



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 27, 2024

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street 2nd FL
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 SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County

Docket No. I-2019-3012769

Dear Secretary Chiavetta,

Enclosed for electronic filing please find the Department's *Pre-Hearing Memorandum* in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Sincerely,

A handwritten signature in black ink, appearing to read 'LJB', followed by a horizontal line.

Leah Jo Bobula
Assistant Counsel

cc: Parties of Record
Jeffrey Matko, Grade Crossing Administrator (via email)
Sarah Fenton, PennDOT Engineer (via email)
Mark Chappell, P.E., Chief of Utilities & Row Section (via email)

**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	:	Docket No. I-2019-3012769
Route SR0268, crosses over a railroad	:	
tunnel formally used by Bessemer and	:	
Lake Erie Railroad in Fairview	:	
Township, Butler County and where	:	Electronically Filed
State Route SR0268 formerly crossed,	:	
below grade, the track of Bessemer and	:	
Lake Erie Railroad in Bradys Bend	:	
Township, Armstrong County		

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION’S
PREHEARING MEMORANDUM**

In accordance with the May 29, 2024, Prehearing Conference Order of Administrative Law Judge John M. Coogan in the above-referenced matter, the Department of Transportation (Department) offers the following:

I. History of the Proceedings:

On October 3, 2019, an Order was entered instituting an investigation be undertaken relating to the abolition and safety surrounding the crossings where State Route SR0268 crosses, above grade, a track of Bessemer and Lake Erie Railroad (B&LE) in Fairview Township, Butler County (Blackburn Tunnel) and where State Route SR0068 crosses, below grade, a track of Bessemer and Lake Erie Railroad in Brady’s Bend Township, Armstrong County (Brady’s Bend Crossing).

On January 31, 2020, the investigation was assigned to the Office of Administrative Law Judge (ALJ).

On November 10, 2020, a prehearing conference was held, but no representative of B&LE appeared, so another prehearing conference was scheduled for December 1, 2020.

During the prehearing conference on December 1, 2020, more time was granted so the Parties could discuss logistics of an engineering study of the crossings.

During the prehearing conference on December 30, 2020, the Parties agreed to get an engineering study for the Blackburn Tunnel and to resolve the Brady's Bend Crossing issue through a stipulation.

On January 4, 2021, the ALJ, Mary D. Long (ALJ Long), filed an Interim Order which instructed B&LE, at its own initial cost, to prepare an engineering report on Blackburn Tunnel. On July 30, 2021, B&LE filed the engineering report.

During the prehearing conference on August 16, 2021, the Parties agreed to a litigation schedule.

On November 12, 2021, the Parties file a Joint Stipulation of Settlement regarding Brady's Bend Crossing.

On January 3, 2022, B&LE filed a Motion for Summary Judgement, arguing B&LE is not a concerned party and, in the alternative, that the PUC has no jurisdiction.

On January 18, 2022, an evidentiary hearing was held. ALJ Long waived 52 Pa. Code § 5.103(c) and directed the Bureau of Investigation and Enforcement (I&E) and PennDOT to include their replies to B&LE's Motion for Summary Judgment in their main briefs. B&LE was granted leave to include any replies to I&E and PennDOT in their reply brief.

On August 1, 2022, ALJ Long denied B&LE's Motion for Summary Judgment and

concluded Blackburn Tunnel required quick remediation as it is concerned unsafe. ALJ Long recommended the Joint Stipulation regarding Brady's Bend Crossing be approved, thereby abolishing the crossing. ALJ Long also stated that 1) the Blackburn tunnel should be filled, with work completed mostly by B&LE; 2) the initial costs should be assigned to B&LE; and 3) upon completion, the crossing should be abolished, with final costs and future maintenance responsibilities to be determined at a hearing if the Parties cannot agree.

On August 19, 2022, B&LE filed exceptions. I&E filed Replies to Exceptions on August 26, 2022.

On December 8, 2022, ALJ Long's Recommended Decision was adopted by the Public Utility Commission.

On May 11, 2023, B&LE filed a Petition for Extension of Time to submit detailed construction plans, which was granted on June 1, 2023.

On August 30, 2023, B&LE provided constructions plans. On September 26, 2023, B&LE provided construction drawings. On October 10, 2023, B&LE provided tunnel fill plans. On October 17, 2023, B&LE provided a letter stating construction would begin during the week of October 23, 2023.

On November 14, 2023, B&LE filed a second Petition for Extension of Time to complete the work necessary by the December 8, 2023, deadline. This second petition was granted on December 5, 2023, extending the deadline until March 31, 2024.

On April 24, 2024, the PUC advised a final inspection would occur on May 8, 2024.

On April 2, 2024, B&LE filed a letter stating the work was completed prior to the deadline.

On May 8, 2024, B&LE filed a petition requesting a hearing to determine the cost allocation for the work completed on the Blackburn Tunnel.

On May 29, 2024, ALJ John M. Coogan ordered a prehearing conference to occur on July 2, 2024, with prehearing memorandums due on or before June 28, 2024.

II. Issue in the Proceedings and the Department's Position Thereon:

Should B&LE be solely responsible for the 1) initial costs; 2) closure construction costs; 3) traffic control and flagging costs during closure construction; and 4) future maintenance and costs for the closure of the Blackburn Tunnel?

Suggested Answer: Yes.

III. Proposed Plan and Schedule of Discovery:

The Department does not anticipate the need for discovery on this issue because the Parties have informally exchanged cost documentation.

IV. Testimony and Witnesses:

The Department intends to offer the following witnesses to address the issue and any questions which are directed to the Department:

Jeffrey Matko
Senior Civil Engineer Supervisor
Pennsylvania Department of Transportation
Engineering District 10-0
2550 Oakland Avenue.
Indiana, PA 15701

Sarah Fenton
Grade Crossing Administrator
Pennsylvania Department of Transportation
400 North Street
Harrisburg, PA 17120

Jeffrey Matko and Sarah Fenton will testify regarding the steps the Department took to provide traffic control and flagging for the closure of the Blackburn Tunnel as well as their opinions regarding cost allocation.

Henry Hartman
Assistant Maintenance Manager
Highway Administration
Pennsylvania Department of Transportation
351 New Castle Road
Butler, PA 16001

Michael Mattis
County Manager
Highway Administration
Pennsylvania Department of Transportation
351 New Castle Road
Butler, PA 16001

Henry Hartman and Michael Mattis will testify regarding the costs incurred by the Department when traffic control and flagging was provided during the closing of the Blackburn Tunnel.

The Department reserves the right to call additional witnesses deemed necessary or to modify its proposed witnesses as the case develops.

VI. Possibility of Settlement:

The Department and B&LE have previously engaged in settlement discussions but were unsuccessful in reaching a resolution. The possibility of settlement is unlikely. However, the parties are willing to provide Joint Stipulations to help ensure more efficient proceedings.

VII. Hearing Time:

The Department anticipates it will need two hours of hearing time to present its case.

VIII. Proposed Litigation Schedule:

The parties have discussed and propose the following litigation schedule:

<u>Due Date</u>	<u>Proceeding</u>
August 16, 2024	Written Direct Testimony
September 13, 2024	Rebuttal Testimony
October 2, 2024	Hearing (virtual)

November 7, 2024	Briefs
November 29, 2024	Reply Briefs

IX. Lead Representative:

As the Department is represented by multiple attorneys, the Department designates Leah Jo Bobula, Assistant Counsel, as their lead representative for the purposes of the July 2, 2024, prehearing conference.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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Fax Number (717) 772-2741

DATED: June 27, 2024

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Township, Butler County and where : **Electronically Filed**
State Route SR0268 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 served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code §1.54, by:

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Butler, PA

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Fairview Township Supervisors
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Karns City, PA 16041

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136 Boosel Road
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¹ Parties with listed emails under the US Mail section were also served electronically.

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Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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