

June 28, 2024

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

Re: Investigation upon the Commission's motion into matters pertaining to the proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0068 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Brady's Bend Township, Armstrong County, Docket No. I-2019-3012769  
BW File No.: 10684-272312

Dear Secretary Chiavetta:

Enclosed for filing please find the **Prehearing Conference Memorandum** of Bessemer & Lake Erie Railroad Company, in the above matter. I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,



John M. Steidle

JMS/krc  
Enclosure

cc: All Interested Parties of Record (per attached service list)  
Administrative Law Judge John M. Coogan

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission’s motion : I-2019-3012769  
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 Bradys Bend Township, :  
Armstrong County :

**BESSEMER AND LAKE ERIE RAILROAD COMPANY’S  
PREHEARING CONFERENCE MEMORANDUM**

AND NOW, Bessemer and Lake Erie Railroad Company (“B&LE”), by and through its attorneys, Burns White LLC, files its Prehearing Conference Memorandum, in accordance with the Prehearing Conference Order dated May 29, 2024:

**I. PROCEDURAL BACKGROUND AND CURRENT STATUS**

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 of the crossings is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by SR0268 (State Route 268 and hereinafter referred to as the Blackburn Tunnel). 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). The Brady’s Bend crossing is not at issue in this cost allocation hearing, as all matters related to that crossing have been resolved.

Pursuant to an Interim Order entered on January 4, 2021, B&LE was directed, at its initial cost and expense, to prepare and submit to the Commission and all Parties of record, an engineering report that detailed the condition of the Blackburn Tunnel.

On January 3, 2022, B&LE filed a Motion for Summary Judgment and asserted that B&LE is 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 asserts, that it is not a concerned party because it no longer owns the property that included the Blackburn Tunnel, nor does it enjoy an substantial ongoing use of the facility.

ALJ Long issued a Recommended Decision on August 1, 2022, denying the Motion for Summary Judgment and concluded that the Blackburn Tunnel is not safe and requires prompt remediation. In addition, 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 responsibilities at a future hearing.

B&LE filed Exceptions to the Recommended Decision on August 19, 2022.

On December 8, 2022, the Commission denied the Exceptions of B&LE and adopted ALJ Long’s Recommended Decision.

B&LE completed the Blackburn remediation project and notified the Commission and all parties accordingly.

On May 7, 2024 and pursuant to the Commission’s directive, B&LE filed a petition requesting a cost allocation hearing.

## **II. ISSUES TO BE ADDRESSED**

1. Allocation of final costs for repair of Blackburn Tunnel; and
2. Determination of necessity of and responsibility for future maintenance responsibilities.

### **III. B&LE POSITION STATEMENT**

B&LE reiterates its position expressed in their previous submissions that under state law, it is not a “concerned party” within the meaning of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* (Code). B&LE also asserts, that it was not a concerned party because it no longer owns the property that included the Blackburn Tunnel, nor does it enjoy a substantial ongoing use of the facility. The holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation calculus of the instant Investigation relative to B&LE.

### **IV. PROPOSED DISCOVERY PLAN AND SCHEDULE**

B&LE proposes that discovery be conducted consistent with the Commission’s regulations at 52 Pa. Code § 5.321, *et seq.*

### **V. PROPOSED WITNESSES**

1. Mark Paull  
Senior Manager Structures  
Canadian National Railway Co.  
17641 South Ashland Avenue  
Homewood IL 60430  
Mr. Paull will testify as to the initial and remediation costs incurred by B&LE on the Blackburn Tunnel.
  
2. Chris Hensly,  
Bridge Supervisor  
Canadian National Railway Co.  
17641 South Ashland Avenue  
Homewood IL 60430  
Mr. Hensly will testify as to the construction aspects of the Blackburn Tunnel repair and remediation.

B&LE reserves the right to present additional witnesses and testimony if deemed necessary.

### **VI. PROPOSED LITIGATION SCHEDULE**

B&LE concurs with the litigation schedule proposed by PennDOT as follows:

1. Written Direct testimony due on August 16, 2024.

2. Written Rebuttal testimony due on September 13, 2024.
3. Hearing to occur the week of October 1, 2024.
4. Briefing Schedule to be established at the hearing.

Respectfully submitted,

BURNS WHITE LLC

Dated: June 28, 2024

By: 

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Route SR0068 formally crosses, 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 **Preconference Memorandum** upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (related to service by a party).

**Via First Class Mail only:**

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**Via Electronic Mail only:**

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BURNS WHITE LLC



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