



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

August 26, 2022

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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

Docket No. I-2019-3012769

I&E's Reply to Bessemer & Lake Erie Railroad Company's Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pennsylvania Public Utility Commission's **Bureau of Investigation and Enforcement's Reply to Bessemer & Lake Erie Railroad Company's Exceptions** in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

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KLR/jfm
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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 : Docket No.: I-2019-3012769
Township, Butler County and where State :
Route SR0068 formerly crossed, below grade, :
the track of Bessemer and Lake Erie Railroad :
in Bradys Bend Township, Armstrong County :

**BUREAU OF INVESTIGATION AND ENFORCEMENT’S
REPLY TO EXCEPTIONS OF
BESSEMER & LAKE ERIE RAILROAD COMPANY**

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Dated: August 26, 2022

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I. INTRODUCTION

On August 1, 2022, Administrative Law Judge (“ALJ”) Mary D. Long issued a Recommended Decision in the above-captioned proceeding, which correctly denied Bessemer & Lake Erie Railroad Company’s (“B&LE”) Motion for Summary Judgement, ordered the Blackburn Tunnel to be completely filled at B&LE’s initial cost and expense, and ordered the Blackburn Tunnel to be abolished when the work was completed.

On August 19, 2022, B&LE served its Exceptions to the ALJ’s Recommended Decision.

Pursuant to the procedural schedule established in the August 1, 2022 Cover Letter for the Recommended Decision and in accordance with Commission regulations at Section 5.535, the Bureau of Investigation and Enforcement (“I&E”) now submits this Reply to B&LE’s Exceptions.¹ For the reasons fully explained below, I&E respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) deny B&LE’s Exceptions and wholly affirm the ALJ’s Recommended Decision without modification.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates the Main Brief, including the Appendices, and the Answer in Opposition to the Motion for Summary Judgement that it filed in the instant proceeding on April 15, 2022, in addition to the Reply Brief filed on May 5, 2022.

II. SUMMARY OF ARGUMENT

The Commission has “exclusive power to determine and prescribe, by regulation or order, the manner in which highway-rail crossings may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of

¹ 52 Pa. Code § 5.535.

public safety.” *Pittsburgh & Lake Erie R. Co. v. Pa. PUC*, 445 A.2d 851, 853 (Pa. Cmwlth. 1982); *see also* 66 Pa. C.S. § 2702(b); *Pa. Game Commission v. Pa. PUC*, 651 A.2d 596, 603 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (1995). A Commission Order must be just and reasonable. *Mun. of Monroeville v. Pa. PUC*, 600 A.2d 655, 657 (Pa. Cmwlth. 1991).

In short, B&LE’s regurgitates its arguments relating to concerned party status and cost allocation in each of its Exceptions without offering anything new or novel. The Recommended Decision reviewed and analyzed B&LE’s arguments thoroughly and correctly denied B&LE’s Motion for Summary Judgement and ordered a cost allocation on B&LE. The Recommended Decision is supported by sound, precedential case law and the evidence of record, and thus should not be disturbed on appeal. Importantly, the Recommend Decision’s Ordering Paragraphs are just and reasonable when reviewing the facts and situation presented in this case.

III. I&E REPLY EXCEPTIONS

Exceptions must be numbered and identify the finding of fact or conclusion of law to which the exception is taken.² Exceptions must have supporting reasons for each specific exception and must be concise.³ As explained further below, B&LE identifies a specific conclusion of law to which it finds exception, but fails to actually challenge or provide specific reasons why the exception is taken. Accordingly, B&LE’s Exceptions should be denied.

A. I&E Reply to B&LE Exception 1, Conclusion of Law No. 3: The ALJ correctly articulated the jurisdiction of the Commission pursuant to Section 2702.

Here, B&LE attempts to reiterate its arguments from its Motion for Summary Judgement to further its position that B&LE is not a concerned party instead of actually challenging

² 52 Pa. Code § 5.533.

³ 52 Pa. Code § 5.533.

Conclusion of Law No. 3. Specifically, Conclusion of Law No. 3 provides:

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

B&LE does not argue that the Conclusion of Law is incorrect or misstated, but rather it argues that B&LE is not a concerned party, which clearly does not relate to Conclusion of Law No. 3. Therefore, Conclusion of Law No. 3 should not be disturbed because B&LE did not provide any supporting reason to challenge the conclusion.

However, in the event the Commission still reviews B&LE's Exception to encompass other Findings of Fact, Conclusions of Law, or Ordering Paragraphs, I&E hereby incorporates by reference its Answer in Opposition to the Motion for Summary Judgment filed April 15, 2022 and its Main Brief filed on April 15, 2022. It is well settled that the Commission determines which parties are "concerned" or "interested" within the meaning of 66 Pa.C.S. §§ 2704(a) & 2702(c).⁵ The Commission is empowered to order the work performed upon such reasonable terms and conditions as it prescribes pursuant to Section 2702.⁶

This matter is similar to *William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297. In that matter, the ALJ established jurisdiction over the subject tunnel from portal to portal and ordered work and maintenance costs to Norfolk Southern/Consolidated Rail Corporation even though the railroad discontinued service through the ICC and sold the property by quitclaim deed to the Allegheny

⁴ Recommended Decision, pg. 35.

⁵ *County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979).

⁶ 66 Pa. C.S. § 2702; *Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa. Cmwlth. 1994).

Valley Land Trust.⁷ Exceptions were filed, and the Commission issued an Opinion and Order affirming the ALJ's determination that the railroad is a concerned party and the cost and maintenance allocation ordered therein.^{8 9}

Moreover, contrary to B&LE's characterization, rights of way are a state issue and not an issue decided or ruled upon by the STB.¹⁰ Bessemer & Lake Erie has not sought nor received Commission approval to abolish the public crossing, and subsequently the public right-of-way.

⁷ *William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297 (May 24, 2000 Recommended Decision).

⁸ *William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297 (September 5, 2000 Opinion and Order)(the matter was subsequently remanded for a hearing on whether the tunnel posed a danger to the public highway above it and to investigate drainage)

⁹ Another matter which provides similar facts is *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County*, Docket No. A-98891 (Order entered May 8, 1975). In that matter, Penn Central sought and received approval from the Interstate Commerce Commission to abandon and discontinue service on the rail line, which included a tunnel structure where the Pennsylvania Turnpike crossed above grade. Penn Central sought to abandon the railroad tunnel and agreed to remove the track and ties, but intended to leave the tunnel structure as is. In rendering its decision, the Commission noted that pedestrians could use the tunnel and that the removal of the track would increase this possibility, and that trees and vegetation was growing around the approaches to the tunnel. The Commission found that the tunnel was constructed subsequent to the construction of the Turnpike and that its collapse would jeopardize the Turnpike, that the benefits of using the tunnel were exclusively accrued by the railroad company, and that it would be inconsistent to assess the costs of backfilling the tunnel to the Turnpike users. Thus, the Commission ordered Penn Central to, at its sole cost and expense, furnish all material and do all work necessary to backfill the tunnel. While the rationale and a majority of the facts in *In re: Application of Penn Central* directly relate to this pending matter, I&E does acknowledge that the case does not involve a land sale.

¹⁰ *Caldwell v. United States*, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004) (citing *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 6-8 (1990)), *reh'g en banc denied* (Fed. Cir.), *cert. denied*, 546 U.S. 826 (2005)("If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect.")).

The estate of a railroad does not terminate until there has been an actual abandonment.¹¹ Mere nonuse of a railroad right-of-way by a railroad does not amount to abandonment¹² and failure to maintain a railroad or allowing brush to grow is not considered an affirmative act.¹³

B&LE attempts to criticize ALJ Long’s reliance on *CSX Transp., Inc. v. Pennsylvania Public Utility Com.*, 558 A.2d 902 (Pa. Cmwlth 1989) by suggesting that a right-of-way is the only factor which can be used to establish a concerned party status. This attempt should fail. In *CSX Transp., Inc. v. Pennsylvania Public Utility Com.*, 558 A.2d 902 (Pa. Cmwlth 1989), the Commonwealth Court noted that CSXT:

confuse[d] the concept of rail line abandonment which is within the exclusive jurisdiction of the ICC and the abolition of a rail/highway crossing which is within the exclusive province of the Commission. These two concepts, contrary to what CSXT would have us believe, are not one and the same thing.¹⁴

In reviewing the cases cited by CSXT, the Commonwealth Court distinguished the matter by noting that in both *Allegheny County Port Authority v. Pennsylvania Public Utility Commission*, 237 A.2d 602 (Pa. 1967), and *Jennings v. Pennsylvania Public*

¹¹ *Lacy v. East Broad Top R. & Coal Co.*, 77 A.2d 706 (Pa. Super. 1951)(The land thus acquired by the railroad is held by it as a public trust, which it may abandon only with the consent of the Commonwealth. *A. D. Graham & Co. v. Pa. Turnpike Com.*, 347 Pa. 622, 33 A. 2d 22; *Conwell v. P. & R. Rwy. Co.*, 241 Pa. 172, 88 A. 417; *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. 287. The consent of the Commonwealth may be evidenced by an Act of the General Assembly, *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. 42, or by an official authorized by it to act on its and the State’s behalf. The legislature’s supervisory power in respect of railroads has been committed and delegated to the Public Utility Commission which is “an administrative arm of the legislature”, whose members are “deputies of the general assembly to perform legislative work.” *Com. ex rel. v. Benn*, 284 Pa. 421, 434, 436, 131 A. 253.)

¹² *Buffalo Township v. Jones*, 813 A.2d 659, 664 (Pa. 2002); *see also Borough of Downingtown v. Friends of Kardon Park*, 55 A.3d 163, 175 (Pa. Cmwlth. 2012); *In re Appeal of Moyer*, 468 A.2d 536, 537 (Pa. Cmwlth. 1983) (for an abandonment to occur, there must be an intent to abandon the property coupled with external acts to achieve that end; mere non-use or lapse of time is not an abandonment.); *see also Birdsboro Municipal Auth. v. Reading Co. and Wilmington & Northern R.R.*, 758 A.2d 222, 227 (Pa. Super. 2000) (holding the mere failure to maintain and repair existing tracks did not amount to an intent to abandon); *Thompson v. Maryland and Pennsylvania R.R. Preservation Soc.*, 612 A.2d 450, 454 (Pa. Super. 1992) (the court held that evidence that the railroad entered into salvage agreements and quitclaimed its interest in the subject property should be submitted for the fact finder to resolve the railroad’s intent to abandon).

¹³ *Quarry Office Park Assoc. v. Philadelphia Electric Co.*, 576 A.2d 358 (Pa. Super. 1990); *Sabados v. Kiraly*, 393 A.2d 486 (Pa. Super. 1978).

¹⁴ *CSX Transp., Inc. v. Pennsylvania Public Utility Com.*, 558 A.2d 902, 906 (Pa. Cmwlth 1989).

Utility Commission, 14 A.2d 882 (Pa. Super. 1940), the proper application to abandon the crossing was filed with and approved by the Commission whereas CSXT did not file such application prior to removing its tracks at the crossing.¹⁵ The Commonwealth Court concluded:

CSXT remains a concerned party with respect to the rehabilitation of this bridge. It had no authority to physically remove its tracks beneath the Mahoning Avenue Viaduct without a Commission order authorizing abandonment of the crossing. It is **further noted** that CSXT retains ownership of the right-of-way where its tracks previously lay. This **also** qualifies CSXT as a concerned party, subject to the jurisdiction of the Commission. CSXT, simply by virtue of the removal of its tracks **without Commission authority**, cannot circumvent the power of the Commission to dictate the manner in which rail/highway crossings may be abandoned. The promotion of public safety is fostered by requiring that those parties who wish to abandon a crossing comply with the established procedure for doing so. For all of the foregoing reasons, we hold that the Commission had the authority to allocate maintenance responsibilities to CSXT.¹⁶

Thus, the Commonwealth Court found CSXT to be a concerned party to the proceeding based upon the active status of the crossing since CSXT did not file an application to abandon. The Commonwealth Court further supported its holding by **also** noting that CSXT retained a right-of-way at the crossing location, which also qualified CSXT as a concerned party in of itself. Accordingly, the retention of a right-of-way was not the major or sole factor which resulted in CSXT's concerned party status, but rather was a separate factor which could have been used on its own. Indeed, CSXT's failure to follow the Commission's procedure to formally abolish the public crossing resulted in CSXT remaining a concerned party. Similarly, B&LE did not receive Commission approval to abolish the Blackburn Tunnel, and thus remains a concerned party.

¹⁵ *CSX Transp., Inc. v. Pennsylvania Public Utility Com.*, 558 A.2d 902, 907-908 (Pa. Cmwlt 1989).

¹⁶ *CSX Transp., Inc. v. Pennsylvania Public Utility Com.*, 558 A.2d 902, 908 (Pa. Cmwlt 1989)(emphasis added).

Furthermore, the ALJ fully considered B&LE's argument and determined that the decision in *Norfolk Southern*¹⁷ was not as narrow as B&LE argued.¹⁸ The ALJ explained that *Norfolk Southern* considered the narrow question of whether a lack of property ownership by a rail utility divested the Commission of jurisdiction to allocate costs.¹⁹ Indeed, the Pennsylvania Supreme Court held that Section 2704 does not include an "ownership litmus" in determining whether a public utility is "concerned."²⁰ The Supreme Court continued to hold that

In 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.²¹

Accordingly, the ALJ found that the Supreme Court did not conclude that the statute included a bright line test as argued by B&LE but rather the intent of the Legislature was for the Commission to determine an equitable allocation of costs to the parties having a substantial interest in rail-highway crossing sites and projects beyond the members of the general public.²² The ALJ concluded that the Supreme Court did not limit the Commission's ability to hold a rail utility liable for costs to those utilities that either own the property or use the facilities at the crossing, and thus concluded that B&LE could be assessed costs.²³

Thus, the ALJ correctly reasoned that B&LE's connection to the Blackburn Tunnel is substantially more than that of a motor carrier that simply uses the crossing to go from one place

¹⁷ *Norfolk Southern Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013).

¹⁸ Recommended Decision, pg. 23.

¹⁹ Recommended Decision, pg. 23.

²⁰ Recommended Decision, pgs. 23-24 (citing *Norfolk Southern Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013)).

²¹ *Norfolk Southern Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619, 629 (Pa. 2013) (citation omitted).

²² Recommended Decision, pg. 24.

²³ Recommended Decision, pg. 24.

to another, and that B&LE is a concerned party who can be allocated costs and maintenance responsibilities.

B. I&E Reply to B&LE Exception 2, Conclusion of Law No. 4: The ALJ correctly found that the Commission is not deprived of jurisdiction because B&LE sold its property to a private organization.

B&LE again attempts to reiterate its arguments on cost allocation and concerned party status which were unsuccessfully argued in its Motion for Summary Judgement and Main Brief to challenge Conclusion of Law No. 4. These attempts should continue to fail as the case law clearly shows that the Commission has the exclusive authority to determine who is a concerned party in a proceeding and to allocate costs to any concerned party as it deems fit as long as the allocation is reasonable and just.

I&E again incorporates by reference its Answer in Opposition to the Motion for Summary Judgement filed April 15, 2022 and its Main Brief filed on April 15, 2022.

Specifically, I&E reiterates the following analysis provided in its Answer in Opposition to the Motion for Summary Judgment, paragraph 40:

[T]he facts in *Pittsburgh Railways* are not analogous to the facts presented in this case. First, the Port Authority of Allegheny County (“Port Authority”) is not a public utility whereas Bessemer & Lake Erie is a public utility. Second, the Port Authority did not use the bridge which was the subject of the proceeding while Bessemer & Lake Erie owned and utilized the subject tunnel. Third, the bridge in Pittsburgh Railways was *abolished* by Railways pursuant to a Commission Order dated 1961 and prior to the Port Authority’s acquisition of Railways’ property in 1964. Here, Bessemer & Lake Erie did not receive Commission approval to abolish the tunnel. Notably, the Supreme Court held “[t]he transportation utilities concerned for purposes of assessment under § 411 are those whose facilities *are constructed* or located at such crossing.”²⁴

²⁴ *Allegheny County Port Auth. v. Pennsylvania PUC*, 237 A.2d 602, 606 (Pa. 1967)(emphasis added).

Contrary to B&LE's position, the holding of *Pittsburgh Railways*²⁵ relates to the intention of the Port Authority Act, the extent of the Commission's jurisdiction as it relates to assigning costs to the Port Authority, and the legal question of whether the Port Authority owned the subject bridge (which was abandoned through the Commission prior to the Port Authority's acquisition of the transportation system) and could be assessed costs. Thus, the facts in *Pittsburgh Railways* are not "on precisely point [sic]" to this matter.

Furthermore, B&LE acknowledges that Section 2704 provides that cost allocation includes facilities "which are **used** in any kind of public utility service."²⁶ In making its argument on plain language, B&LE fails to recognize that the word "used" is the past tense version of "use," and thus is not limited to only those facilities that are currently in use.²⁷ The record is clear that B&LE **used** the Blackburn Tunnel to transport its freight, and thus it can be allocated costs to alter and abolish the crossing. Additionally, the language used in Section 2704 clearly shows the General Assembly's intent to not allow a public utility to abandon ownership and current usage of a crossing as a basis to sidestep its responsibility for the maintenance and safety of the crossing. The existence of a public crossing is not affected when a public utility merely stops using it or sells the land surrounding the area.²⁸ Instead, the public utility remains liable for the public crossing and is required to file the appropriate application before the Commission to suspend or abolish the crossing, and at which point the Commission will

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

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

²⁷ See generally Dictionary.com, <https://www.dictionary.com/browse/used>, defining "used" as "previously used or owned;" Merriam-Webster, <https://www.merriam-webster.com/dictionary/use>, defining "use" as "to put into action or service;" Law.com, <https://dictionary.law.com/Default.aspx?selected=2202>, defining "use" as "the right to enjoy the benefits of real property or personal property (but primarily used in reference to real property), whether the owner of the right has ownership of title or not."

²⁸ *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 404 A.2d 786 (Pa. Cmwlth. 1979) (The public utility commission retains jurisdiction over a crossing until permission to abandon operation of tracks is sought and granted by the commission.).

determine whether or not the crossing is safe and if the suspension/abolishment is in the public interest.²⁹ If the General Assembly intended to allow this absorb result, then the word “used” would not have been utilized.

Thus, Conclusion of Law No. 4 is supported by the relevant case law and should not be disturbed.

C. I&E Reply to B&LE Exception 3, Conclusion of Law No. 5: The ALJ correctly articulated the law and standards used by the Commission in determining maintenance and cost allocation.

In challenging Conclusion of Law No. 5, B&LE continues its constant theme of reiterating its arguments related to concerned party status and cost allocation without specifically addressing why the Conclusion is incorrect. Conclusion of Law No. 5 is accurately stated and correctly cited/supported, and thus it should not be disturbed.

To address the specific claims in Exception 3, I&E again incorporates by reference its Answer in Opposition to the Motion for Summary Judgement filed April 15, 2022 and its Main Brief filed on April 15, 2022, in addition to all arguments made in Reply to Exceptions 1-2 above. In short, the Commission is not precluded from allocating costs to B&LE as explained in detail in all of I&E’s filings and the Recommended Decision. Importantly, the Recommended Decision allocates the cost to B&LE at its **initial cost and expense**, and thus reserves B&LE’s ability to challenge the final allocation of costs of the work at a later proceeding.³⁰

Contrary to B&LE assertions, it exercised its ability to access and alter the Blackburn Tunnel after the October 24, 2022 conveyance. Local landowner Ms. Anna Marie Sherwin

²⁹ See generally 66 Pa.C.S. § 2702 and 66 Pa.C.S. § 2704; see also *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956)(whether the applicant has established that the abolition is necessary and proper for the service, accommodation, convenience or safety of the public); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

³⁰ Recommended Decision, pgs. 32-33, 36-39.

unequivocally testified that the railroad ties and track were removed by B&LE **after** the land was sold to the group, the Western Allegheny Landowners Association (“WALA”).³¹

Furthermore, the record shows that B&LE caused the deterioration of the Blackburn tunnel. After the land was conveyed, Ms. Sherwin stated that B&LE removed the rails and then graded down the area surrounding the rails.³² She further explained that when B&LE graded the area, they took the hump out of the tunnel, which was a raised-up area carrying the tracks into the tunnel, and removed the drainage ditches alongside the hump, and that is why the area is currently ponded.³³ Ms. Sherwin personally watched the work being done by B&LE and confirmed that the water did not pond at the tunnel’s portal when the line was active and in service by B&LE.³⁴ Moreover, the record is clear that B&LE did not maintain or inspect the Blackburn Tunnel in the past 20 years, and even admits this in its Exceptions.³⁵ Thus, the record established that B&LE’s actions and lack of maintenance the past 20 years caused the tunnel to deteriorate and subsequently partially collapse.

The Recommended Decision further supported its initial cost allocation to B&LE by noting the following facts: the tunnel was built over 100 years ago and logic would suggest that the presence of the road dictated the railroad’s decision to construct the tunnel, i.e., the road system existed first; B&LE benefited from the grade-separated crossing which permitted transportation of freight unimpeded by the public transportation system; B&LE benefited from the cost savings from failure to maintain the crossing the past 20 years; and B&LE’s failure to secure Commission approval to abandon the Blackburn Tunnel.³⁶ In utilizing the factors

³¹ N.T. pgs. 149-150.

³² N.T. pgs. 143, 148-149.

³³ N.T. pgs. 143, 148-149.

³⁴ N.T. pgs. 143, 148-151.

³⁵ I&E Statement No. 1, pg. 3; N.T. pg. 87.

³⁶ Recommended Decision, pgs. 33-34.

provided in *Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013), the Recommended Decision also viewed the factors which would relate to PennDOT and the local municipalities, i.e., the benefit of a grade-separated crossing to eliminate the risk of train and vehicular accidents and the lack of responsibility for the maintenance of a public crossing.³⁷ In viewing all these factors, the ALJ correctly found that B&LE should bear the initial cost and expense related to the alteration and subsequent abolishment of the Blackburn Tunnel. Accordingly, Conclusion of Law No. 5 should not be disturbed.

D. I&E Reply to B&LE Exception 4, Conclusion of Law No. 6: The ALJ correctly found that it is just and reasonable for B&LE to furnish all material and do all work necessary to fill and permanently close the Blackburn Tunnel at its initial cost and expense.

B&LE again reiterates its argument that the Commission is precluded from allocating costs to it and that the cost allocation issued in the Recommended Decision is not just and reasonable. I&E incorporates by reference I&E Reply to Exception 1-3 above. As explained in I&E Reply to Exception 3, the Recommended Decision's cost allocation to B&LE was just and reasonable because B&LE operated through the subject tunnel for decades and benefited from the grade-separated crossing to efficiently move freight without the liability of an at-grade crossing.³⁸ B&LE also had not inspected or maintained the tunnel since 2001, and is the sole party responsible for its deterioration.³⁹ Thus, Conclusion of Law No. 6 should not be deleted.

E. I&E Reply to B&LE Exception 5, Ordering Paragraph No. 1: The ALJ correctly denied B&LE's Motion for Summary Judgement.

I&E hereby incorporates by reference its Answer in Opposition to the Motion for Summary Judgement filed April 15, 2022 and its Main Brief filed on April 15, 2022, in addition

³⁷ Recommended Decision, pg. 33.

³⁸ I&E Statement No. 1, pg. 3; N.T. pg. 87.

³⁹ Recommended Decision, pg. 34; I&E Statement No. 1, pg. 3; N.T. pgs. 87-88; B&LE Statement No. 1, pg. 5.

to any and all arguments made in I&E's Reply to Exceptions 1-4 above. The ALJ correctly denied B&LE's Motion for Summary Judgement as outlined in the Recommended Decision and discussed herein, thus Ordering Paragraph No. 1 should not be disturbed on appeal.

F. I&E Reply to B&LE Exception 6, Ordering Paragraph No. 2: The ALJ correctly ordered B&LE, at its initial cost and expense, to complete all work required to alter the Blackburn Tunnel by dewatering the tunnel and portal areas, constructing the portal bulkheads, and filling the entire tunnel with suitable material.

I&E hereby incorporates by reference its Answer in Opposition to the Motion for Summary Judgement filed April 15, 2022 and its Main Brief filed on April 15, 2022, in addition to any and all arguments made in I&E's Reply to Exceptions 1-4 above. The ALJ correctly ordered B&LE to complete the work required to alter the Blackburn Tunnel and make it safe prior to its abolishment, and thus Ordering Paragraph No. 2 should not be modified.

IV. CONCLUSION

I&E respectfully requests that the Commission reject the Exceptions of Bessemer & Lake Erie Railroad Company for the reasons discussed above, and approve, in its entirety, the ALJ's Recommended Decision.

Respectfully submitted,



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Dated: August 26, 2022

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day, August 26, 2022, served a true copy of the foregoing **Bureau of Investigation and Enforcement’s Reply to Bessemer & Lake Erie Railroad Company’s Exceptions**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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