



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

June 28, 2024

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 formally crosses, below grade, the track of Bessemer and Lake Erie Railroad in Brady's Bend Township, Armstrong County
Docket Nos. I-2019-3012769
I&E Prehearing Conference Memorandum

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's ("I&E") **Prehearing Conference Memorandum** in the above-referenced matter.

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,

A handwritten signature in blue ink that reads "Garrett Rine".

Garrett A. Rine
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 327921
(717) 783-6150
garrine@pa.gov

GAR/ac
Enclosures

cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

Docket No. I-2019-3012769

**PREHEARING CONFERENCE MEMORANDUM
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

TO ADMINISTRATIVE LAW JUDGE JOHN M. COOGAN:

The Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") files this Prehearing Conference Memorandum in accordance with Administrative Law Judge ("ALJ") John M. Coogan's Prehearing Conference Order dated May 29, 2024.

I. HISTORY OF THE PROCEEDING

On October 3, 2019, the Commission ordered an investigation be instituted at Docket I-2019-3012769 for the purpose of determining all matters relating to the abolition and safety of the crossings where State Route SR0268 crosses, above grade, a track of Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 crosses, below grade, a track of Bessemer and Lake Erie Railroad in Brady's Bend Township, Armstrong County,

as well as the future disposition of the crossings, what work shall be performed at the crossings, and allocation of the cost of any work ordered.

One crossing is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by State Route SR0268 (“Blackburn Tunnel”). The other crossing is located in Brady’s Bend Township, Armstrong County, where SR0068 crosses, below grade, the track (“Brady’s Bend Crossing”).

On December 30, 2020, a prehearing conference was held in which counsel for I&E, PennDOT, BLE and Fairview Township appeared. During the hearing all parties agreed an engineering study of Blackburn Tunnel was appropriate given its current state.

On January 04, 2021, ALJ Mary D. Long submitted an *Interim Order Directing an Engineering Study and Scheduling a Further Status Conference*. Among other things, the order stated:

“That Bessemer and Lake Erie Railroad, at its initial cost and expense, on or before July 30, 2021, shall prepare and submit to the Commission and all parties of record for examination, an engineering report detailing the current condition of the tunnel structure at the crossing located in Fairview Township, Butler County. The report shall be completed by a certified professional engineer, shall include the engineer’s professional opinion about the current integrity of the structure, a recommended disposition of the structure, including preliminary cost estimates and any other matter of material or serious concern.”

B&LE completed and submitted the engineering study on July 30, 2021. The parties agreed to a litigation schedule which included dates for the filing of written testimony and an evidentiary hearing on January 18, 2022. The parties were able to come to a resolution concerning the Brady’s Bend Crossing via Joint Stipulation of Settlement filed on November 12, 2021. The evidentiary hearing was held as scheduled on January 18, 2022. On July 09, 2022, ALJ Mary D. Long filed a recommended decision.

On December 8, 2022, the Commission entered an Opinion and Order at Docket I-2019-3012769, adopting the ALJ's Recommended Decision, consistent with the Opinion and Order. The Commission's Opinion and Order concisely summarizes the responsibilities of the parties involved in the proceeding, which were outlined in ALJ Long's Recommended Decision. The Opinion and Order states:

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.

Commission Order at 16.

By letter dated April 2, 2024, counsel for B&LE notified all interested parties that all work associated with the tunnel fill project for Blackburn Tunnel as ordered and approved by the Commission had been completed. By letter dated April 24, 2024, Daniel R. Helfrich, P.E., Rail Safety Division, Bureau of Technical Utility Services, notified all parties of record that a final inspection would be held on Wednesday, May 8, 2024, at 12:00 p.m. (noon) for the above-referenced proceeding.

On May 7, 2024, counsel for B&LE filed a *Petition of Bessmer and Lake Erie Railroad Company Requesting a Hearing for the Purpose of Allocating Costs Associated with the Commission's Opinion and Order Entered December 08, 2022.* On May 29, 2024, Administrative Law Judge John M. Coogan, filed a Prehearing Conference Order, which, among other things, scheduled a telephonic prehearing conference to address B&LE's Petition for a cost allocation hearing to be held on July 2, 2024, at 10:00 AM.

II. I&E PREHEARING CONFERENCE MEMORANDUM

A. Service

All service on, and communication to, I&E in this proceeding should be addressed to:

By Mail: Garrett A. Rine
 Prosecutor
 Pennsylvania Public Utility Commission
 Bureau of Investigation and Enforcement
 Commonwealth Keystone Building
 400 North Street
 Harrisburg, PA 17120

By Telephone: (717) 783-6150

By E-mail: garrine@pa.gov

B. Statement Regarding Settlement

I&E is open and willing to discuss settlement of this matter.

C. Plan and Schedule of Discovery

I&E proposes that discovery be conducted consistent with the Commission's regulation at 52 Pa. Code §§ 5.321, *et seq.* To date, I&E has not initiated formal discovery.

D. Discovery Orders

I&E does not propose any modifications to the Commission's regulations pertaining to discovery at 52 Pa. Code §§ 5.321, *et seq.*

E. Proposed Litigation Schedule

I&E will review the litigation schedules proposed by the other parties.

F. Names and Addresses of Witness(es) to be Presented

Daniel R. Helfrich, P.E.,
TUS Rail Safety Division
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 3rd Floor
Harrisburg, PA 17120
dhelfrich@pa.gov

I&E reserves the right to modify the identified witness and/or present additional witnesses as it deems necessary based on the issues identified by the parties.

G. Issues to be Addressed

The purpose of the hearing is to receive testimony from all parties concerning the allocation of costs associated with filling and permanently sealing the Blackburn Tunnel in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by State Route SR0268. The original costs associated with this project were provided by B&LE. B&LE alleges a total project cost of \$2,790,496.10. The Commission's Opinion and Order directed the final assignment and allocation of final costs for this work and future maintenance responsibilities to be determined at a future hearing and proceeding, in the event the Parties cannot reach an agreement on their own.

H. Statement of Evidence to be Presented

I&E's witness(es) will testify to I&E's position as follows:

The purpose of the litigation was to address two railroad crossings owned and operated by B&LE. A joint stipulation was reached between the parties for the abolishment of Brady's Bend crossing and approved by the Commission. Per the Commission's December 8, 2022, Order, B&LE permanently sealed Blackburn Tunnel at its initial cost. B&LE contends that they are not responsible for any costs associated with the Blackburn Tunnel project.

I&E's witness(s) will provide testimony supporting the full cost allocation should be the responsibility of B&LE for the following reasons. The ALJ's Recommended Decision, supported by the Commission's Order, deemed B&LE to be a concerned party who benefited from the Blackburn Tunnel crossing for years. Furthermore, the sale of the property in 2002 did not divest B&LE of the responsibility of maintaining the crossing. B&LE never appropriately applied for abolishment of the railroad crossings at Brady's Bend or Blackburn Tunnel. For approximately twenty (20) years Blackburn Tunnel was left to deteriorate. Had B&LE addressed the abolishment of the crossings prior to the sale of the land, the cost would certainly have been drastically reduced.

I&E's witness(es) may testify to additional matters based upon the issues identified by the parties.

Respectfully submitted,



Garrett A. Rine
Prosecutor
PA Attorney ID No. 327921

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
Phone: (717) 783-6150
Email: garrine@pa.gov

Dated: June 28, 2024

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Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake :
Erie Railroad in Brady's Bend Township, :
Armstrong County :

Docket No. I-2019-3012769

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Prehearing Conference Memorandum** dated June 28, 2024, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail Only

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