



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

October 25, 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 *Cost Allocation Main Brief* 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", written over 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 : I-2019-3012769  
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 :

**COST ALLOCATION MAIN BRIEF OF THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION**



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DATED: October 25, 2024

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## STATEMENT OF THE CASE

### I. HISTORY OF THE PROCEEDING

On May 31, 2001, Bessemer and Lake Erie Railroad Company (“B&LE”) filed an application with the Pennsylvania Utility Commission (“Commission”) to abolish 29 at-grade and separated-grade crossings at various locations in Armstrong and Butler Counties. *See* Commission Docket No. A-00117858. Overall, 27 of the 29 crossing were approved to be abolished. The crossing where State Route (“SR”) 0268 crossed over a railroad tunnel formerly used by B&LE in Fairview Township, Butler County (DOT No. 051 728 M) (“Blackburn Tunnel”) and where SR0068 formerly crossed, below grade, the B&LE track in Brady’s Bend Township, Armstrong County (DOT No. 051 730 N) (“Brady’s Bend”) (collectively hereinafter referred to as the “Crossings”) were the two not approved to be abolished.

In 2002, B&LE sold a 394-acre tract of land that encompassed the Brady’s Bend and the Blackburn Tunnel to a private non-railroad entity, the Western Allegheny Landowners’ Association (“WALA”), which later subdivided the tract into parcels and distributed the parcels to individual landowners. Following the sale of the land to WALA, B&LE physically dismantled and removed the rails and ties from the tracks. B&LE did not provide notice of the 2002 sale or dismantling of the railroad tracks to the Commission or the Department of Transportation.

In 2004, the Pennsylvania Department of Transportation (“Department”), with the permission of B&LE, removed the Brady’s Bend bridge structure to alleviate safety concerns and realigned the roadway at its sole cost and expense.

In 2018, in response to a local resident’s complaint about the collapse of the Blackburn Tunnel, the Department contacted the Commission concerning the formal disposition of the Crossings. Following an investigative field conference held on June 26, 2018, on October 3, 2019, the Commission initiated the within investigation docket for the purpose of determining all

matters relating to the abolition and safety of the Crossings, what work would be performed at the Crossings, and the allocation of costs for any such work.

On or about November 12, 2021, a joint stipulation was entered and filed with the Commission whereby all parties agreed that the Brady's Bend crossing should be formally abolished and requested that the Commission issue an Opinion and Order effectuating the abolishment, with the Department agreeing to maintain the roadway within its right-of-way at Brady's Bend at its sole cost and expense.

On or about January 3, 2022, B&LE filed a Motion for Summary Judgment. At the January 18, 2022 hearing concerning the Commission's investigation, the parties agreed that the Department and the Commission's Bureau of Investigation & Enforcement ("I&E") would respond to the Motion within their main briefs following the hearing.

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 to complete the work of filling in the tunnel (Tunnel Fill Project). 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 for the Tunnel Fill Project 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 for the Tunnel Fill Project. On May 29, 2024, ALJ John M. Coogan (“ALJ Coogan”) ordered a prehearing conference to occur on July 2, 2024, with prehearing memorandums due on or before June 28, 2024. Prehearing memorandums were filed and during the prehearing conference on July 2, 2024, a procedural schedule was agreed upon where direct testimony or a status report would be due on August 16, 2024, rebuttal testimony or joint stipulations of facts would be due on September 13, 2024, and an evidentiary hearing would be held on October 2, 2024.

On August 6, 2024, the parties held a brief status conference to discuss the Joint Stipulations of Fact. The parties filed a status report by way of draft joint stipulations of facts by August 16, 2024. The parties filed a Joint Stipulation of Facts on September 13, 2024. On September 16, 2024, ALJ Coogan issued an order admitting the joint stipulations of fact into the record. ALJ Coogan also ordered main briefs be due by October 25, 2024 and reply briefs be due by November 4, 2024.

This matter is before the Commission to determine the cost allocation of the Tunnel Fill Project for the Blackburn Tunnel.

## **II. POSITION OF THE PARTIES**

The only remaining issue for the Commission’s consideration is who shall be allocated the costs incurred for Tunnel Fill Project at the Blackburn Tunnel, including costs incurred for the 1)

AECOM Engineering Report; 2) Swank Construction costs; and 3) traffic control costs<sup>1</sup>.

B&LE takes the position that none of the costs should be allocated to them because they are not a concerned party and the Surface Transportation Board (“STB”) approved B&LE’s Notice of Exemption through Orders filed on October 10, 2000, and on January 17, 2001, authorizing the abandonment and discontinuance of service through B&LE’s Western Allegheny Branch, including the Blackburn Tunnel. Additionally, B&LE sold the property where the Blackburn Tunnel lies in 2002 so they argue they no longer have a property interest in the Blackburn Tunnel and therefore, should not be liable for any costs related to the Blackburn Tunnel.

I&E takes the position that the costs for the engineering report and Tunnel Fill Project should be allocated to B&LE because under the Commission, B&LE is responsible for the inspection, maintenance, and costs associated with the upkeep of the Blackburn Tunnel and B&LE cannot simply sell their land to ignore their obligations to the public crossing. I&E takes the position that the Department should bear the costs incurred for traffic control during the Tunnel Fill Project.

The Department takes the position that all costs incurred for the engineering report, Tunnel Fill Project, and traffic control, should be allocated to B&LE. B&LE benefitted the most from the separated crossing from its initial construction and is primarily responsible for the deterioration. Therefore, it is just and reasonable to allocate all costs to B&LE.

## **DISCUSSION**

### **III. SUMMARY**

It is well established that the Public Utility Commission has jurisdiction over rail-highway crossings. 66 Pa.C.S. § 2702. The Commission also has the exclusive authority to allocate the costs related to the creation, maintenance, repair, replacement, or removal of a crossing. 66 Pa.C.S. § 2704(a). In evaluating a rail-highway matter, the Commission is not limited to any fixed rule but

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<sup>1</sup> Responsibility for future maintenance is not at issue because the parties agreed in the Joint Stipulations of Fact that the property owners would be responsible.

must take all relevant factors into consideration, with the fundamental requirement being that its order is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999). Reviewing courts will not overturn an allocation of costs unless it is unjust or unreasonable. *Phila. v. Pa. P.U.C.*, 676 A.2d 1298 (Pa. Cmwlt. 1995).

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:

- 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 conferred on each party with the construction of the crossing;
- d. whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal; and
- e. the relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

*N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlt. 2008) (citing *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlt. 1995)). The Commission is not required to set forth an analysis of these five factors since such “a practice . . . would hold PUC to a more rigorous standard in expressing its reasons for a cost allocation determination [and] would unnecessarily infringe upon the discretionary aspect of [its] decision” *Millcreek Twp. v. Pa. P.U.C.*, 753 A.2d 324 (Pa. Cmwlt. 2000) (quoting *AT&T v. Pa. P. U. C.*, 737 A.2d 201 (1999)). Overall, the Commission has wide latitude “to determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa v. Pa P.U.C.*, 672 A.2d 352, 355 (Pa. Cmwlt. 1995).

**IV. IT IS JUST AND REASONABLE FOR THE PUBLIC UTILITY COMMISSION TO ALLOCATE THE COSTS OF FILLING IN THE BLACKBURN TUNNEL CROSSING TO BESSEMER AND LAKE ERIE RAILROAD.**

- a. Costs should be assigned to the railroad because an existing state route was present before Bessemer and Lake Erie Railroad or its predecessor-in-interest constructed the Blackburn Tunnel.**

The initial factor that the Commission should consider is: “[t]he party that originally built the crossing.” *Greene Twp. Bd. of Supervisors* at 619 citing *Dep’t of Transp. v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). In *Dep’t of Transp.*, the Commonwealth Court held that it was unreasonable for the Commission to allocate costs associated with relocating railroad facilities made necessary by a bridge rehabilitation project onto the County and Township involved because, in short, the railroad had built the subject bridge and they should assume the costs. *Dep’t of Transp.* at 533. In each case before it, the Commission may consider any one of many factors; however, the original construction of the crossing has been relied upon in numerous cases. *See Id.*; *Borough of Bridgeville v. Allegheny County.*, Docket No. C-79091518, 1991 Pa. PUC LEXIS 82 (Order entered April 29, 1991). Indeed, where a party constructed a crossing for its own benefit, it would be unfair to allocate costs of removal or maintenance regarding the crossing to another entity who did not benefit from the construction of the crossing. Another factor to consider is whether the road existed before or after the construction of the crossing. *Greene Twp. Bd. of Supervisors* at 619 (Pa. Cmwlth. 1995).

B&LE (or its predecessor-in-interest) constructed the Blackburn Tunnel crossing in 1906. Dep’t St. 1, p. 3, lines 16–20; I&E St., Daniel Helfrich, p. 2, lines 20–22; B&LE St., Daniel Radle, p. 3, line 19. The tunnel was constructed under an existing state route. Dep’t St.1, p. 3, lines 16–20; Dep’t Ex. C; N.T. at 99, lines 18–23. The Department maintained that existing state route for approximately 40 years without the presence of a crossing or any issues that would arise due to the presence of a crossing. N.T. at 119, lines 15-18; Dep’t. Ex. C. Because there was already an existing state route, the Blackburn Tunnel was not erected to benefit the Department. The railroad

line was utilized by B&LE until 1998 and abandoned in January of 2001. Dep't St. 1, p.3, lines 18-19; B&LE St., Michael Barron, p. 3, lines 4-6; p. 4, lines 3-6. In the present case, the fact that B&LE (or its predecessor-in-interest) is responsible for the original construction of the crossing must be heavily weighed. The un rebutted evidence presented demonstrates that the tunnel was owned and operated by B&LE.

**b. Costs should be assigned to the railroad because B&LE and its predecessor-in-interest received the initial benefits of the construction of the rail line and tunnel.**

The Commission can consider the initial benefits of the crossing between the parties. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). In the present case, it is clear that the railroad received all of the initial benefits of the crossing. N.T. at 93, line 25; 94, lines 1-13; 108, lines 18-25; 109, lines 1-18; 119, lines 4-12. Courts have found an inherent benefit to railroads from the creation and maintenance of separated grade crossings. See *Consol. R.R. Corp. v. Pa. P.U.C.*, 671 A.2d 248, 251 (Pa. Cmwlth. 1995) ("Clearly, a railroad receives a significant benefit from a grade-separated crossing"). In *Pittsburgh and Lake Erie R.R. Co. v. Pa. P.U.C.*, 556 A.2d 944 (Pa. Cmwlth. 1989), the Commonwealth Court, in affirming the Commission's Order, identified the inherent benefits of separated grade crossings as: "1) relief from liability for accidents and reduced insurance costs, 2) elimination of the need and maintenance for automatic signals, and 3) uninhibited use of the rail line." *Id.* at 946. While the Department also receives some benefit from grade-separated crossings from the elimination of the chance of train-vehicle contact, the primary benefit is clearly for the railroad in cases where the road was in existence prior to the crossing. N.T. at 93, line 25; 94, lines 1-13; 108, lines 18-25; 109, lines 1-18; 119, lines 4-12. This benefits both the rail and roadway users as safety is greatly increased for both and neither are inconvenienced since the grade separation provides for the free movement of trains and vehicles. *Id.* In addition, the lengthy amount of time B&LE and its predecessor-in-

interest utilized and operated the railway must weigh in favor of allocating costs to the railroad. From its construction in 1906 until the abandonment in 2001, B&LE or its predecessor-in-interest received the benefits of the railway. I&E St., Daniel Helfrich, p. 3, lines 10–20; B&LE St., Michael Barron, p. 4, lines 3–6.

As such, the railroad benefitted on a much greater scale than the Department and has since the tunnel was first constructed in 1906. Therefore, it is just and reasonable to allocate costs to B&LE.

- c. **Costs should be assigned to the railroad because B&LE, or its predecessor-in-interest, is primarily responsible for the deterioration of the crossing that has led to the need for replacement or repair.**

The party who is responsible for the deterioration of the crossing is a factor that should be considered in allocating costs. *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995). Additionally, where a railroad was assigned maintenance but failed to properly maintain a crossing, it is not unjust to assign total reconstruction costs to the successor railroad. *Wheeling & Lake Erie Ry. Co. v. Pa. P.U.C.*, 778 A.2d 785, 793 (Pa. Cmwlth. 2001).

In *Wheeling & Lake Erie Ry. Co.*, the railroad's predecessor-in-interest constructed the railroad crossing in 1930. The construction of the bridge was made necessary due to the excavation of a hill by the railroad in order to expand its service through the area. *Id.* at 788-89. At the hearing in 1995 the railroad testified that no maintenance had taken place on the bridge despite maintenance responsibilities being assigned to the railroad. *Id.* The Commission allocated the entire reconstruction costs to the railroad. *Id.* at 790. In appealing the decision, the railroad argued that other parties should bear some of the costs as the railroad should have been notified that repairs were necessary sooner and that there were improper repairs performed to the bridge. *Id.* at 793. In weighing the factors and finding the total allocation of costs to the railroad to be reasoned and articulate, the court stated that since the predecessor railroad had the obligation to properly

maintain the bridge yet allowed the bridge to fall in disrepair, they would dismiss the argument that other entities should have been made to share in the costs. *Id.* at 794.

In the instant case, B&LE or its predecessor-in-interest built the tunnel and was exclusively responsible for its maintenance until 2001 when it was abandoned, and then subsequently sold in 2002. Dep't St. 1, p. 3, lines 16–20; B&LE St., Michael Barron, p. 5, lines 4–18, p. 6, lines 10–23. When the Commission did not grant its request to abolish the crossing, rather than continuing to fulfill its legal duty to obtain the approval, which undoubtedly would have included some degree of repair or maintenance responsibilities, B&LE sold the property without notifying the Commission, the Department, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Department of Environmental Resources, or the Department of Conservation and Natural Resources thereby avoiding any repair or maintenance responsibilities. N.T. at 19–24, 120.

Thus, B&LE realized a substantial cost savings by not maintaining the tunnel since at least 2001, even though there was no Commission order exonerating it from responsibility and received the benefit of payment from the purchasers of the property via a quitclaim deed. B&LE now asserts it bears no responsibility for the deterioration of the tunnel since the 2001 sale and argues it should not bear any costs. B&LE St., Michael Barron, p. 9, lines 14–17, 22–23, p. 10, lines 1–20.

The Commission should follow the precedent in *Wheeling & Lake Erie Ry. Co.* and find that where maintenance would have been assigned to the railroad, the total cost of making the tunnel safe should be assigned to the railroad. *Wheeling, supra.* 778 A.2d 785. Just as in the *Wheeling* case, B&LE and its predecessor-in-interest received the initial benefits from the construction of the tunnel crossing, and the construction of the tunnel was necessary due to the railroad's desired and less costly placement of the rail line under the highway and more consistent with the contours of the land. N.T. at 119, lines 4–14. As in *Wheeling*, because the predecessor railroad had the obligation to properly maintain the bridge yet allowed the bridge to fall in

disrepair, no other entity should have to share in the costs. *Wheeling, supra.* 778 A.2d 785. Similarly, B&LE should not be rewarded for shirking its duty to obtain Commission approval to abolish the crossing, which would have addressed properly maintaining or closing the tunnel in order to ensure its safety to the travelling public.

Moreover, even where maintenance is currently unassigned, the fact that the railroad has not provided any maintenance on structures that it built and profited from for almost a century should be weighed against the railroad. Again, B&LE should not be rewarded for evading its responsibilities. Therefore, this factor should be weighed against the railroad and the Commission should allocate all costs for the Tunnel Fill Project to B&LE.

**d. The equities hold that B&LE should be held responsible for the sole cost and expense of any alterations or abolishment of the crossing.**

The “equities of a particular situation” is a factor that can be considered. *Application of the City of Wilkes-Barre*, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, \*5-\*6 (Order entered April 9, 1981); see also *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992).

In the present matter, equity dictates that it is just and reasonable to assign any cost allocation onto B&LE. The Department’s 50-foot right of way for SR 0268 does not even extend to the tunnel openings. Dep’t St. 1, p. 4, lines 20–23; p. 5, lines 1–21, 12–13; Dept. Ex. C. Also, B&LE was aware of its duty to obtain approval of the abolition of the Blackburn Tunnel crossing in 2001, and instead of giving the required notice and obtaining the necessary approval, it underhandedly sold the property, thereby depriving the Commission and the Department of the ability to fully address the safety of the tunnel. B&LE claims that the Surface Transportation Board’s (“STB”) Orders filed on October 10, 2000, and on January 17, 2001, authorizing the abandonment and discontinuance of service through B&LE’s Western Allegheny Branch, including the Blackburn Tunnel, exonerate B&LE of the costs because the Commission is pre-empted by Federal Law. B&LE

Main Brief, p. 19–20, April 14, 2022. However, the Commission’s authority to authorize and set conditions for the abolition of rail- highway crossings is distinct from the STB's exclusive jurisdiction to regulate rail service or transportation and is therefore not pre-empted by Federal authority. *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlth. 2001). B&LE only completed the Tunnel Fill Project to close the Blackburn Tunnel after being ordered by the Commission to do so. Op. and Order, p. 37, December 8, 2022 (adopting ALJ Long Recommended Decision, August 1, 2022). As such, the Department should bear no responsibility for any expenses relating to the abolishment of Blackburn Tunnel, including flagging costs incurred during the Tunnel Fill Project.

Given the aforementioned factors, it is both just and reasonable for the Commission to require B&LE to bear the sole cost of the Tunnel Fill Project for the Blackburn Tunnel and reimburse the Department for the associated flagging costs.

### **PROPOSED FINDINGS OF FACT**

1. By Secretarial Letter dated April 30, 2002, Docket No. A-00117858, the Commission abolished 27 of 29 crossings on the abandoned line of Bessemer & Lake Erie Railroad Company (“B&LE”) at B&LE’s request. (Dep’t Ex. B).
2. The two remaining crossings that were not abolished by the Commission were the former Kaylor railroad bridge crossing on SR0068 located in Brady’s Bend Township, Armstrong County (“Brady’s Bend”) and the tunnel crossing under SR0268 in Fairview Township, Butler County (“Blackburn Tunnel”). (Dep’t St. 1, p. 2, lines 21–23; p. 3, lines 1–3).
3. Brady’s Bend is the subject of a separate Joint Stipulation amongst the parties pertaining to its disposition and was addressed in ALJ Long’s Recommended Decision and adopted by the Commission to issue a Secretarial Letter officially abolishing the crossing at SR 068. (Joint Stipulation, November 8, 2021; Op. and Order, p. 37, December 8, 2022

(adopting ALJ Long Recommended Decision, August 1, 2022)).

4. The Blackburn Tunnel was established in 1906 when B&LE or its predecessor in interest created a timber bent support tunnel under existing SR0268 for operation of its railway line. (Dep't St. 1, p. 3, lines 16–20; I&E St., Daniel Helfrich, p. 2, lines 20–22; B&LE St., Daniel Radle, p. 3, line 19).
5. The Department owns a 50-foot right of way from the center line of SR0268, which does not extend to the tunnel openings. (Dep't St. 1, p. 4, lines 20–23; p. 5, lines 12–13; Dept. Ex. C).
6. B&LE or its predecessor-in-interest utilized the railway line and received the benefit of the railway until 1998 and was responsible for the maintenance of the Blackburn Tunnel until its abandonment in 2001 and subsequent sale in 2002. (Dep't St. 1, p. 3, lines 16–20, p. 6, lines 1–2; I&E St., Daniel Helfrich, p. 3, lines 10–20; B&LE St., Michael Barron, p. 3, lines 4–6, p. 4, lines 3–6, p. 5, lines 4–7).
7. B&LE conveyed the 394-acre property containing the Blackburn Tunnel via quitclaim deed to the Western Allegheny Landowners Association (WALA). (B&LE St., Michael Barron, p. 5, lines 10–18).
8. WALA conveyed smaller parcels of the property, at issue for this case, to William G. and Kay D. Barnhart, Dean M. and Patricia A. Tascarella, Thomas H. and Anna Marie Sherwin, and Ronald E. and Madeline E. Stitt. (B&LE St., Michael Barron, p. 5, lines 13–18).
9. B&LE benefitted from the construction of the tunnel since it reduced safety risk for the railroad as well as costs savings due to not having to build up or fill the surrounding land at the time of construction for an at-grade crossing. (N.T. at 93, line 25; 94, lines 1–13; 108, lines 18–25; 109, lines 1–18; 119, lines 4–12).
10. B&LE did not provide notice to the Department, the Pennsylvania Game Commission, the

Pennsylvania Fish and Boat Commission, the Department of Environmental Resources, or the Department of Conservation and Natural Resources of any sale of the Blackburn Tunnel. (N.T. at 19–24).

11. In compliance with the January 4, 2021 Interim Order, B&LE acquired and submitted an Engineering Report from AECOM. Joint Stipulation of Facts (JS), p. 2, ¶¶ 1–3.
12. B&LE incurred the costs for the AECOM Engineering Report, totaling \$19,584.10. JS, p. 2, ¶ 4; JS-1.
13. In compliance with the December 8, 2022, Opinion and Order adopting the August 1, 2022, Recommended Decision, B&LE submitted construction plans to permanently dewater, seal, and fill the Blackburn Tunnel. JS, p. 2, ¶ 5.
14. On October 10, 2023, a Secretarial Letter was issued, approving B&LE’s plan to fill in the tunnel (“Tunnel Fill Project”). JS, p. 2, ¶ 8.
15. B&LE contracted with Swank Construction to carry out the Tunnel Fill Project and construction began on October 23, 2023. JS, pp. 2–3, ¶¶ 6, 9.
16. Swank Construction completed the Tunnel Fill Project on March 29, 2024. JS, p. 3, ¶ 10.
17. The Tunnel Fill Project was completed to the satisfaction of the Commission’s Rail Safety Division, the Department, and the property owners. JS, p. 3, ¶¶14–16; JS-4.
18. B&LE incurred costs totaling \$2,770,912.00 for completion of the Tunnel Fill Project. JS, p. 2, ¶ 11; JS-2.
19. The Department provided flagging for traffic control during the Tunnel Fill Project, incurring costs totaling \$27,189.05. JS, p. 3, ¶ 13; JS-3.

### **PROPOSED CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. §§102, 501, 2702 *et seq.*

2. The Commission's authority to authorize and set conditions for the abolition of rail-highway crossings is distinct from the STB's exclusive jurisdiction to regulate rail service or transportation and is therefore not pre-empted by Federal authority. *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlth. 2001).
3. The Commission has exclusive jurisdiction to regulate the construction, relocation, suspension, abolition, or alteration of railroad facilities that cross any other public utility or a public highway either 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.
4. In appropriating costs in railroad crossing cases, the Commission is not limited to any fixed rule but must take all relevant factors into consideration, with the fundamental requirement being that it is just and reasonable. *AT&T v. Pa. P. U. C.*, 737 A.2d 201, 213 (1999); *Greene Twp. Bd. of Supervisors v. Pa. P.U.C.*, 668 A.2d 615 (Pa. Cmwlth. 1995).
5. 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. *N. Lebanon Twp. v. Pa. P.U.C.*, 962 A.2d 1237, 1247 (Pa. Cmwlth. 2008) (citing *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995)).
6. Overall, the Commission has wide latitude "to determine which factors are relevant in assessing costs within the context of the particular case before it." *Bell Atl. Pa. v. Pa. P.U.C.*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

7. Applying the facts to the above factors, it is just and reasonable that Bessemer and Lake Erie Railroad bear the costs for the AECOM Engineering Report, the costs paid to Swank Construction for completion of the Tunnel Fill Project, and flagging costs incurred by the Department for traffic control during the Tunnel Fill Project for the Blackburn Tunnel. *Greene Twp. Bd. Of Supervisors v. Pa. P.U.C.*, 668 A.2d 615, 619 (Pa. Cmwlth. 1995); *Erie L.R. Co. v. Pa. P.U.C.*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. P.U.C.*, 802 F. Supp. 1273, 1273 (E.D. Pa. 1992); Application of the City of Wilkes-Barre, Docket No. A-00101606, 1981 Pa. PUC LEXIS 102, \*5-\*6 (Order entered April 9, 1981).

### **PROPOSED ORDER**

THEREFORE,

IT IS RECOMMENDED:

1. That Bessemer and Lake Erie Railroad, at its sole cost and expense, be responsible for the costs incurred for the AECOM Engineering Report, totaling \$19,584.10.
2. That Bessemer and Lake Erie Railroad, at its sole cost and expense, be responsible for the costs incurred for the Tunnel Fill Project, completed by Swank Construction, totaling \$2,770,912.00.
3. That Bessemer and Lake Erie Railroad, at its sole cost and expense, reimburse the Department for costs incurred for traffic control during the Tunnel Fill Project, totaling \$27,189.05.
4. Future costs and maintenance of the Blackburn Tunnel will be the responsibility of the private landowners on which the tunnel resides, namely Ronald E. Stitt, Anne Marie Sherwin, Patricia A. Tascarella, and Kay D. Barnhart.
5. The Department, at its sole cost and expense, shall furnish all material and do all work

necessary to maintain the roadway of State Route 0268, including the right-of-way and any features or other ancillary facilities of the roadway located at the Blackburn Tunnel.

6. If any non-carrier public utility is affected, each non-carrier public utility company, at its sole cost and expense, shall furnish all material and perform all work required hereafter to maintain their respective facilities through the area of the former Blackburn Tunnel Crossing.
7. After the cost allocation is determined, a Secretarial Letter will be issued formally abolishing the Blackburn Tunnel crossing.

### CONCLUSION

The Department respectfully requests, that based on the foregoing, the Commission determine that it is just and reasonable to allocate all costs resulting from the Tunnel Fill Project to the Bessemer and Lake Erie Railroad.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: October 25, 2024

**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** :

**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 electronic mail:

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Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF TRANSPORTATION



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DATED: October 25, 2024