



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

October 25, 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 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County.

Docket No. I-2019-3012769

I&E's Main Brief

Dear Secretary Chiavetta:

Enclosed please find the **Main Brief** of the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement in the above-referenced proceeding.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'G. Rosul', is written over a light blue horizontal line.

Grant Rosul
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 318204
(717) 783-5243
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GR/ac
Enclosures

cc: As per Certificate of Service
Daniel R. Helfrich, P.E. (*via email* - dhelfrich@pa.gov)

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

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Grant Rosul
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Dated: October 25, 2024

I. PROCEDURAL HISTORY

On December 8, 2022, the Commission issued an Opinion and Order adopting the Recommended Decision of Administrative Law Judge Mary J. Long, issued August 1, 2022, and ordered that the Bessemer & Lake Erie Railroad Company (“Bessemer & Lake Erie” or “B&LE”) undertake remediation work on the Blackburn Tunnel at its initial cost and expense.¹

As part of the December 8, 2022, Opinion and Order, it was noted 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.”²

On September 26, 2023, B&LE submitted construction plans to the Commission.

On October 10, 2023, a Secretarial Letter was issued by the Commission approving the Means and Methods proposal and the engineering plan submitted by B&LE and directed B&LE to “submit completed detailed “As-Built” plans following the completion of the construction project.”

On April 2, 2024, B&LE reported to the Commission that work on the Blackburn Tunnel was completed by its contractor on March 29, 2024.

On May 7, 2024, B&LE filed a Petition requesting a hearing for the purpose of allocating costs associated with the Commission’s Order entered December 8, 2022.

On July 9, 2024, the Honorable John M. Coogan, Administrative Law Judge, issued a

¹ *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 (Dec. 8, 2022, Opinion and Order at p. 31).*

² *Id.* at p. 37.

Scheduling Order, directing that Direct Testimony or a Status Update be provided to the Court by August 16, 2024, and that Rebuttal Testimony or a Joint Stipulation of Facts be filed on September 13, 2024.

On August 6, 2024, the Parties jointly provided a status update to ALJ Coogan.

On September 13, 2024, the Parties jointly filed a Joint Stipulation of Facts relating to the allocation of costs of the work done to properly close the below-grade crossing known as the Blackburn Tunnel.

I&E submits this Main Brief in accordance with the briefing schedule that was established at the conclusion of the evidentiary hearing and documented through the March 2, 2022 Briefing Order.³ Proposed Findings of Fact, proposed Conclusions of Law, together with legal citations proposed Ordering Paragraphs, are submitted as Appendices A, B, and C, respectively.

II. STATEMENT OF THE CASE

The Commission instituted this investigation for the purpose of determining all matters relating to the abolition and safety of two crossings (State Route 68 and State Route 268) on an abandoned line of the Bessemer & Lake Erie Railroad Company. The public crossing at State Route 268 was a railroad tunnel approximately 744-feet in length made of bare rock with timber bent supports that was originally constructed in 1906.⁴ The tunnel's interior was lined with corrugated metal in 1975 and the railroad track and ties were removed from the structure at some point in the past.⁵

At the time of the initial investigation, access to the tunnel was limited by heavy

³ N.T. pgs. 155-158; *see also* Briefing Order, dated March 2, 2022.

⁴ I&E Statement No. 1, pgs. 2-3; B&LE Statement No. 3, pg. 3.

⁵ I&E Statement No. 1, pgs. 2-3; B&LE Statement No. 3, pg. 3.

vegetation, steep slopes, and ponding of water at both the inside and outside of the tunnel.⁶

The east portal of the tunnel was visibly cracked and deteriorated above the tunnel, and individuals peering at the east portal were able to see evidence of a complete collapse at approximately 100-feet inside the tunnel entrance.⁷ The west portal was also visibly cracked and deteriorated, and individuals could see that portions of the corrugated steel liner were deformed, which indicated some degree of structural failure in that area.⁸

B&LE originally filed an application on or about May 31, 2001 with the Commission, Docket No. A-00117858, for approval to abolish 29 public crossings, including the subject tunnel where the railroad crosses State Route 268 below grade.⁹ However, the April 30, 2002, Secretarial Letter granting the application did not include the final disposition of the tunnel.¹⁰

At the conclusion of the investigation and ensuing litigation, the Honorable Mary D. Long, Administrative Law Judge, issued a Recommended Decision in which she recommended that the “Bessemer & Lake Erie Railroad, at its initial cost and expense, shall furnish all materials and perform all work required to alter the public crossing at State Route

⁶ I&E Statement No. 1, pg. 3; B&LE Statement No. 3, pg. 5; B&LE Exhibit 14, Appendix D.

⁷ B&LE Statement No. 3, pg. 4; B&LE Exhibit 14.

⁸ B&LE Statement No. 3, pgs. 4-5; B&LE Exhibit 14.

⁹ I&E Statement No. 1, pg. 4; *see generally Application of Bessemer and Lake Erie Railroad Company for Approval of the Abolition of Twenty-Eight Crossings where Applicant's Former Hilliard's Branch and Western Allegheny Branch are Intersected by Public Highways and Streets in the Townships of Marion, Clay, Concord, and Fairview in Butler County and in the Township of Brady's Bend in Armstrong County and Application for the Abolition of One Tunnel Located in the Township of Fairview in Butler County*, Docket No. A-00117858.

¹⁰ I&E Statement No. 1, pg. 4; N.T. pgs. 93, 107-108 (Mr. Helfrich explained that the April 30, 2002 Secretarial Letter outlined specific work that needed to be completed on all the crossings in the application except for the tunnel, no work was ordered to be completed on the tunnel. Thus, the February 1, 2012 Secretarial Letter stating that the work has been completed and that the matter could be closed did not include the tunnel); *see generally Application of Bessemer and Lake Erie Railroad Company for Approval of the Abolition of Twenty-Eight Crossings where Applicant's Former Hilliard's Branch and Western Allegheny Branch are Intersected by Public Highways and Streets in the Townships of Marion, Clay, Concord, and Fairview in Butler County and in the Township of Brady's Bend in Armstrong County and Application for the Abolition of One Tunnel Located in the Township of Fairview in Butler County*, Docket No. A-00117858.

268 by dewatering the subject tunnel structure and portals 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.”¹¹

It was recommended that the Pennsylvania Department of Transportation (“PennDOT”), “at its initial cost and expense, to furnish all material and do all work necessary to establish and maintain any detours or traffic controls required to properly and safely accommodate highway traffic during the Tunnel Fill Project.”¹²

ALJ Long also recommended that “all work necessary to complete the alteration of the subject crossing at State Route 268 be done in a manner satisfactory to this Commission within 12 months of the entry of an Order approving the work described herein....”¹³

ALJ Long recommended that “the Commission order the full closure of the Blackburn Tunnel, but reserve the final allocation of costs for a later proceeding.”¹⁴

The Commission, by Opinion and Order dated December 8, 2022, adopted the Recommended Decision of ALJ Long.¹⁵

On August 29, 2023, B&LE submitted its Means and Methods proposal and engineering sketch plan to all parties.¹⁶

The plan was approved on October 10, 2023, construction began on October 23,

¹¹ ALJ Rec. Decision at 36.

¹² Joint Stipulation of Facts, Sept. 16, 2024, Para. 12.

¹³ ALJ Rec. Decision at 38.

¹⁴ ALJ Rec. Decision at 32-33.

¹⁵ *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 (Dec. 8, 2022, Opinion and Order at p. 31).

¹⁶ Joint Stipulation of Facts, Sept. 16, 2024, Para. 7.

2023, and construction was completed on March 29, 2024.¹⁷

The costs incurred by PennDOT to comply with the traffic control directive totaled \$27,189.05.¹⁸

The costs incurred by B&LE to complete the Tunnel Fill Project totaled \$2,770,912.00.¹⁹ The costs incurred by B&LE to complete the Engineering Report totaled \$19,584.10.²⁰

III. BURDEN OF PROOF

Section 315 provides that “[i]n any proceeding upon the motion of the commission, involving the service or facilities of any public utility, the burden of proof to show that the service and facilities involved are adequate, efficient, safe, and reasonable shall be upon the public utility.”²¹ Accordingly, Bessemer & Lake Erie, as the public utility responsible for the tunnel, bears the burden of proving, by a preponderance of evidence, the allocation of costs for the abolishment of the below-grade crossing.²² “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”²³

IV. SUMMARY OF ARGUMENT

The allocation of costs for alteration or abolishment of a rail crossing is within the discretion of the Commission. B&LE should bear the cost for the remediation, closure, and

¹⁷ Joint Stipulation of Facts, Sept. 16, 2024, Paras. 8-10.

¹⁸ Joint Stipulation of Facts, Sept. 16, 2024, Para. 13.

¹⁹ Joint Stipulation of Facts, Sept. 16, 2024, Para. 11.

²⁰ Joint Stipulation of Facts, Sept. 16, 2024, Para. 4.

²¹ 66 Pa.C.S. § 315.

²² 66 Pa.C.S. §§ 315 and 332(a); *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

²³ *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

abolishment of the below-grade crossing of its rail line at State Route 268 in Fairview Township, Butler County. B&LE is the party which benefitted from the crossing when it was in operation. These benefits included using the rail line to move freight and avoid costs and liabilities associated with an at-grade crossing. Further, B&LE was responsible for the deterioration of the tunnel. The Pennsylvania Department of Transportation should bear its own costs for traffic control at the crossing.

V. ARGUMENT

A. LEGAL STANDARD

In apportioning costs between parties for the repair, maintenance, alteration, or abolishment of a rail crossing, “the PUC is not limited to any fixed rate with respect to the allocation of costs, but instead, may take all relevant factors into consideration.”²⁴ The allocation of costs between the parties is within the discretion of the PUC, but such allocation must be just and reasonable.”²⁵

B. THE COST BORNE TO REMEDIATE THE BLACKBURN TUNNEL SHOULD BE ALLOCATED TO BESSEMER & LAKE ERIE

Among the factors which the Commonwealth Court noted as relevant to the assignment of costs and maintenance responsibilities, as noted in *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995), are the following:

- 1) The party that originally built the crossing, and whether the roadway existed before the construction of the crossing;
- 2) The party that owned and maintained the crossing;
- 3) The relative benefit initially conferred on each party with the construction of the crossing;

²⁴ *City of Philadelphia v. Pa. P.U.C.*, 626 A.2D 1298, 1301 (Pa. Cmwlth. 1996).

²⁵ *Id.* (citing *Borough of South Greensburg v. Pa. P.U.C.*, 544 a.2D 82 (Pa. Cmwlth. 1988)).

- 4) Whether either party is responsible for the deterioration of the crossing resulting in 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.²⁶

In addition, the Commission has considered the following: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation.²⁷ These factors are neither mandatory nor exclusive of other considerations, and the Commission's allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.²⁸

Notably, ownership is not a controlling factor considered in allocating costs and maintenance responsibilities.²⁹ Most recently, the Commission reinforced the position that ownership is not the sole controlling factor in allocating cost.³⁰ In *Application of CSX Transportation, Inc.*, Docket No. A-2019-3013783, the Commission noted that CSXT and the City of Philadelphia put forth arguments about which party owns the bridge, but stated that it would not consider or address that issue.³¹ The Commission instead agreed with the

²⁶ *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995); see also *AT&T v. Pa. P.U.C.*, 558 Pa. 290, 737 A.2d 201 (1999) (when allocating costs of constructing, removing or altering a rail-highway crossing, the PUC is not confined to any one rate or formula; it must consider all relevant factors).

²⁷ *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981).

²⁸ *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793; *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996).

²⁹ *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979) (“ the issue of costs of future maintenance and repair is separable from the issue of compensation for property rights appropriated.”).

³⁰ *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783 (Opinion and Order dated February 3, 2022) (Petition for Reconsideration denied November 10, 2022).

³¹ *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783, fn. 5 (Opinion and Order dated February 3, 2022).

ALJ's conclusion that ownership is not a controlling factor considered in allocating costs or maintenance responsibilities. The Commission affirmed the ALJ's conclusion that CSXT was responsible for the bridge's deterioration over the years due to lack of maintenance and was therefore properly assessed maintenance responsibilities.³²

Here, B&LE operated through the subject tunnel for decades and was the party that benefited the most by having a safe and operable tunnel to efficiently move freight and commodities without the liability of an at-grade crossing.³³ B&LE has not inspected or maintained the tunnel since 2002 and is the sole party responsible for the deterioration of the tunnel.³⁴

Moreover, Anna Marie Sherwin ("Ms. Sherwin"), one of the property owners who now owns property above the tunnel, testified at the January 18, 2022, hearing before ALJ Long that B&LE, during a meeting regarding the sale of the surrounding land, told her that B&LE was responsible for the tunnel and would fulfill the requirements of the Commission.³⁵ Ms. Sherwin was also advised by B&LE representatives that her and the other landowners had no right to the tunnel and that B&LE was going to fill the tunnel.³⁶

³² *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783, pgs. 21-22, fn. 5 (Opinion and Order dated February 3, 2022) (citing *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979)), (Petition for Reconsideration pending whereas CSXT argues that the City of Philadelphia should be allocated costs for maintenance of the bridge superstructure, no argument made regarding ownership.).

³³ I&E Statement No. 1, pg. 3; N.T. pg. 87.

³⁴ *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 (Dec. 8, 2022, Opinion and Order), p. 36 ("B&LE admitted to not maintaining or inspecting the Blackburn Tunnel since 2002.").

³⁵ N.T. pg. 140.

³⁶ N.T. pgs. 141-142.

It was undisputed that the tunnel was deteriorated, not structurally sound, and at risk of collapse, as evident by the testimony of all parties at the January 18, 2022, hearing before ALJ Long, and the pictures showing the most recent collapse at the eastern portal of the tunnel.

At the same hearing, Dan Helfrich, P.E., credibly opined that the subject tunnel portal areas should be permanently sealed with a concrete or grouted rock bulkhead, and the tunnel filled with suitable material such as foam sand, flowable fill, or other acceptable material to encompass the whole void space within the entire limits of the subject tunnel.³⁷ This solution would prevent potential subsidence over the entire length of the tunnel, eliminate potential access to the tunnel, and remove the potential for trespassing.³⁸ B&LE's own witness testified that it defers to the recommendations of I&E and PennDOT for the disposition of the tunnel from an engineering standpoint.³⁹

ALJ Long agreed and ordered that B&LE, at its initial cost and expense, perform the work necessary to alter the public crossing known as the Blackburn Tunnel by "dewatering the subject tunnel structure and portals 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."⁴⁰

Additionally, ALJ Long found that "[i]t is generally accepted that grade-separated crossings create an inherent benefit to railroads," including "relief from the liability for accidents, reduced insurance costs, and the elimination of the need for safety features such as

³⁷ I&E Statement No. 1, pg. 9.

³⁸ I&E Statement No. 1, pg. 9.

³⁹ B&LE Statement No. 1, pg. 11.

⁴⁰ ALJ Rec. Decision at p. 36.

signals.” This finding, incorporated into the Commission’s Opinion and Order, went on to note that “B&LE benefitted from the crossing because the tunnel permitted the transportation of freight unimpeded by the public safety constraints that are created by the maintenance of an at-grade crossing.”⁴¹

ALJ Long also found that B&LE “benefitted from the cost savings resulting from its failure to maintain the crossing,” and that the tunnel had not even been inspected since at least 2001, when B&LE filed its application to abandon the crossing (although no documentation of any inspection in 2001 was ever produced by B&LE).⁴²

This would not be the first time the Commission ordered a rail company to fill in a tunnel and bear the costs of doing so. In *In re: Application of Penn Central Transportation Company*, Docket No. A-98891, the Commission found that the tunnel in that matter, which was previously abandoned through the Interstate Commerce Commission, was constructed and placed after the construction of the Turnpike for the sole benefit of the railroad, and that the benefits from utilizing the tunnel have been exclusively realized by the railroad company and it would be inconsistent to assess the cost of backfilling the tunnel to the users of the Turnpike.⁴³ Accordingly, the Commission ordered the railroad company, **at its sole cost and**

⁴¹ ALJ Rec. Decision at p. 33.

⁴² REC. Decision at p. 33.

⁴³ *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County*, Docket No. A-98891 (Order entered May 8, 1975).

expense, to completely backfill the tunnel with suitable material to fill all voids and to seal the tunnel openings with sand and cement grout.⁴⁴

It is clear that B&LE, as the entity responsible for the tunnel's deteriorated condition and the entity which benefited the most from the tunnel's existence, should bear the costs of the work that was performed to remediate and then abolish it.

VI. CONCLUSION

I&E respectfully requests that presiding ALJ Coogan and the Commission find that the Bessemer & Lake Erie Railroad should be ordered to bear the sole cost and expense of the work that was performed to remediate and then abolish the below-grade crossing at SR0268 known as the Blackburn Tunnel.

Respectfully submitted,



Grant Rosul
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Dated: October 25, 2024

⁴⁴ *In re: Application of Penn Central Transportation Company, Debtor, for Approval of the Abolition of (1) the Crossing, at Grade, by the Removal of a Private Industrial Track Connected to Applicant's Track Where It Crosses Township Road No. 770, (2) the Crossings, at Grade, by the Removal of the Track Where It Crosses State Highway Route 64213 and Township Road Nos. 563, 778 and 485, (3) the Crossing, by the Removal of the Track, Where State Highway Route 64134 Crosses Below the Grade of the Track of Said Company and (4) the Crossing, by the Removal of the Track, Where the Pennsylvania Turnpike Crosses Above the Grade of the Track of Said Company, All in Mt. Pleasant Township, Westmoreland County, Docket No. A-98891 (Order entered May 8, 1975).*

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

PROPOSED STATEMENT OF FACTS

1. By Opinion and Order dated December 8, 2022, the Commission adopted the Recommended Decision of Administrative Law Judge Mary D. Long.¹

2. In her Recommended Decision, ALJ Long recommended that the “Bessemer & Lake Erie Railroad, at its initial cost and expense, shall furnish all materials and perform all work required to alter the public crossing at State Route 268 by dewatering the subject tunnel structure and portals 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.”²

3. It was further recommended that “It was recommended that the Pennsylvania Department of Transportation (“PennDOT”), “at its initial cost and expense, to furnish all

¹ *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 (Dec. 8, 2022, Opinion and Order).*

² ALJ Rec. Decision at 36.

material and do all work necessary to establish and maintain any detours or traffic controls required to properly and safely accommodate highway traffic during the Tunnel Fill Project.”³

4. ALJ Long also recommended that “all work necessary to complete the alteration of the subject crossing at State Route 268 be done in a manner satisfactory to this Commission within 12 months of the entry of an Order approving the work described herein....”⁴

5. ALJ Long recommended that “the Commission order the full closure of the Blackburn Tunnel, but reserve the final allocation of costs for a later proceeding.”⁵

6. Further, the ALJ addressed arguments raised by B&LE that it was not a “concerned party” and could therefore not be allocated costs, and found that B&LE was in fact a “concerned party” to the matter of the Blackburn Tunnel.⁶

7. The Commission, in its Opinion and Order, found that “the Recommended Decision is supported by sound legal reasoning and evidence of record,” and explained its reasoning for why B&LE was a “concerned party”

8. On August 29, 2023, B&LE submitted its Means and Methods proposal and engineering sketch plan to all parties.⁷

9. The plan was approved on October 10, 2023, construction began on October 23, 2023, and construction was completed on March 29, 2024.⁸

³ Joint Stipulation of Facts, Sept. 16, 2024, Para. 12.

⁴ ALJ Rec. Decision at 38.

⁵ ALJ Rec. Decision at 32-33.

⁶ ALJ Rec. Decision at 23-26.

⁷ Joint Stipulation of Facts, Sept. 16, 2024, Para. 7.

⁸ Joint Stipulation of Facts, Sept. 16, 2024, Paras. 8-10.

10. The costs incurred by PennDOT to comply with the traffic control directive totaled \$27,189.05.⁹

11. The costs incurred by B&LE to complete the Tunnel Fill Project totaled \$2,770,912.00.¹⁰

12. The costs incurred by B&LE to complete the Engineering Report totaled \$19,584.10.¹¹

13. Engineer Daniel Helfrich, P.E., from the Commission’s Rail Safety Division, conducted a Final Inspection of the Tunnel Fill Project on May 8, 2024. After conducting the Final Inspection, it is the position of the Commission’s Rail Safety Division that the work performed as part of the Tunnel Fill Project was completed and is satisfactory.¹²

14. Four property owners were impacted by the Tunnel Fill Project. They are: Ronald E. Stitt, Anne Marie Sherwin, Patricia A. Tascarella, and Kay D. Barnhart (collectively, “the Property Owners”). The property owners are satisfied with the work performed, and after the adjudication of final costs, the future costs and maintenance of the former tunnel will be borne by the individual Property Owners.¹³

15. On May 7, 2024, B&LE filed a Petition Requesting a Hearing for the purpose of allocating costs associated with the Commission’s Order entered December 8, 2022, in this matter.¹⁴

⁹ Joint Stipulation of Facts, Sept. 16, 2024, Para. 13.

¹⁰ Joint Stipulation of Facts, Sept. 16, 2024, Para. 11.

¹¹ Joint Stipulation of Facts, Sept. 16, 2024, Para. 4.

¹² Joint Stipulation of Facts, Sept. 16, 2024, Para. 14.

¹³ Joint Stipulation of Facts, Sept. 16, 2024, Para. 15-16, JS-4.

¹⁴ Petition of Bessemer and Lake Erie Railroad Company Requesting a Hearing for the Purpose of Allocating Costs Associated with the Commission's Opinion and Order entered December 8, 2022.

16. On July 25, 2024, a Supplemental Scheduling Order was issued, removing Fairview Township and Butler County as parties to this proceeding.¹⁵
17. On August 14, 2024, a Second Supplemental Scheduling Order was issued, removing Kay Barnhart as a party to this proceeding.¹⁶
18. On July 2, 2024, a prehearing conference was held, which included counsel for I&E, PennDOT, and B&LE.
19. On July 25, 2024, a Supplemental Scheduling Order was issued, removing Fairview Township and Butler County from the proceeding.¹⁷
20. On August 14, 2024, a Second Supplemental Scheduling Order was issued, removing Kay Barnhart from the proceeding.¹⁸
21. On September 16, 2024, the Joint Stipulation of Facts between the parties was entered into the record.¹⁹
22. On September 16, 2024, ALJ Coogan issued a briefing order, directing that Main Briefs be filed by October 25, 2024.²⁰
23. “The lack of maintenance by B&LE over the past twenty years has contributed to the Blackburn Tunnel’s deterioration and partial collapse.”²¹

¹⁵ Order on Briefs and Closing the Record, Sept. 16, 2024.

¹⁶ *Id.*

¹⁷ Supplemental Scheduling Order, July 25, 2024.

¹⁸ Second Supplemental Scheduling Order, August 14, 2024.

¹⁹ Order Admitting the Joint Stipulation of Facts to the Record, Sept. 16, 2024.

²⁰ Order on Briefs and Closing the Record, Sept. 16, 2024.

²¹ *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 (Dec. 8, 2022, Opinion and Order), pp. 35-36.*

24. “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.”

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

PROPOSED CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission (“Commission”) has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. §§ 2702 and 2704.
2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, and 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 and 2704.
3. As the moving party, Bessemer & Lake Erie Railroad bears the burden of proving, by a preponderance of evidence, the allocation of costs for the abolishment of the below-grade crossing of its railroad at State Route 268.¹

¹ 66 Pa.C.S. §§ 315 and 332(a); *see also Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 n. 1 (Pa. Cmwlth. 1990); *Borough of Bridgewater v. Pa. P.U.C.*, 124 A.2d 165 (Pa. Super. 1956); *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237 (Pa. Cmwlth. 2008).

4. “A preponderance of the evidence means only that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party.”²

5. In apportioning costs between parties for the repair, maintenance, alteration, or abolishment of a rail crossing, “the PUC is not limited to any fixed rate with respect to the allocation of costs, but instead, may take all relevant factors into consideration.”³

6. The allocation of costs between the parties is within the discretion of the PUC, but such allocation must be just and reasonable.”⁴

7. The relevant factors for evaluating the assignment of costs and maintenance responsibilities are:

- a. The party that originally built the crossing, and whether the roadway existed before the construction of the crossing;
- b. The party that owned and maintained the crossing;
- c. The relative benefit initially conferred on each party with the construction of the crossing;
- d. Whether either party is responsible for the deterioration of the crossing resulting in the need for its repair, replacement or removal;
- e. The relative benefit that each party will receive from the repair, replacement or removal of the crossing.⁵

² *Energy Conservation Council of Pennsylvania v. Pa. P.U.C.*, 995 A.2d 465, 478 (Pa. Cmwlth. 2010).

³ *City of Philadelphia v. Pa. P.U.C.*, 626 A.2D 1298, 1301 (Pa. Cmwlth. 1996).

⁴ *Id.* (citing *Borough of South Greensburg v. Pa. P.U.C.*, 544 a.2D 82 (Pa. Cmwlth. 1988)).

⁵ *Greene Township v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995); *see also AT&T v. Pa. P.U.C.*, 558 Pa. 290, 737 A.2d 201 (1999) (when allocating costs of constructing, removing or altering a rail-highway crossing, the PUC is not confined to any one rate or formula; it must consider all relevant factors).

8. The Commission has also considered the following: (1) the benefits to the utility and its ratepayers; (2) the availability of state or federal funding for the project; (3) the placing of the costs upon the party responsible for the situation; and (4) the equities of a particular situation.⁶ These factors are neither mandatory nor exclusive of other considerations, and the Commission’s allocation of cost will stand as long as the allocation is just and reasonable and has a sound legal and factual basis.⁷

9. Ownership is not a controlling factor considered in allocating costs and maintenance responsibilities.⁸

⁶ *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981).

⁷ *AT&T v. Pa. P.U.C.*, 737 A.2d 201, 209 (Pa. 1999); *Wheeling & Lake Erie Railway Co.*, 778 A.2d at 793; *Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996).

⁸ *Trustees of Property of Penn Central Transportation Company v. United States Ry. Assoc.*, 463 F. Supp. 1321, 1328 (Special Ct. 1979) (“the issue of costs of future maintenance and repair is separable from the issue of compensation for property rights appropriated.”); *Application of CSX Transportation, Inc. for Approval of the Abolition of the Crossing (DOT 140 634 G) where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc. located in the City of Philadelphia, Philadelphia County, and the allocation of cost thereto*, Docket No. A-2019-3013783 (Opinion and Order dated February 3, 2022) (Petition for Reconsideration denied November 10, 2022).

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

PROPOSED ORDERING PARAGRAPHS

1. That Bessemer & Lake Erie Railroad shall be allocated its own costs, already incurred, for the remediation, closure, and abolishment of the below-grade crossing at State Route 268 in Fairview Township, Butler County, known as the Blackburn Tunnel.
2. That the Pennsylvania Department of Transportation shall be allocated its own costs, already incurred, for the traffic control devices utilized during the Tunnel Fill Project.
3. That the Property Owners, after the entry of a final Commission Order allocating costs and relinquishing jurisdiction, shall be responsible for the future ongoing maintenance of the Blackburn Tunnel.

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and Lake Erie Railroad in Bradys Bend :
Township, Armstrong County :

CERTIFICATE OF SERVICE

I hereby certify that I have this day, October 25, 2024, served a true copy of the foregoing **Main Brief of the Bureau of Investigation and Enforcement**, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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