FILED ELECTRONICALLY**

EXCEPTIONS OF BESSEMER & LAKE ERIE RAILROAD COMPANY TO THE RECOMMENDED DECISION

BESSEMER & LAKE ERIE RAILROAD COMPANY ("B&LE"), by and through its counsel, BURNS WHITE LLC, hereby files the following Exceptions to the Recommended Decision of Administrative Law Judge Mary D. Long, issued July 29, 2022, pursuant to the provisions of 52 Pa. Code § 5.533, as follows:

1. B&LE excepts to Conclusion of Law No. 3 on page 35 of the Recommended Decision, which states that "[t]he Commission has exclusive jurisdiction to regulate the construction, relocation, abolition or alteration of railroad facilities that cross any other public utility or public highway 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.

The longstanding rule in Pennsylvania has been that a railroad must own property or facilities at a crossing in order to be considered a "concerned party" to whom the Commission has authority to allocate any costs associated with the crossing. *See City of Chester v. Pennsylvania Public Utility Comm'n,* 798 A.2d 288, 294 (Pa. Commw. 2002) (*citing Consolidated Rail Corp. v.*

Pennsylvania Public Utility Comm'n, 55 Pa.Cmwlth. 576, 423 A.2d 1108 (1980); *Pennsylvania Public Utility Comm'n v. Southeastern Pa. Transp. Auth.*, 21 Pa.Cmwlth. 106, 343 A.2d 371 (1975); and *Lehigh Valley R.R. v. Pennsylvania Public Utility Comm'n*, 161 A. 422 (Pa. Super. Ct. 1932)).

B&LE is not a "concerned party" as the term is defined under the relevant provisions of Pennsylvania's Public Utility Code. B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002; has not conducted any operations at the SR0268 crossing since 1998; and has no easement-based right of way to the SR0268 crossing. The real property, rail line, and any rail facilities at the SR0268 grade crossing were conveyed to WALA on October 24, 2002.[1] It is likewise undisputed that B&LE has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing.

The Pennsylvania Supreme Court expanded the definition of a "concerned party" for purposes of the Commission's cost-allocation jurisdiction and authority in *Norfolk Southern Railway Company v. Public Utility Commission*:

> 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).

As noted in B&LE's briefing, although the *Norfolk Southern* court expanded the class of entities (*i.e.*, beyond owners of rail-highway crossing facilities) that can be considered "concerned

[1] The Blackburn Tunnel is 744 feet long and is located chiefly in the four parcels (later sold by WALA to individual landowners and identified in exhibits 6, 7, 8, and 9 of B&LE's main brief) that total 34.02 acres. See also Exhibit 5. These four individual parcels, represent a mere 8.6% of the total acreage (394 acres) B&LE sold to WALA in October 2002. The remaining 359.98 acres (91.8%) are not related to the tunnel and not addressed in ALJ's Long's Recommended Decision. BLE St. 1 at 5.

parties", there must still be *at least* (*i.e.*, in the absence of any ownership) a substantial, ongoing use of the crossing by the railroad in order for it to be a "concerned party". A railroad which does not own, operate at, or have any right of way interest in a rail-highway crossing thus does not 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 carriers merely using the public highway at a crossing for deliveries, i.e., the *City of Chester* example)." *Norfolk Southern*, at 631. B&LE does not have a "substantial interest" in the SR0268 crossing, and B&LE's "interest" in the SR0268 crossing is 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).

Despite these facts, Administrative Law Judge ("ALJ") Long agreed with the other parties' positions, noting that pursuant to *Norfolk Southern*, "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". Page 24 of the Rec. Dec. As noted, B&LE has not "conducted operations" at the subject crossing since 1998, thus B&LE takes exception to this finding by ALJ Long, as there is no evidentiary basis to support this finding.[2] This interpretation by ALJ Long fails to consider the relevant facts, and applies *Norfolk Southern* in a way that ignores Supreme Court of Pennsylvania precedent and disregards Section 2704(a) of the Public Utility Code. It is clear that B&LE is not a "concerned party" to whom any

[2] Notably, ALJ Long found that "BLE discontinued operation of rail service on the Western Allegheny Branch around 1998." BLE St. 1 at 3; BLE Ex. 1.

costs of, *inter alia*, abolition, repair, removal, and/or future maintenance of the tunnel located at the SR0268 may be assessed.[3]

Further, ALJ Long's reliance upon *CSX Transp. Inc. v. PA. Pub. Util. Comm'n*, 558 A.2d 902 (Pa. Cmwlth. 1989) to support her conclusion that a sale of property or abandonment of service by the STB does not preclude the Commission from assessing costs against B&LE is misplaced. Page 25 of the Rec. Dec. A close reading of *CSX Transp.* demonstrates that it is entirely distinguishable from the facts of this matter. The *CSX* court cited *Allegheny County Port Authority v. Pennsylvania Public Utility Commission*, 237 A.2d 602 (1967) as support for its position that in the absence of a rail facility or other "concern" on the subject property, the Port Authority could not be required to bear any costs associated with the crossing. *CSX Transp.*, at 908. The court distinguished *Allegheny* from the facts of the parties in the *CSX* case, noting that CSXT did not have authority to physically remove its tracks and had retained ownership in a right of way where the tracks previously laid. *CSX Transp.*, at 908. Unlike *CSX Transp.*, B&LE did receive STB authorization to abandon service and does not have any right-of-way interest in the SR0268 crossing.

It is respectfully submitted that ALJ Long's interpretation of the law by citing to language from *Norfolk Southern* regarding the equitable interests she asserts were part of the Legislature's intent at the time Section 2704 was enacted ignores the fact that the issue of whether B&LE is a "concerned party" is a legal question, rather than an equitable one. The *Norfolk Southern* court specifically noted that it did not address "the equities associated with the Commission's decision

[3] *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).

to assess costs against Norfolk, as this is not among the issues selected for review here".[4] *Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619, 632, n.11 (Pa. 2013).

As demonstrated *supra*, the Commission does not have 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", when it is clear from all pertinent facts that B&LE is not a "concerned party" against whom costs may be assessed. Perhaps tellingly, at no point did ALJ Long ever determine that B&LE is a concerned party under the law, and no analysis on that point is included in the decision. She merely reasons around that critical issue, rather than actually address it. Accordingly, in the absence of B&LE being a concerned party, the Commission lacks jurisdiction to assess costs against it.

2. B&LE also excepts to Conclusion of Law No. 4 on page 35 of the Recommended Decision, which states that "[t]he 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)".

[4] 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 not analyze the "equitable factors" related to the Commission's authority to assess costs under Section 2704(a), and (2) did not assess costs of maintenance to the Norfolk Southern Railway Company.

In this regard, B&LE incorporates its arguments at pages 5-10 of its Main Brief and at pages 2-8 of its Reply Brief. B&LE argued in its Main and Reply Briefs that the Commonwealth Court's holding in *City of Chester* precluded any cost allocation to B&LE because railroads are precluded from cost allocations where, as in the present case, the railroad does not own any property or facilities at the rail-highway crossing at issue. In *Norfolk Southern Railway Company, supra,* the Supreme Court of Pennsylvania found that a railroad must still be an owner of the relevant facilities at issue to be a "concerned party" to assess costs against where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way. The *Norfolk Southern* court's holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities "***used*** in any kind of public utility service." (emphasis added).

As noted in *Norfolk Southern* in its analysis of other decisions related to the issues of use and ownership, "neither of those cases [*Pittsburgh Railways* and *Lehigh Valley*] involved a nonowner transportation utility possessing a right of way through a deteriorated rail-highway crossing and regularly conducting operations there" which the court found to be "an issue of first impression". *Id*.

However, *Norfolk Southern's* holding 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" does not abrogate the prior holdings of *Pittsburgh Railways* or *Lehigh Valley*. *See, e.g,. Six L's Packing Co. v. W.C.A.B. (Williamson),* 44 A.3d 1148, 1157-58 (Pa. 2012) (explaining that the holding of a judicial decision is to be "read against the facts" presented to the reviewing court when evaluating the precedential effect of the same) (*citing*

Oliver v. City of Pittsburgh, 11 A.3d 960, 966 (Pa. 2011)). Therefore, the holdings of *Pittsburgh Railways* and *Lehigh Valley* are still binding upon the Commission, and B&LE respectfully notes that ALJ Long's decision fails to follow Pennsylvania Supreme Court precedent.

The facts in *Pittsburgh Railways* are on precisely point here,[5] where the Commission attempted to allocate the costs of replacing and maintaining a rail-highway crossing to the Port Authority of Allegheny County where the Port Authority enjoyed no ownership interest and/or right of way interest in either the crossing or its related facilities, nor was the Port Authority operating any transportation utility services over the relevant railroad line, which had been previously abandoned by a railroad company. *Id*. at 604- 605.

Pittsburgh Railways stated that Section 2704 of the Public Utility Code "empowering the Commission to allocate costs in a highway-rail crossing situation, must be read in connection with Section [2702]". *See* 237 A.2d at 606. "Section [2702](a) defines the crossings with respect to which the Commission can assess certain costs under Section [2704]. Such crossings are those which involve the facilities of 'a public utility *engaged in the transportation of passengers or property*". *Id*. (emphasis added); *see also* 66 Pa.C.S. § 2702(a). Therefore, "[t]he transportation utilities [c]oncerned for purposes of assessment under Section [2704] are those whose facilities are constructed or located at such crossing". *See* 237 A.2d at 606.

Pittsburgh Railways ultimately held that, "the law has been firmly established in this Commonwealth that a transportation utility has no concern with any crossing for purposes of

[5] The facts in *Lehigh Valley* differ from this matter in two critical respects: the railroad company in *Lehigh Valley*: (1) still owned the relevant facilities at the subject crossings (*i.e.*, one being abolished and a new crossing being constructed to build a bridge over the existing tracks of the railroad company); and (2) operated public utility services over the crossing to be abolished. *See* 161 A. 422, 424 (holding that, "It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad"). Here, B&LE has no such ownership interest or right of way interest and does not operate any public utility service on the SR0268 crossing and has not conducted any operations at the SR0268 crossing since 1998.

assessment . . . where it does not have a rail facility situated at such crossing". *Id.* Applying this rule, the *Pittsburgh Railways* court determined that the Port Authority was not a concerned party and, therefore, the Commission lacked the statutory authority to assess costs to the Port Authority for the replacement and maintenance of the crossing at issue – *i.e.*, a railway facility that the Port Authority: (1) did not own, (2) did not have a right of way interest in, and (3) over which the Port Authority did not operate any transportation utility services. *Id.* at 608.

ALJ Long's citation to *Bronder v. Armstrong Cty. Rails to Trails* in her Recommended Decision has no precedential value and is not binding on this Commission. Rec. Dec. at 25. B&LE does not and has not argued that the Commission lacks jurisdiction over the issue between the parties, but rather that the Commission cannot allocate costs to B&LE because it is not a concerned party as noted in Exception 1, and that it does not own the subject property, nor does it maintain a right-of-way.

It is undisputed that the real estate where the rail line was located and any rail facilities at the SR0268 grade crossing were conveyed to WALA on October 24, 2002. It is also undisputed that B&LE has no ownership interest in real property or track, signal, communication, any or other railroad facilities whatsoever at the former crossing, and in fact B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002, it has not conducted any operations at the SR0268 crossing since 1998, and it has no easement-based right of way to the SR0268 crossing. B&LE St. 1 at 3-5.

In light of these undisputed facts, the holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation determination of the instant matter relative to B&LE. These cases collectively require a finding that B&LE is not a "concerned party" as the term is defined under the Public Utility Code, because B&LE: (1) has no ownership interest in the SR0268

crossing, (2) has no right of way interest in the SR0268 crossing, and (3) does not conduct transportation utility operations at the SR0268 crossing.

Accordingly, the Commission has no statutory authority to allocate any costs for the repair, removal, reconstruction or maintenance of the tunnel located at the SR0268 grade crossing to B&LE. A ruling to the contrary would not only be in opposition to the precedential authority of *Norfolk Southern* and *Pittsburgh Railways*, but it would also eviscerate the plain language meaning of Section 2704(a) of the Public Utility Code. *See* 66 Pa.C.S. § 2704(a) (expressly limiting the Commission's cost allocation authority to only those facilities "***used*** in any kind of public utility service") (emphasis added). Section 2704(a) reflects the common-sense judgment of the General Assembly that an entity that abandoned all ownership and usage rights of a rail crossing should not be charged with responsibility for repairs to the crossing. Therefore, B&LE respectfully requests that summary judgment be entered in its favor as a matter of law.

3. B&LE also excepts to Conclusion of Law No. 5 on page 36 of the Recommended Decision, which states that "[t]he 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)."

In this regard, B&LE incorporates its arguments at pages 7-13 of its Reply Brief that the Commission is precluded any cost allocation to B&LE because the railroad does not own any

property or facilities at the crossing at issue, and that 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)).

B&LE notes that the Commission is precluded from allocating any cost to it for the reasons cited in its Exceptions 1 and 2 above, which are incorporated herein by reference. As noted, in *Norfolk Southern Railway Company, supra*, the Supreme Court of Pennsylvania held that a railroad must still be an owner of the relevant facilities at issue to be a "concerned party" to assess costs against where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way. The *Norfolk Southern* court's holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities "***used*** in any kind of public utility service." (emphasis added).

With the sole exception that B&LE's predecessor in interest originally built the crossing at issue and that B&LE received an initial benefit from the construction of the SR0268 crossing, all remaining factors set forth in *Greene* all favor B&LE. Therefore, B&LE should not be assessed any costs of repair, maintenance or abolition in relationship to the SR0268 crossing. Moreover, B&LE has not owned the SR0268 crossing or the surrounding 394 acres of land since it conveyed the property in fee simple absolute to WALA on October 24, 2002, and B&LE reserved no right of way interest in the SR0268 crossing. Neither WALA nor its counsel negotiated maintenance responsibilities for the SR0268 crossing with B&LE. The SR0268 crossing became the private property of WALA and then subsequent grantees within the same chain of title, and all ownership and maintenance responsibilities belong to the private property owners as a matter of law.

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. 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 and/or repairing the SR0268 crossing. B&LE has had no right of control over the SR0268 crossing since October 24, 2002, and it was not in a position to prevent or correct any deterioration that has occurred and it not now responsible for any costs associated with the property.

B&LE (*i.e.*, a party with no legal right to inspect, alter, maintain, repair or access the SR0268 crossing) did not cause and could not have 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. Responsibility for the deterioration belongs to WALA, and subsequent transferees of the property – not B&LE. Therefore, this factor favors B&LE's position that it should not be assessed any costs relative to the SR0268 crossing.

B&LE would derive zero benefit 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.

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. In reliance upon that sale, B&LE stopped inspecting and/or maintaining the SR0268 crossing because it no longer owned that property. Any deterioration since B&LE has been out of possession is the direct and proximate result of the private property owners' and/or DOT's failure to properly maintain the SR0268 crossing consistent with their legal obligations to do so. It would not be just and reasonable for the Commission to assess any costs to B&LE relative the SR0268 crossing. A balancing of the equities shows that the majority of relevant factors favors B&LE's position, and B&LE takes exception to ALJ Long's decision that such costs should be assessed against B&LE.

4. B&LE also excepts to Conclusion of Law No. 6 on page 36 of the Recommended Decision, which states that "[i]t 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."

B&LE first notes that the Commission is precluded from allocating any cost to it for the reasons cited in its Exceptions 1, 2, and 3 above, which are incorporated herein by reference. Even if the Commission were not precluded by the precedents cited herein *supra*, allocating any costs to B&LE in this proceeding, which is denied, such an allocation would be neither "just" nor "reasonable". When apportioning costs, the standard is that the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement being that its Order "is just and reasonable". *Greene Township*, 668 A.2d at 618. It is respectfully submitted that in making her determination, ALJ Long did not sufficiently consider that B&LE has not owned

the property for 20 years, had no use of it, and had no access or right of access to it, thus any deterioration on the subject property was the responsibility of the property owners.

It is respectfully suggested that B&LE is being allocated costs in this proceeding simply because it was the former owner of the SR0268 crossing at issue. ALJ Long states that the cost allocation made against B&LE could be resolved among the parties, and that "the parties are encouraged to meet and confer and attempt to reach an amicable resolution". *See* Recommended Decision at 39. Regardless of whether or not B&LE would have the ability to recoup its costs in another forum, it would be unjust and unreasonable for the Commission to put B&LE to that expense and trouble.

To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so. Therefore, ALJ's Recommended Order directing costs be allocated to the B&LE should be reallocated and borne by the concerned parties, namely, PennDOT, Butler County and Fairview Township.

5. B&LE excepts to Recommended Ordering Paragraph 1 on page 36 of the Recommended Decision, denying B&LE's motion for summary judgment. B&LE respectfully disagrees with ALJ Long's Recommended Order denying its motion, for the reasons cited in B&LE's Exceptions 1-4 above, which are incorporated herein by reference as if stated in full.

6. B&LE excepts to Recommended Ordering Paragraph 2 on page 36 of the Recommended Decision, which states that Bessemer & Lake Erie Railroad, at its initial cost and expense, shall furnish all materials and perform all work required to alter the crossing at State Route 268 by dewatering the subject tunnel structure and portal areas, constructing permanent portal bulkheads, and completely filing the entire tunnel structure, from portal to portal, with

suitable material in accordance with the approved plans and this Order, for the reasons cited in B&LE's Exceptions 1-4 above, which are incorporated herein by reference as if stated in full.

Date: August 19, 2022

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 **Exceptions of Bessemer & Lake Erie Railroad Company to the Recommended Decision** dated August 19, 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:

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Respectfully submitted,

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