

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held December 8, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
Stephen M. DeFrank, Vice Chairman  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

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

I-2019-3012769

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Bessemer & Lake Erie Railroad Company (B&LE) on August 19, 2022, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Mary D. Long, issued August 1, 2022, in the above-captioned proceeding. The Commission's Bureau of Investigation and Enforcement (I&E) filed Replies to Exceptions on August 26, 2022. For the reasons stated below, we

shall deny B&LE's Exceptions, and adopt the ALJ's Recommended Decision, consistent with this Opinion and Order.

## I. History of Proceeding

On October 3, 2019, the 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 B&LE Railroad. One crossing is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by SR0268 (State Route 268) (Blackburn Tunnel).<sup>1</sup> The other crossing is located in Brady's Bend Township, Armstrong County, where SR0068 (State Route 68) crosses, below grade, the track (Brady's Bend Crossing).<sup>2</sup> B&LE, the Pennsylvania Department of Transportation (PennDOT), Fairview Township, Brady's Bend Township and Armstrong County were made parties to the investigation.<sup>3</sup> R.D. at 2.

The investigation was assigned to the Office of Administrative Law Judge on January 31, 2020. Throughout the proceeding, appearances were entered by I&E, PennDOT, Fairview Township, Butler County, and B&LE. Three landowners affected by the disposition of the crossings were identified and served with the hearing notice and prehearing conference order. *Id.* at 2-3.

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<sup>1</sup> This tunnel was referred to as "the Blackburn Tunnel" by a local resident, Ann Marie Sherwin. *See* Transcript (Tr.) at 224-25. The name is used here as a convenience to the reader. R.D. at 2, n.1.

<sup>2</sup> As explained below, the other crossings along this line were abolished by Secretarial Letter dated April 30, 2002, at Docket No. A-00117858 (*April 2002 Secretarial Letter*). *Id.* at 2, n.2.

<sup>3</sup> Butler County was not initially included as a party but was later notified of the proceeding. *Id.* at 2, n.3.

On November 10, 2020, the prehearing conference convened and counsel for I&E and PennDOT appeared; however, no representative of B&LE appeared. Conditions at the subject crossings were discussed, and the ALJ concluded that an engineering study was required, but that conducting such a study would be difficult without the participation of the railroad. A further prehearing conference was scheduled for December 1, 2020, in order to provide an opportunity to locate counsel for B&LE. *Id.* at 3.

At the further prehearing conference on December 1, 2020, the Parties requested additional time to discuss an engineering study of the crossings because counsel for B&LE had only recently been retained; therefore, a further prehearing conference was scheduled for December 30, 2020. At the December 30, 2020, conference, the Parties agreed that an engineering study of the Blackburn Tunnel was appropriate. The Parties also noted the possibility that the Brady's Bend Crossing could be resolved by a stipulation. *Id.*

By Interim Order entered on January 4, 2021, the ALJ directed B&LE, 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 Blackburn Tunnel. B&LE filed the completed report (AECOM Report) on July 30, 2021. *Id.* at 4.

A further prehearing conference was held on August 16, 2021, at which the Parties agreed to a litigation schedule. *Id.*

On November 12, 2021, the Parties filed a Joint Stipulation of Settlement (Joint Stipulation) regarding the disposition of the Brady's Bend Crossing. *Id.*

On January 3, 2022, B&LE filed a Motion for Summary Judgment which argued that B&LE was not a “concerned party” within the meaning of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* (Code) and that the Commission did not have jurisdiction because the action by the Surface Transportation Board (STB) preempted Commission jurisdiction. B&LE also argued, in the alternative, that it was not a concerned party because it no longer owned the property that included the Blackburn Tunnel. *Id.*

The evidentiary hearing convened on January 18, 2022.<sup>4</sup> At the hearing, the ALJ waived 52 Pa. Code § 5.103(c) and directed I&E and PennDOT to include their responses to B&LE’s Motion for Summary Judgment in their main briefs and granted leave to B&LE to include any reply to I&E and PennDOT’s responses in its reply brief. *Id.* at 4-5.

The record includes a 261-page transcript<sup>5</sup> and closed on May 9, 2022. *Id.* at 5-6.

In the Recommended Decision issued on August 1, 2022, ALJ Long denied the Motion for Summary Judgment and concluded that the Blackburn Tunnel is not safe and requires prompt remediation. ALJ Long recommended that: (1) the Blackburn Tunnel should be filled, and the work should largely be performed by B&LE; (2) the initial costs should be assigned to B&LE; and (3) upon completion of the work to the satisfaction of the Commission, the crossings should be formally abolished. The ALJ further recommended that the Commission assign final costs and future maintenance

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<sup>4</sup> See R.D. at 5 for a complete description of the testimony and exhibits admitted into evidence.

<sup>5</sup> The transcript pages are not sequentially numbered; therefore, all transcript citations contained herein refer to the electronic version of the transcript for the January 18, 2022, hearing unless otherwise noted. R.D. at 5, n.7.

responsibilities at a future hearing, in the event the Parties cannot reach an agreement. Finally, ALJ Long found that the Joint Stipulation regarding the Brady's Bend Crossing is reasonable and appropriate and recommended that it should be approved without modification, and that the Brady's Bend Crossing should be abolished. *Id.* at 2.

As noted, *supra*, B&LE filed Exceptions on August 19, 2022. I&E filed Replies to Exceptions on August 26, 2022.

## **II. Background**

The Commission instituted an investigation to examine the safety of the public crossings at the Blackburn Tunnel and Brady's Bend Crossing, and 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. R.D. at 13.

### **A. Background of the Crossings**

B&LE acquired the railroad line, known as the Western Allegheny Branch, which included the Blackburn Tunnel and Brady's Bend Crossing, from the Western Allegheny Railroad Company in 1967. B&LE discontinued operation of rail service on the Western Allegheny Branch around 1998 and in 2000 filed a notice with the STB to abandon service along approximately twenty miles of rail line in Butler and Armstrong Counties. The STB authorized the abandonment of rail service on January 17, 2001. *Id.* at 14.

On May 31, 2001, B&LE filed an Application with the Commission, at Docket No. A-00117858, which sought authorization to abandon twenty-eight grade crossings and one tunnel. The *April 2002 Secretarial Letter* granted B&LE's Application

to abolish twenty-seven of the grade crossings. However, the Commission did not authorize B&LE to abolish the Blackburn Tunnel or Brady's Bend Crossing.<sup>6</sup> The *April 2002 Secretarial Letter* further directed B&LE and other parties to perform certain work necessary to abolish the twenty-seven crossings and set deadlines for the work and assigned costs. Moreover, the *April 2002 Secretarial Letter* stated that the Blackburn Tunnel and Brady's Bend Crossing would be addressed by 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 Crossing in connection with a roadway improvement project. The Commission further observed that B&LE and PennDOT were negotiating a disposition of the Blackburn Tunnel. *Id.* at 14-15; *April 2002 Secretarial Letter* at 4.

On October 24, 2002, B&LE conveyed the property containing the Blackburn Tunnel to the Western Allegheny Landowner's Association (WALA). In 2004, PennDOT, with B&LE's permission, removed the railway bridge that carried the B&LE track over State Route 68 at Brady's Bend Crossing, and realigned the roadway. *R.D.* at 15; *See Joint Stipulation* at ¶9. Subsequent Secretarial Letters issued by the Commission at Docket No. A-00117858 did not include any specific mention of either the Blackburn Tunnel or Brady's Bend Crossing. The final Secretarial Letter at Docket No. A-00117858 presented for the record was dated February 1, 2012 and stated that B&LE had been directed to abolish "various crossings" in Armstrong and Butler Counties and noted that "[a]ll work has been completed" and "since all work has been completed, the case be "CLOSED," although neither the Blackburn Tunnel nor Brady's Bend Crossing were specifically mentioned. *Id.* at 15; *I&E St. 1* at 4; *PennDOT Exh. B.* No further Commission action was taken at Docket No. A-00117858. *Id.* at 16.

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<sup>6</sup> The Blackburn Tunnel was identified as Crossing No. 27(a) and Brady's Bend Crossing was identified as Crossing No. 28. *April 2002 Secretarial Letter* at ¶ 1.

In 2018, PennDOT contacted the Commission concerning the disposition of the two crossings. Following an informal investigative field conference on June 26, 2018, that was attended by the Commission's Rail Safety Division, PennDOT, B&LE and six local homeowners located near the Blackburn Tunnel, the Commission instituted the investigation described above on October 3, 2019, regarding the disposition of the Blackburn Tunnel and Brady's Bend Crossing. *Id.*

## **B. Current Conditions of the Crossings**

Brady's Bend Crossing was resolved by the removal of the bridge which carried B&LE's tracks over State Route 68 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. *Id.*; PennDOT St. 1 at 3.

Originally constructed in 1906, the Blackburn Tunnel is 744 feet long and is a bare rock cut structure with timber bent supports. The tunnel interior was lined with a corrugated metal liner for the entire length in 1975. In 2002, B&LE removed the railroad track and ties. The rock above the east portal of the tunnel is visibly cracked and deteriorated. The exposed rock immediately above the portal showed some deterioration of the portal embankment, which has exposed the timber bents at the portal ends. Similarly, the rock above the west portal of the tunnel is also visibly cracked and deteriorated. R.D. at 16.

Approximately 100 feet inside the eastern entrance, there is evidence of a complete collapse of the tunnel, and portions of the corrugated steel liner are deformed which 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. *Id.* at 16-17.

In addition, areas of ponding water exist where the track has been removed. The tunnel is accessible by both pedestrians and all-terrain vehicles from both the east and west entrances; however, it is not clear for passage from one end to the other because of the collapsed portion. *Id.* at 17.

## **C. Positions of the Parties**

### **1. B&LE**

B&LE argued that the Commission does not have jurisdiction to require it to do any work or assess any costs on B&LE regarding the Blackburn Tunnel because it is no longer a “concerned party” within the meaning of the Code. B&LE contended that the sale of the railroad property to WALA divested the Commission of jurisdiction. *Id.* at 17; B&LE M.B. at 3-9 (citing *Norfolk Southern Ry. Co. v. Pa. PUC*, 77 A.3d 619 (Pa. 2013) (*Norfolk Southern*); *City of Chester v. Pa. PUC*, 798 A.2d 288 (Pa. Cmwlth. 2002) (*City of Chester*)).

B&LE disagreed with I&E and PennDOT that not complying with 66 Pa. C.S. § 2709, which requires 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 B&LE’s property to WALA. B&LE further averred that the local governments and PennDOT had constructive notice of its intent to dispose of the property, but failed to act on any rights they may have had. B&LE also argued that the doctrine of laches and the three-year statute of limitations in the Code forecloses voiding the sale of the property to WALA. R.D. at 17-18; B&LE M.B. at 9-18.

In the alternative, B&LE argued that 66 Pa. C.S. § 2702 is preempted by the Interstate Commerce Commission Termination Act (ICCTA). B&LE claimed that 49 U.S.C. § 10501(b) demonstrates federal intent to preempt state regulation of railroads; therefore, the abandonment by the STB forecloses the exercise of authority by the Commission. R.D. at 18; B&LE M.B. at 19-20.

## **2. I&E**

I&E disagreed with B&LE's arguments that the Commission has no jurisdiction to require B&LE to perform work to remediate the conditions at the Blackburn Tunnel or assess costs on B&LE. I&E contended 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. R.D. at 18; I&E M.B. at 8-9.

In addition, I&E argued that the sale of the property, which included the Blackburn Tunnel, does not divest the Commission of jurisdiction. Rather I&E contended that B&LE remains a "concerned party" as that term has been interpreted by the Pennsylvania Supreme and Commonwealth Courts. I&E averred that 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." I&E M.B. at 16 (citing *Norfolk Southern*). I&E argued that B&LE remains a concerned party subject to the Commission's jurisdiction because B&LE, or its predecessor, constructed the tunnel and B&LE failed to abolish the tunnel as required by the Code. R.D. at 18-19; I&E M.B. at 15-17.

Moreover, I&E argued that the Blackburn Tunnel is hazardous to the public. I&E averred that a portion of the tunnel is collapsed, that there are pools of water located in and around the tunnel which pose a hazard, and that the collapse of the tunnel

was caused by structural failure which may worsen if not addressed. Therefore, I&E argued that the tunnel portal areas should be permanently sealed with concrete or grouted rock bulkheads, and the tunnel should be filled with a suitable material to fill the entire space. R.D. at 19; I&E M.B. at 17-21.

Finally, I&E contended that all the costs to make the tunnel safe should be assessed to B&LE. In support of its position, I&E argued that the courts have held that ownership of the property is not the controlling factor considered in allocating costs, and that the current condition of the tunnel is due to B&LE's neglect. I&E further averred that B&LE operated through the tunnel for decades and therefore benefited the most from the crossing. R.D. at 19; I&E M.B. at 21-25.

### **3. PennDOT**

Similar to I&E, PennDOT contended that B&LE's preemption argument should be rejected. PennDOT argued that well-established precedent demonstrates that STB jurisdiction and Commission jurisdiction are distinct and nothing in the ICCTA preempts the Commission from regulating the safety of rail highway crossings. R.D. at 19; PennDOT M.B. at 2-5.

PennDOT further argued that the sale of the property, which includes the Blackburn Tunnel, does not divest the Commission of jurisdiction to assign work and assess costs. Rather, PennDOT contended that the Commission never approved B&LE's request to abolish the crossing, and that B&LE should not be allowed to simply remove the rails and sell the property to avoid Commission authority to ensure that the crossing is safe. R.D. at 19-20; PennDOT M.B. 5-7.

Finally, PennDOT contended that all costs related to the remediation of the conditions at the Blackburn Tunnel should be assessed on B&LE. PennDOT argued that

B&LE, 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 averred that it would not be fair to assess any costs to PennDOT because B&LE should not benefit from failing to fill the tunnel and properly abolish the crossing, which would have protected the integrity of State Route 268. R.D. at 20; PennDOT M.B. at 7-14.

### **III. Discussion**

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

#### **D. Legal Standards**

Sections 2702 and 2704 of the Code, 66 Pa. C.S. §§ 2702 and 2704, set forth the powers of the Commission in cases involving rail-highway crossings. These Sections provide, in pertinent part, as follows:

§ 2702. Construction, relocation, suspension and abolition of crossings.

(a) General rule. -- No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility,

and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

(b) Acquisition or property and regulation of crossing. -- The commission is hereby vested with exclusive power to appropriate property for any such crossing, except as to such property as has been or may hereafter be condemned by the Department of Transportation for projects financed entirely by the Commonwealth and for Federal Aid Projects . . . and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossings may be constructed, altered, relocated, suspended or abolished, . . . to effectuate the prevention of accidents and the promotion of the safety of the public...

(c) Mandatory relocation, alteration, suspension or abolition. -  
- Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, . . . to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. . . The commission may order the work of construction, relocation, alteration, 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...

§ 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings.

(a) General rule. --...[t]he cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid as provided in this section, by the public utilities, municipal corporations...concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice

and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

66 Pa. C.S. §§ 2702 and 2704.

Furthermore, the Commission has stated that:

As provided by these Sections of the Code, the Commission has the exclusive jurisdiction to determine whether and how a rail-highway crossing should, as pertinent to this case, be abolished, as well as to determine which party or parties should bear the costs of such abolition. *Department of Transportation v. Pa. PUC*, 282 A.2d 313, 316 (Pa. Cmwlth. 1971). When the Commission exercises its discretion to allocate costs in a rail-highway crossing case, it is not limited to any fixed rule, but takes all relevant factors into consideration, with the fundamental requirement being that its order be just and reasonable. *Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983).

Title 49 U.S.C.A. § 10903, which empowers the Interstate Commerce Commission (ICC) to authorize abandonment of rail lines neither conflicts with, nor preempts the provisions of the Code, 66 Pa. C.S. §§ 2702 and 2704, pertaining to the suspension or abolition of rail-highway crossings, the assignment of responsibility therefor, and the allocation of the costs thereof. Thus, where a railroad has received permission from the ICC to abandon a rail line, or a section thereof, and has exercised that permission by physically removing its tracks and ties from the right-of-way, this Commission retains the jurisdiction to assign maintenance responsibility for the rail-highway crossing and to allocate the costs thereof. In exercising this jurisdiction, the Commission can allocate a portion of the maintenance costs to the railroad which had physically removed its tracks pursuant to the authorization received from the ICC. *CSX Transportation, Inc. v. Pa. PUC*, 558 A.2d 902 (Pa. Cmwlth. 1989), alloc. denied, 567 A.2d 654 (1989). Thus, the fact that the rail line has been abandoned, the tracks and ties removed, or the fact that the railroad transferred the right-of-way at issue in this

proceeding to a third party, which is not a public utility, does not oust the jurisdiction of the Commission from enforcing its outstanding Order of October 9, 1961, at Docket No.

A-86353, or from entering a new order in this proceeding assigning responsibility for the work to be performed, if any, and allocating the costs thereof. Once the Commission has determined that there is a rail-highway crossing at a particular location, a rail-highway crossing continues to exist at that location until the Commission, in the exercise of its exclusive power, 66 Pa. C.S. §§ 2702 and 2704, suspends, abolishes, etc., the crossing.

*Borough of Ingram v. Consolidated Rail Corporation, Corliss Roadways Corporation, Commonwealth of Pennsylvania Department of Transportation, County of Allegheny, Equitable Gas Company, Western Pennsylvania Water Company, and AT&T Communications of PA, Inc.; and Application of Consolidated Rail Corporation for approval of the abolition of the crossings where the tracks of said Corporation's Pittsburgh-Columbus Main Line and Sheridan Branch cross public highways in the City of Pittsburgh, the Boroughs of Ingram and Crafton, Allegheny County, Docket Nos. C-00861036; A-00107227 (Decision issued May 15, 1991).*

## **1. Abolition of Crossings**

The Code provides that no crossing may be abolished without a Commission order. 66 Pa. C.S. § 2702(a). Section 2702 of the Code vests the Commission with the exclusive jurisdiction and “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 public safety.” 66 Pa. C.S. § 2702; *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).

## 2. Crossing Maintenance Work and Cost Allocation

The Commission may order any public utility or municipal corporation concerned or the Commonwealth to perform work associated with any order issued regarding the crossing. 66 Pa. C.S. § 2702(c). The Commission has the exclusive authority to determine and order which parties shall perform the work at the crossing and which parties shall maintain the crossing in the future to prevent accidents and promote the safety of the public. *SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (1992).

The costs of such work may be assessed and allocated among parties “in such proper proportion as the Commission may . . . determine.” 66 Pa. C.S. § 2704(a). The Commission determines which parties are concerned within the meaning of 66 Pa. C.S. § 2704(a) and 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979).

The Commission has considered many factors when allocating highway-rail maintenance responsibilities, such as:

1. The party that originally built 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 each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.

5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

*N. Lebanon Twp.* at 1247 (citing *Greene Twp. Bd. of Supervisors v. Pa. PUC*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).

The Commission is not restricted to the above-cited factors. *Millcreek Twp. v. Pa. PUC*, 753 A.2d 324 (Pa. Cmwlth. 2000) (citing *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999)). The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. PUC*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. PUC*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981). Moreover, the Commission may “determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. PUC*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

#### **E. ALJ’s Initial Decision**

In her Recommended Decision, ALJ Long made fifty-five Findings of Fact and reached six Conclusions of Law. R.D. at 6-12 and 35-36. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ concluded that the Blackburn Tunnel is not safe and requires prompt remediation. Accordingly, the ALJ recommended that B&LE perform the work to fill the Blackburn Tunnel at its initial cost. Following the completion of the work, the ALJ recommended that the crossings should be formally abolished, and final costs and

future maintenance responsibilities should be assigned at a future hearing if the Parties cannot reach an agreement on their own. Additionally, the ALJ recommended that the Joint Stipulation regarding the Brady's Bend Crossing should be approved without modification and abolished. R.D. at 2.

Regarding B&LE's argument that the Commission lacks jurisdiction because this proceeding is preempted by the ICCTA, the ALJ concluded that the Commonwealth Court, in *Wheeling & Lake Erie Railway Company v. Pa. PUC*, 778 A.2d 785 (Pa. Cmwlth. 2001) (*Wheeling & Lake Erie Railway*) ruled that federal law regulating rail service does not preempt the Commission's authority to regulate rail-highway crossings and to allocate costs related to the safety and maintenance of rail-highway crossings. The ALJ held that B&LE did not distinguish the Commonwealth Court's decision in *Wheeling & Lake Erie Railway*, nor did it cite any precedent overruling that decision. *Id.* at 21-22.

In addition, the ALJ found that the Commission was not divested of jurisdiction over this matter due to B&LE's sale of the railroad property. Rather, the ALJ concluded, that 66 Pa. C.S. § 2702 vests the Commission with exclusive powers to determine and prescribe the manner in which rail-highway crossings may be constructed, altered, relocated, suspended or abolished, *Id.* at 22; 66 Pa. C.S. § 2702(b), and that the Commission's power regarding rail-highway crossings endures until the Commission issues an order authorizing the abolition of the crossing. *Id.* at 22-23; *City of Pittsburgh v. Pa. PUC*, 404 A.2d 786 (Pa. Cmwlth. 1979). The ALJ found that the Commission had not authorized B&LE to abolish the Blackburn Tunnel crossing in 2002 when B&LE sold the property to WALA. *Id.* at 23.

Furthermore, the ALJ disagreed with B&LE's narrow interpretation of *Norfolk Southern* regarding what it means to be a "concerned" party under 66 Pa. C.S. § 2704(a). The ALJ explained that the Pennsylvania Supreme Court in *Norfolk Southern*

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." *Id.* at 23-24 (citing *Norfolk Southern* at 633). Moreover, the ALJ determined that 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. *Id.* at 25 (citing *Bronder v. Armstrong Cnty. Rails to Trails*, Docket C-00956690 (Order entered November 6, 1996) (*Bronder*); *Borough of Bridgeville v. Allegheny Cnty*, 74 P.U.C. 720 (1991)).

The ALJ concluded that B&LE's connection to the Blackburn Tunnel is more substantial than that of a motor carrier that simply uses the crossing to get from one place to another, and that, but for the sale of its property which includes the tunnel, B&LE would be a "concerned" party even though it no longer operated rail service through the Blackburn Tunnel. The ALJ held that B&LE cannot escape from its responsibilities for the safety of rail crossings by simply abandoning service at the STB and selling the property. *Id.* at 26. Moreover, the ALJ found that there is no evidence that B&LE provided the required notice that it intended to sell the Blackburn Tunnel property pursuant to 66 Pa. C.S. § 2709, and that the disposition of the property is "voidable" if a rail utility fails to provide proper written notice. *Id.* at 27 citing 66 Pa. C.S. § 2709(c). Therefore, the ALJ denied B&LE's Motion for Summary Judgment. *Id.*

Next, the ALJ concluded that the condition of the Blackburn Tunnel is deteriorated, dangerous and a significant hazard to the public because a portion of the tunnel is collapsed, access to the tunnel is unrestricted, and there is significant ponding of water in and around the tunnel. The ALJ noted that the Blackburn Tunnel is over 100 years old, and the roadway above it has an average traffic volume of 1,454 vehicles per day. Furthermore, the ALJ stated that the AECOM Report described visible cracks at the portal of the tunnel, a complete collapse about 100 feet inside the tunnel entrance, and

the deformed corrugated steel liner, and it concluded that “this structure does not have the structural integrity to prevent future collapsing or any subsidence in the roadway above.” *Id.* at 27-29; B&LE Exh. 14 at 1; B&LE St. 3 at 7; Tr. 154-55; PennDOT St. 2 at 2.

As a result, pursuant to 66 Pa. C.S. § 2702, the ALJ recommended that the Commission order the full closure of the Blackburn Tunnel, but that the final allocation of costs should be reserved for a later proceeding. Therefore, the ALJ assigned B&LE the responsibility to fill and permanently close the Blackburn Tunnel at its initial cost and expense because B&LE’s predecessor built the tunnel over 100 years ago and B&LE primarily benefitted from the crossing. Further, the ALJ found B&LE’s argument that it was incumbent upon WALA, who was represented by counsel, to raise the poor condition of the tunnel at the time B&LE sold the property as speculative and irresponsible. To the contrary, the ALJ stated that B&LE was aware that the Commission was under the impression that B&LE was negotiating with PennDOT regarding the final disposition of the tunnel, and that B&LE did not follow up with the Commission when it decided to change strategies and negotiate the sale of the property to WALA a few months later. The ALJ concluded that B&LE 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. *Id.* at 32-34. The ALJ summarized her recommendation as follows:

In sum, B[&]LE failed to secure Commission authority to abandon the Blackburn Tunnel and failed to ensure the integrity of the structure. The consequence of B[&]LE’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. B[&]LE cannot now complain that it did not maintain the tunnel because it did not have access to private property. B[&]LE is entirely responsible for that situation. Further, there is nothing in the record that B[&]LE 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 B[&]LE to remediate the tunnel at its initial cost and expense.

*Id.* at 34.

Finally, ALJ Long recommended that the Joint Stipulation regarding Brady's Bend Crossing be approved without modification. She concluded that it is just and reasonable to abolish Brady's Bend Crossing and assign future maintenance costs to PennDOT. The ALJ found that 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, and that this realignment improved the sight distance and overall safety of the traveling public. The ALJ concluded that there are no disputes regarding Brady's Bend Crossing, nor are there any outstanding cost allocation issues for the Commission to resolve.

*Id.* at 34-35.

## **F. Exceptions**

In its Exception No. 1, B&LE excepts to Conclusion of Law No. 3 of the Recommended Decision, which states that:

The 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.

R.D. at 35.

B&LE argues that 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. Exc. at 1-2 (citing *City of Chester*). B&LE contends that it is not a “concerned party,” as the term is defined under the relevant provisions of the Code, because it has had no ownership interest in any facilities at the Blackburn Tunnel since October 24, 2002, has not conducted any operations at the crossing since 1998, and has no easement-based right-of-way to the crossing. B&LE avers that the real property, rail line, and any rail facilities at the Blackburn Tunnel were conveyed to WALA on October 24, 2002, and that it has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing. *Id.* at 2.

B&LE argues that 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*, but that there must still be at least a substantial, ongoing use of the crossing by the railroad in order for it to be a “concerned party.” B&LE contends that it does not have a “substantial interest” in the Blackburn Tunnel because it has not conducted operations at the crossing since 1998 and does not use the public highway at the crossing for any purpose. *Id.* at 2-3.

In addition, B&LE argues that the ALJ’s reliance on *CSX Transp. Inc. v. Pa. PUC*, 558 A.2d 902 (Pa. Cmwlth. 1989) (*CSX Transp.*) to conclude 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. Rather, B&LE argues that *CSX Transp.* is distinguishable from the facts of the instant matter because, unlike *CSX Transp.*, B&LE received STB authorization to abandon service and does not have any right-of-way interest in the subject crossing. Furthermore, B&LE argues that the ALJ erred because she cited to *Norfolk Southern* and asserted that equitable interests were part of the Legislature’s intent at the time 66 Pa. C.S. § 2704 was enacted; however, B&LE contends

that the issue of whether it is a “concerned party” is a legal question, not an equitable one. *Id.* at 4.

Finally, B&LE states that the Commission does not have discretion to alter the *Norfolk Southern* court’s definition of “concerned party”, nor may it consider the equity issues before deciding the threshold legal issue, when it is clear that B&LE is not a “concerned party” against whom costs may be assessed. Therefore, B&LE contends that, in the absence of B&LE being a concerned party, the Commission lacks jurisdiction to assess costs against it. *Id.* at 5.

In its Exception No. 2, B&LE excepts to Conclusion of Law No. 4 of the Recommended Decision, which states that:

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).

R.D. at 35.

B&LE contends 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 instant case, the railroad does not own any property or facilities at the rail-highway crossing at issue, and 66 Pa. C.S. § 2704(a) expressly limits

any cost allocation relative to the abolition of a crossing to only those facilities “used in any kind of public utility service.” Exc. at 6 (citing *Norfolk Southern*).

B&LE further argues that the Pennsylvania Supreme Court in *Pittsburgh Railways Co. v. Pa. PUC*, 237 A.2d 602, 606 (Pa. 1967) (*Pittsburgh Railways*), held that the Code provides that the Commission can only assess costs under 66 Pa. C.S. § 2704 to crossings which involve the facilities of “a public utility engaged in the transportation of passengers or property.” *Id.* at 7 (citing *Pittsburgh Railways* at 606; 66 Pa. C.S. § 2702(a)). Therefore, B&LE contends that transportation utilities concerned for purposes of assessment under 66 Pa. C.S. § 2704 are those whose facilities are constructed or located at such crossing. *Id.* B&LE avers that the Commission cannot allocate costs to it here because it is not a concerned party, and it does not own the subject property, nor does it maintain a right-of-way. *Id.* at 8.

Moreover, B&LE argues that *Norfolk Southern* and *Pittsburgh Railways* require a finding that B&LE is not a “concerned” party, as defined under the Code, because B&LE: (1) has no ownership interest in the Blackburn Tunnel crossing; (2) has no right-of-way interest in the crossing; and (3) does not conduct transportation utility operations at the crossing. For that reason, B&LE contends that the Commission has no statutory authority to allocate any costs for the repair, removal, reconstruction or maintenance of the Blackburn Tunnel to B&LE, and that summary judgment be entered in its favor as a matter of law. *Id.* at 8-9.

Next in its Exception No. 3, B&LE excepts to Conclusion of Law No. 5 of the Recommended Decision, which states that:

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).

R.D. at 36.

B&LE argues that the Commission is precluded from 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." Exc. at 9-10. Also, B&LE avers that the Commission is precluded from allocating any cost to it for the reasons it argued above in Exception Nos. 1 and 2. *Id.* at 10.

B&LE contends that it should not be assessed any costs of repair, maintenance or abolition in relationship to the Blackburn Tunnel. B&LE avers that it has not owned the crossing or the surrounding 394 acres of land since it conveyed the property to WALA in October 2002, and that B&LE reserved no right-of-way interest in the crossing to use or enter the property for any purpose, had no right of control over the crossing, and did not negotiate any maintenance responsibilities to prevent or correct any deterioration. Therefore, B&LE contends that the Blackburn Tunnel 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. *Id.*

Furthermore, B&LE argues that any responsibility for the deterioration of the tunnel belongs to WALA and subsequent transferees of the property, not B&LE.

Therefore, B&LE contends that it should not be assessed any costs relative to the Blackburn Tunnel. Moreover, B&LE avers that it would derive no benefit from abolishing or removing the crossing; rather, the Parties who would benefit from abolishment or removal are the private property owners and PennDOT. B&LE contends that it would suffer great prejudice if the costs of abolition or deterioration of the crossing and tunnel were assessed in any amount to B&LE. B&LE argues that the October 2002 conveyance and deed to WALA does not impose any legal obligation upon B&LE to inspect or maintain the crossing, and that in reliance upon the sale, B&LE stopped inspecting and maintaining the crossing because it no longer owned the property. B&LE argues that it would not be just and reasonable for the Commission to assess any costs to B&LE relative to the crossing. *Id.* at 11-12.

In its Exception No. 4, B&LE excepts to Conclusion of Law No. 6 of the Recommended Decision, which states that:

It is just and reasonable that B[&]LE, 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.

R.D. at 36.

B&LE contends that the Commission is precluded from allocating any costs to it for the reasons set forth in its Exception Nos. 1-3. B&LE argues that allocating any costs to it in this proceeding would not be just or reasonable, and that in doing so in the Recommended Decision the ALJ did not sufficiently consider that B&LE has not owned the property for twenty years, had no use of it, and had no access or right of access to it;

therefore, any deterioration of the subject property was the responsibility of the property owners. Exc. at 12-13.

Furthermore, B&LE states that it is being allocated costs in this proceeding simply because it was the former owner of the Blackburn Tunnel and that it would be unjust and unreasonable for the Commission to put B&LE to the expense and trouble of meeting with the Parties to attempt to reach a resolution on final cost allocation. Rather, B&LE argues that the costs here should be reallocated and borne by the concerned parties, including PennDOT, Butler County and Fairview Township. *Id.* at 13.

Next in its Exception No. 5, B&LE excepts to Ordering Paragraph No. 1 of the Recommended Decision, which denied B&LE's Motion for Summary Judgment. B&LE disagrees with the ALJ's recommendation denying the motion for the reasons cited in B&LE's Exception No. 1-4 above. *See* Exc. at 13.

Finally, in its Exception No. 6, B&LE excepts to Ordering Paragraph No. 2 of the Recommended Decision which states that B&LE, at its initial cost and expense, shall furnish all materials and perform all work required to alter the Blackburn Tunnel by dewatering the subject tunnel structure and portal 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. B&LE refers to the reasons offered in its Exception Nos. 1-4 above in support of this Exception. *Id.* at 13-14.

## **G. Reply Exceptions**

Initially, in reply to B&LE's Exceptions, I&E generally states that B&LE repeats its arguments relating to concerned party status and cost allocation without offering anything new or novel. I&E avers that the ALJ reviewed and analyzed B&LE's

arguments thoroughly, and that the Recommended Decision is supported by sound, precedential case law and evidence of record, and should not be disturbed. Additionally, I&E argues that B&LE's Exceptions should be denied because while they identify specific conclusions of law to which B&LE excepts, they fail to actually challenge or provide specific reasons why any exception is taken. R. Exc. at 2.

In reply to B&LE's Exception No. 1, I&E contends that the ALJ correctly articulated the jurisdiction of the Commission pursuant to 66 Pa. C.S. § 2702. I&E argues that Conclusion of Law No. 3 of the Recommended Decision should not be disturbed because B&LE did not provide any supporting reason to challenge the conclusion, and B&LE argues that it is not a concerned party which does not relate to Conclusion of Law No. 3. R. Exc. at 2-3.

In the event the Commission reviews B&LE's Exception No. 1 to encompass other Findings of Fact, Conclusions of Law, or Ordering Paragraphs, I&E argues that 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), and that the Commission is empowered to order the work performed upon such reasonable terms and conditions as it prescribes pursuant to 66 Pa. C.S. § 2702. *Id.* at 3. I&E avers that the Commission has previously established jurisdiction of railroad tunnels no longer in use and ordered work and maintenance costs to the railroad. *Id.* at 3-4 (citing *William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297; *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-00098891 (Order entered May 8, 1975)).

Moreover, I&E argues that railroad rights-of-way are a state issue and not an issue that is decided or ruled upon by the STB. *Id.* at 4. I&E avers that B&LE has not sought nor received Commission approval to abolish the public crossing and public right-of-way. B&LE further posits that the estate of a railroad does not terminate until there has been an actual abandonment, that mere nonuse of a railroad right-of-way by a railroad does not amount to abandonment, and that failure to maintain a railroad or allowing brush to grow is not considered an affirmative act. *Id.* at 5.

I&E argues that the ALJ was correct in finding that B&LE is a concerned party and should be assessed costs here. I&E contends that a right-of-way is not the only factor which can be used to establish a concerned party; rather a railroad may be a concerned party to a proceeding based upon the active status of the crossing due to the railroad's failure to follow the Commission's procedure to formally abolish a public crossing. I&E concludes that in this case, B&LE did not receive Commission approval to abolish the Blackburn Tunnel and, therefore, remains a concerned party. *Id.* at 5-6.

Finally, I&E argues that the ALJ correctly determined that the Pennsylvania Supreme Court's decision in *Norfolk Southern* was not as narrow as B&LE argued. I&E contends that the ALJ properly found that the Court did not conclude that the statute includes a bright line test, but rather the intent of the Legislature was for the Commission to determine an equitable allocation of costs to parties having a substantial interest in rail-highway crossing sites and projects beyond the members of the general public. Therefore, I&E avers that the ALJ correctly concluded that the Commission's ability to hold a rail utility liable for costs is not limited to those utilities that either own

the property or use the facilities at the crossing, and that B&LE could be assessed costs. *Id.* at 7-8.

In reply to B&LE's Exception No. 2, I&E argues that the ALJ correctly found that the Commission is not deprived of jurisdiction because B&LE sold its property to a private entity. I&E avers 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 states that B&LE is a public utility that owned and utilized the Blackburn Tunnel for which it did not receive Commission approval to abolish, and that, under 66 Pa. C.S. § 2704, B&LE can be allocated costs to alter and abolish the crossing. R. Exc. at 8.

In addition, I&E contends that the language used in 66 Pa. C.S. § 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. I&E continues that the existence of a public crossing is not affected when a public utility merely stops using it or sells the land surrounding the area. Rather, I&E argues that 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 determine whether or not the crossing is safe and if the suspension/abolishment is in the public interest. *Id.* at 9-10.

Next in reply to B&LE's Exception No. 3, I&E argues that the ALJ correctly articulated the law and standards used by the Commission in determining maintenance and cost allocation. I&E states that the Commission is not precluded from allocating costs to B&LE, and notes that the Recommended Decision allocates the cost to B&LE at its initial cost and expense, and reserves B&LE's ability to challenge the final allocation of costs of the work at a later proceeding. R. Exc. at 10.

I&E contends that B&LE's actions and lack of maintenance over the past 20 years caused the tunnel to deteriorate and partially collapse. First, I&E avers that B&LE accessed and altered the Blackburn Tunnel after the October 2002 conveyance, based upon a local landowner's testimony that the railroad ties and track were removed by B&LE after the land was sold to WALA. Second, I&E argues that B&LE caused the deterioration of the Blackburn Tunnel because B&LE graded down the area and removed the hump that carried the tracks into the tunnel and adjacent drainage ditches when the rails were removed causing the area to be currently ponded with water. Third, I&E states that B&LE admitted to not maintaining or inspecting the Blackburn Tunnel in the past twenty years. *Id.* at 10-11.

Furthermore, I&E agrees with the Recommended Decision's allocation of initial costs to B&LE because the tunnel was built over 100 years ago, B&LE benefited from the crossing by transporting freight over the public transportation system, B&LE benefited from the cost savings by not maintaining the crossing for the past twenty years, and B&LE's failed to secure Commission approval to abandon the Blackburn Tunnel. As compared to the benefits to PennDOT and the local municipalities, I&E argues that 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. *Id.* at 11-12.

In reply to B&LE's Exception No. 4, I&E argues that 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. I&E contends that 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, and that B&LE had not inspected or maintained the tunnel since 2001, and, therefore, is the sole party responsible for its deterioration.

R. Exc. at 12.

Next in reply to B&LE's Exception No. 5, I&E contends that the ALJ correctly denied B&LE's Motion for Summary Judgement as outlined in the Recommended Decision. I&E avers that Ordering Paragraph No. 1 of the Recommended Decision should not be disturbed. R. Exc. at 12-13.

Finally, in reply to B&LE's Exception No. 6, I&E argues that 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 contends that Ordering Paragraph No. 2 of the Recommended Decision should not be modified because the ALJ correctly ordered B&LE to complete the work required to alter the Blackburn Tunnel and make it safe prior to its abolishment. R. Exc. at 13.

## **H. Disposition**

Upon our review of the record and arguments, we shall deny B&LE's Exceptions and adopt the ALJ's Recommended Decision, consistent with this Opinion and Order. Several of B&LE's Exceptions challenge various Conclusions of Law which are restatements of well-settled law, while others fail to provide specific reasons why an exception is taken. We agree with I&E that B&LE, in its Exceptions, repeats its arguments previously offered before the ALJ relating to concerned party status and cost allocation. We conclude that the ALJ carefully reviewed and analyzed the Parties' arguments thoroughly, including B&LE's, and that the Recommended Decision is supported by sound legal reasoning and evidence of record. For this reason, we will not disturb the conclusions in the Recommended Decision, and we will deny the Exceptions.

While B&LE raises six Exceptions, the argument woven throughout all of them is that B&LE contends that it is not a "concerned party" within the meaning of the Code because it has had no ownership interest in any facilities at the Blackburn Tunnel

since October 2002 and no easement-based rights-of-way to the crossing, nor has it conducted any operations at the crossing since the late 1990s. As such, and also because B&LE believes it is not responsible for any deterioration of the crossing, B&LE argues that the Commission does not have jurisdiction, and is, therefore, precluded, from directing that B&LE furnish all materials and perform all the work necessary to alter and remediate the Blackburn Tunnel, at its initial cost and expense. We disagree.

The Commission is vested with exclusive jurisdiction to determine and prescribe the manner in which rail-highway crossings may be constructed, altered, relocated, suspended or abolished, and no rail-highway crossing may be altered, relocated, suspended or abolished without Commission authorization. 66 Pa. C.S. § 2702(a)-(b). Further, the Commission may order the construction, relocation, alteration, protection, suspension or abolition of any crossing to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth, in such proportions as the Commission, after notice and hearing, determines. 66 Pa. C.S. § 2702(c). The Commission's power regarding rail-highway crossings endures until the Commission issues an order authorizing the abolition of the crossing. *City of Pittsburgh v. Pa. PUC*, 404 A.2d 786 (Pa. Cmwlth. 1979). The Commission determines which parties are "concerned" or "interested" within the meaning of 66 Pa. C.S. §§ 2704(a) & 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979). The Commission is empowered to order the work performed upon such reasonable terms and conditions as it prescribes pursuant to Section 2702. 66 Pa. C.S. § 2702; *Pennsylvania Game Commission v. Pa. PUC*, 651 A.2d 596 (Pa. Cmwlth. 1994).

In *Norfolk Southern*, the Pennsylvania Supreme Court rejected an earlier decision of the Commonwealth Court which held that property ownership was required to allocate costs to a railway under 66 Pa. C.S. § 2704. Rather, the Pennsylvania Supreme Court held that 66 Pa. C.S. § 2704 does not include an "ownership litmus" test in

determining whether a public utility is “concerned.” *Norfolk Southern* at 633. The Supreme Court, in determining whether it was reasonable for the Commission to interpret Section 2704 to allocate costs to a rail utility that used, but did not own, the facilities at the crossing, found that it was proper 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. *Id.* at 631. Moreover, the Supreme Court held that the Commission’s interpretation of whether a utility is concerned is entitled to deference where that interpretation is reasonable, and that a party must have some “substantial interest” in the crossing beyond the interest of the general public in order to be “concerned.” In addition, the Supreme Court explained that 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. Importantly, 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. *Id.* at 633.

Furthermore, the Commission has held railroads accountable in cases where a railroad fails to secure Commission authorization to abolish a crossing but sells the property. *See Bronder; Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991). 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. *Bronder*. In addition, the Commission has previously established jurisdiction of railroad tunnels no longer in use and ordered work and maintenance costs to the railroad. *See, e.g., William Seybert v. Consolidated Rail Corporation; Application of the Consolidated Rail Corporation*, Docket Nos. C-00981956, A-00116297 (Order entered August 31, 2000).

Additionally, in *CSX Transp., Inc. v. Pa. PUC*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989), the Commonwealth Court concluded that the abandonment of service by the STB does not divest the Commission of jurisdiction. There, the Court specifically stated:

[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.

*CSX Transp., Inc. v. Pa. PUC*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989).

In the instant case, neither the language of 66 Pa.C.S. § 2704 nor the Pennsylvania Supreme Court's decision in *Norfolk Southern* requires a different result. The Commission did not authorize B&LE to abolish the Blackburn Tunnel crossing in 2002 when B&LE sold the property to WALA. Following B&LE's application to abolish crossings in May 2001, the Commission issued the *April 2002 Secretarial Letter*, which explicitly stated that the Blackburn Tunnel would be the subject of future Commission action in view of the representation to the Commission that B&LE and PennDOT were negotiating the final disposition of the tunnel. *April 2002 Secretarial Letter* at 4.

However, six months later, B&LE conveyed the property that included the Blackburn Tunnel to WALA on October 24, 2002, without receiving Commission authorization to abolish the Blackburn Tunnel after the *April 2002 Secretarial Letter* and before it conveyed the property.

We agree with the ALJ that, but for the sale of its property which includes the tunnel, B&LE would be a “concerned” party even though it no longer operated rail service through the Blackburn Tunnel. B&LE’s attempt to divest itself of the responsibility to maintain the Blackburn Tunnel by selling the property does not absolve it from the responsibility because B&LE never properly completed the process to receive authorization to abolish the Blackburn Tunnel. In order to satisfy the Commission’s mandate to ensure the safety of public rail-highway crossings, it is necessary that the Commission hold B&LE accountable for its failure to complete the process to properly abolish the Blackburn Tunnel. To that end, the ALJ stated:

B[&]LE 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 B[&]LE for deliberately failing to comply with its statutory and regulatory obligations.

R.D. at 26. We agree. B&LE remains a concerned party based upon the active status of the Blackburn Tunnel crossing because it failed to follow the proper procedure to receive Commission approval to abolish the Blackburn Tunnel.

Moreover, as we concluded, *supra*, B&LE’s actions to sell the property instead of properly completing the process to receive Commission authorization to abolish the Blackburn Tunnel did not absolve B&LE of its maintenance responsibility. However, the lack of maintenance by B&LE over the past twenty years has contributed to

the Blackburn Tunnel's deterioration and partial collapse. Although B&LE removed the railroad tracks and ties and graded down the area that carried the tracks into the tunnel following the sale of the land to WALA, B&LE admitted to not maintaining or inspecting the Blackburn Tunnel since 2002. Furthermore, B&LE primarily benefitted from the Blackburn Tunnel by transporting freight through the crossing for many years prior to selling the land to WALA. In addition, following B&LE's failure to secure Commission approval to abolish and abandon the Blackburn Tunnel crossing, B&LE benefitted from cost savings for many years by not expending resources to maintain the crossing.

The ALJ succinctly summarized her conclusions as follows:

B[&]LE is not relieved of its responsibility for the Blackburn Tunnel by selling the property. To allow B[&]LE to immunize itself from Commission jurisdiction in this way would do violence to the Commission's critical mandate to protect public safety. B[&]LE 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. B[&]LE 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.

R.D. at 27 (emphasis added). Inasmuch as B&LE's connection as a concerned party to the Blackburn Tunnel is substantial, B&LE can be allocated costs and maintenance responsibilities for it pursuant to 66 Pa. C.S. §§ 2702 and 2704.

It is undisputed by the Parties that the Blackburn Tunnel is deteriorated and dangerous to the public. A portion of it is collapsed and access to the tunnel is not restricted. Cracks are visible, portions of the corrugated steel liner are deformed, and there is ponding of water in and around the tunnel. Although the land directly above the tunnel and State Route 268, which runs over a portion of the tunnel, show no signs of

underground subsidence or failure of the roadway to date, we find that it is important to ensure the prompt and complete remediation of the Blackburn Tunnel by B&LE at its initial cost and expense, as the ALJ ordered in her Recommended Decision, to make the tunnel safe by dewatering the tunnel and portal areas, constructing portal bulkheads, and filling the entire tunnel with suitable material, prior to its abolishment. In order to ensure that this critical work is completed in a prompt fashion, we note that the ALJ in her Recommended Decision provided for B&LE's ability to challenge the final assignment and allocation of final costs for this work and future maintenance responsibilities at a future hearing and proceeding, in the event the Parties cannot reach an agreement on their own.

#### **IV. Conclusion**

Based upon our review of the record, the applicable law, and the reasons set forth above, we shall deny the Exceptions of B&LE, and therefore, adopt, the ALJ's Recommended Decision, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions of Bessemer & Lake Erie Railroad Company, filed on August 19, 2022, to the Recommended Decision of Administrative Law Judge Mary D. Long, issued on August 1, 2022, at this docket, are denied, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge Mary D. Long, issued on August 1, 2022, at this docket, is adopted, consistent with this Opinion and Order.

3. That this proceeding be referred to the Bureau of Technical Utilities – Rail Safety for monitoring of completion of the project.

4. That upon satisfactory completion of the project, the Bureau of Technical Utilities Services – Rail Safety shall issue a Secretarial Letter closing the proceeding.

5. That upon the submission of the Secretarial Letter, as set forth in Ordering Paragraph 4, the Secretary’s Bureau shall mark the proceeding at Docket No. I-2019-3012769 closed.

**BY THE COMMISSION**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: December 8, 2022

ORDER ENTERED: December 8, 2022