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November 4, 2024

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
400 North Street, 2nd 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 SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County, Docket No. I-2019-3012769
BW File No.: 10684-272312

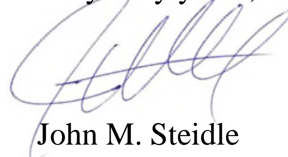
Dear Secretary Chiavetta:

I am enclosing for filing the following Reply Brief of Bessemer & Lake Erie Railroad Company (B&LE) to the Main Brief of the Bureau of Investigation & Enforcement on behalf of The Bessemer & Lake Erie Railroad Company in the above-referenced matter.

As evidenced by the attached Certificate of Service, the Reply Brief is being served on all parties of record.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,



John M. Steidle

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

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKET NO.: I-2019-3012769

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

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REPLY BRIEF OF BESSEMER & LAKE ERIE RAILROAD COMPANY ("B&LE") TO THE MAIN BRIEF OF THE BUREAU OF INVESTIGATION & ENFORCEMENT

Respectfully submitted pursuant to September 16, 2024 Briefing Order

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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 Bradys Bend Township, Armstrong County

: Docket No.: I-2019-3012769

AND NOW, here comes BESSEMER & LAKE ERIE RAILROAD COMPANY ("B&LE"), by and through its counsel, BURNS WHITE LLC and files the within Reply Brief in support of B&LE's Main Brief pursuant to the Administrative Law Judge's Briefing Order dated September 16, 2024 as follows:

I. Brief Introduction

The relevant facts of this matter are undisputed: (1) B&LE has not conducted any operations at the SR0268 crossing in over twenty (20) years; (2) B&LE has no ownership interest in the SR0268 crossing (or the adjacent 394 acres of land), because the same was conveyed by B&LE to the Western Allegheny Landowners Association ("WALA") on October 24, 2002 via quitclaim deed; (3) B&LE did not reserve any right of way interest in the SR0268 crossing; and, therefore, (4) B&LE has had no right of access to or control over the SR0268 crossing since October 24, 2002.[1] Consequently, it is beyond contestation that B&LE is not a "concerned party" to whom any costs of, *inter alia,* abolition, repair, removal and/or future maintenance of the tunnel located at the SR0268 may be assessed.[2]

The Pennsylvania Public Utility Commissions' Bureau of Investigation and Enforcement ("BIE") advocates in its Main Brief that the Pennsylvania Public Utility Commission ("PAPUC"

[1] These facts have been public knowledge since the quitclaim deed conveying the SR0268 crossing (and surrounding lands) to WALA was recorded in the Butler County, Pennsylvania Recorder of Deeds Office on November 8, 2002.

[2] *See* 66 Pa.C.S. §§ 2702(a), 2704(a); *see also Norfolk S. Ry. Co. v. Pub. Util. Comm'n,* 77 A.3d 619 (Pa. 2013); *Pittsburgh Railways Co. v.Pa P.U.C.,* 237 A.2d 602, 606 (Pa. 1967).

or the “Commission”) should ignore Pennsylvania Supreme Court precedent and the plain language of Section 2704(a) of the Public Utility Code by allocating such costs to B&LE. The Commission has no authority to allocate costs to a party that is not “concerned”.

The Pennsylvania Supreme Court made it clear in *Norfolk Southern* that whether a public utility is a “concerned party” for purposes of the Commissions' cost allocation authority under Section 2704(a) is a threshold issue and a matter of statutory construction. The Commission must first determine who is a “concerned party” relative to the SR0268 crossing before it has any discretion whatsoever under Section 2704(a) to assess costs. Only after the “concerned party” issue is ruled upon may the Commission then proceed to exercise its discretion and consider the equities of the matter in assessing costs to “concerned parties” in “proper proportions”. Indeed, the equities of the matter are irrelevant as the “concerned party” issue raised by B&LE presents a legal question—not an equitable question.

The Commission has discretion to allocate costs to “concerned parties,” but it has no discretion to select who is a “concerned party”. Instead, where the Commonwealth's highest court has prescribed a legal definition for the term “concerned party” based upon its interpretation of the General Assembly's legislative intent, the Commission is bound by the Pennsylvania Supreme Court's definition.

Pursuant to the Pennsylvania Supreme Court's plainly worded and unambiguous definition, B&LE is not a “concerned party” to whom costs may be assessed. For this reason, and for all of the reasons that follow, B&LE respectfully requests that it be dismissed from this matter and that no costs relative to the SR0268 crossing be assessed to B&LE.

II. Argument

A. BIE’s interpretation of Section 2704 of the Public Utility Code ignores binding Pennsylvania Supreme Court precedent.

BIE's Main Brief fails to address the preliminary issue of whether B&LE is a "concerned party" to whom the Commission has the authority to assess costs. Rather, it is BIE's position that "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." *See* BIE's Main Brief at p.6. This position directly contradicts the *Norfolk Southern* court's explicit holding in addition to the plain language of the Public Utility Code.

The *Norfolk Southern* court held that a ruling regarding whether a public utility is a "concerned party" must be made in the first instance before the Commission may exercise its discretion under Section 2704(a) for determining the "proper proportions" in which costs should be allocated amongst concerned parties. *Id.* at 628-29 *(citing* 66 Pa.C.S. § 2704(a)). Indeed, whether B&LE is a "concerned party" is a threshold issue for the Commission's consideration. *Id.* (holding that the PAPUC's "position that concerned party status is entirely discretionary with the Commission is not a sound one"; rather, it is "fundamentally correct" based upon the "plain text of Section 2704(a)" that the Commission cannot "select the parties who will be subject to allocation on a discretionary basis").[3]

The initial determination of whether B&LE is a concerned party or not is subject to plenary review by appellate courts as a "matter of statutory construction" and requires an interpretation of what the General Assembly meant by the phrase "public utilities . . . concerned." *Norfolk S. Ry. Co.,* 77 A.3d at 628. Accordingly, where the Pennsylvania Supreme Court has previously defined the term "concerned party" based upon its interpretation of the General Assembly's legislative intent, the holding of the Commonwealth's highest court in this regard is not subject to the Commission's discretion. *Id.*

[3] "[E]ither a party is `concerned' (and thus subject to discretionary cost allocation) or it is not (and therefore the Commission lacks discretion to allocate costs to such party). Once concerned-party status is confirmed, the Commission's decision-making is tethered by the requirements of sound factual and legal bases." *Norfolk S. Ry. Co.,* 77 A.3d at 632 *(*citing *Greene Twp. Bd. of Sup'rs v. Pennsylvania Pub. Util. Comm'n,* 668 A.2d 615, 618 (Pa. Commw. Ct. 1995)).

The *Norfolk Southern* court ultimately rejected ownership as a litmus test for "concerned party" status but also made it clear that ownership still plays a central role in the analysis. *See Id.* at 633. The *Norfolk Southern* court noted that Norfolk Southern Railway Company's "argument that the salient `concern' derives from ownership of facilities at the crossing site is also a plausible one, particularly as it is ***tethered*** to a core class of utilities as to which a substantial portion of the substantive content of Sections 2702 and 2704 seems to be directed". ***Id.*** at 629 (emphasis added). "Norfolk's construction has the advantage of avoiding the sort of overbreadth envisioned in the motor-carrier example related in *City of Chester*." *Id.* (distinguishing and abrogating City of Chester v. Pa. P.U.C., 798 A.2d 288 (Pa. Commw. Ct. 2002)). Without question, the *Norfolk Southern* court refused to afford an interpretation to the term "concerned party" that is not directly tied to the plain language of Sections 2702 and 2704 of the Public Utility Code for fear of overbreadth.

The Commission's authority related to ordering the abolition of a crossing applies to public utilities[4] "engaged in the transportation of passengers or property". *See* 66 Pa.C.S. § 2702(a). Similarly, ordering compensation for damages "which the owners of adjacent property taken, injured, or destroyed may sustain in the . . . abolition of any crossing" relates to crossing facilities[5] "which are used in any kind of public utility service". ***Id.*** at § 2704(a). Taken together, these provisions of the Public Utility Code expressly contemplate that a public utility must be presently engaged in providing transportation services and using the relevant crossing facility in order to be a "concerned party."

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[4] The term "public utility" is defined as, "[a]ny person or corporations . . . ***owning and operating*** in this Commonwealth equipment or facilities for . . . (iii) Transporting passengers or property as a common carrier". 66 Pa.C.S. § 102 (emphasis added).

[5] The term "facilities" is defined as including plant and equipment ***"owned, operated,*** leased, licensed, ***used,*** controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." 66 Pa.C.S. § 102 (emphasis added).

If the Pennsylvania General Assembly had intended for a public utility which was previously engaged in providing transportation services or which previously used a railroad crossing facility to be subject to the Commission's discretionary cost assessment authority, Section 2704(a) would have been written in the past tense. It is not. Moreover, the definitions section of the Public Utility Code, *see* 66 Pa.C.S. § 102, supports this conclusion by expressly qualifying the terms "public utilities" and "facilities" with the words "ownership," "operating," "use," and "control."

The *Norfolk Southern* court's holding is consistent with the statutory text of these sections of the Public Utility Code. The Pennsylvania Supreme Court explicitly stated as a matter of first impression that:

> We hold that a transportation utility need not own facilities at a rail-highway crossing to be a *concerned party* for purposes of the PUC's cost-allocation jurisdiction and authority, *at least where the utility conducts regular operations at the crossing and may enforce an easement-based right of way.*

See 77 A.3d 619, 633 (Pa. 2013) (emphasis added).[6]

The *Norfolk Southern* court's principle holding is plain and unambiguous. Where a railroad does not own the facilities at a rail-highway crossing, does not conduct regular operations at the crossing and cannot enforce an easement-based right of way, the railroad is not a "concerned party" to whom costs of repair, maintenance and/or abolition may be assessed. Indeed, a railroad which does not own, operate at, or have any right of way interest in a rail-highway crossing does not, by any stretch of the imagination, have "a substantial interest in" the same "beyond that which is coterminous with members of the general public at large (such as the interests of motor common carriers merely using the public highway at a crossing for deliveries, *i.e.*, the *City of Chester* example)." *Id.* at 631.

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[6] Norfolk Southern Railway Company maintained its easement based right of way "attained through a succession in interest dating to the original track owner, and which is enforced through ongoing operating agreements with Amtrak pertaining to track segments owned by the latter". *Norfolk S. Ry. Co.,* 77 A.3d at 632, n.11. Here, B&LE does not have a right of way interest nor does it enjoy any type of operating agreement analogous to the one referenced in *Norfolk Southern.*

As demonstrated *supra,* the Commission has no discretion to alter the *Norfolk Southern* court's definition of the term "concerned party," nor may the Commission consider the equities argued by BIE before deciding the threshold issue — *i.e.,* is B&LE a "concerned party"? The answer is no.

Here, there is no material dispute of fact that B&LE conveyed all of its property interests in the SR0268 crossing and surrounding land on October 24, 2002 to WALA. Accordingly, B&LE has not owned, operated on, used, had access to or had control over the SR0268 crossing for approximately the last twenty (20) years. B&LE does not have a "substantial interest" in the SR0268 crossing. Instead, B&LE's interests in the SR0268 crossing, if any, are arguably less than that of the general public at large, because B&LE does not use the public highway at the SR0268 crossing for any purpose — not even to the extent of the motor common carrier example analyzed in *City of Chester. See City of Chester,* 798 A.2d 288 at 293-94, *abrogated by Norfolk S. Ry. Co. v. Pub. Util. Comm'n,* 77 A.3d 619 (Pa. 2013).

For these reasons and for all of the reasons previously asserted by B&LE in its Main Brief, B&LE respectfully requests that the Commission find that B&LE is not a concerned party to this proceeding and, therefore, no costs related to the SR0268 crossing may be assessed to B&LE.

B. Alternatively, a balancing test of the equities favors B&LE's position that no costs related to the SR0268 crossing should be assessed to B&LE.

Once a ruling as to concerned party status is made, Section 2704(a) vests the Commission with authority to subsequently determine which concerned parties shall bear the costs associated with *inter alia* constructing, repairing, maintaining and/or abolishing the relevant rail-highway crossing. *See* 66 Pa.C.S. § 2704(a). Section 2704(a) gives the Commission discretion to determine the "proper proportions" in which such costs should be allocated amongst the concerned parties. *Id.*; *see also Greene Twp. Bd. of Sup'rs v.Pa P.U.C.,* 668 A.2d 615, 618 (Pa. Commw. Ct. 1995) (citing *Borough of S. Greensburg v. Pa P.U.C.,* 544 A.2d 82 (Pa. Commw. Ct. 1988)).

The Commission's authority to allocate costs is not "unfettered"; rather, the Commission's exercise of its discretion must be "based upon some sound legal or factual basis and not just the Commission's policy." *See Greene Twp. Bd. of Sup'rs,* 668 A.2d at 618 (citing *Port Auth. of Allegheny County v. Pennsylvania Public Utility Commission,* 217 A.2d 810 (Pa. Super. Ct. 1966)). In *Greene Twp. Bd. Of Sup'rs,* the Commonwealth Court of Pennsylvania explained:

> While there is no Pennsylvania case law or statutory law clearly delineating the factors that are relevant to the allocation of costs among the parties, a review of the numerous cases involving challenges to the reasonableness of the Commission's decisions indicates that several factors have consistently been viewed as relevant. They include:
>
> 1. The party that originally built the crossing. Related to this factor is the issue of whether the road existed before or after 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[];
>
> 4. Whether either party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement or removal[]; and
>
> 5. The relative benefit that each party will receive from the repair, replacement or removal of the crossing.

668 A.2d at 619 (citing *Pittsburgh and Lake Erie R.R. Co. v. Pa P.U.C.,* 556 A.2d 944 (Pa.Cmw1th.1989); *Department of Transportation v. Pa P.U.C.,* 469 A.2d 1149 (Pa.Cmwlth.1983); *Department of Transportation v. Pa P.U.C.,* 464 A.2d 645 (Pa.Cmw1th.1983); and *Department of Transportation v. Pa P.U.C.,* 346 A.2d 371 (Pa.Cmwlth.1975)).

Here, B&LE concedes that its predecessor in interest originally built the crossing and that B&LE did receive an initial benefit from the construction of the SR0268 crossing. However, the remaining factors all favor B&LE. Therefore, the constellation of relevant facts favor a finding that

B&LE should not be assessed any costs of repair, maintenance or abolition in relationship to the SR0268 crossing.

Factor 2 — Ownership and Maintenance Responsibilities Do Not Belong to B&LE

It is beyond dispute that B&LE has not owned the SR0268 crossing or the surrounding 394 acres of land since it conveyed the same to WALA on October 24, 2002. The conveyance to WALA was in fee simple absolute and B&LE reserved no right of way interest in the SR0268 crossing. *See* B&LE Ex. 5. WALA was represented by competent counsel of its choosing for purposes of this conveyance. *Id.; see also* Jan. 18, 2022 H.T. at pg. 228. Neither WALA nor its counsel negotiated maintenance responsibilities for the SR0268 crossing with B&LE and, therefore, WALA assumed the same of its own volition. *See* B&LE Ex. 5.

Based upon the foregoing, B&LE has had no ownership interest in, right of access to or control over the SR0268 crossing since 2002. The SR0268 crossing became the private property of WALA and then subsequent grantees within the same chain of title. *See* B&LE Ex. 6-9.

Consequently, ownership and maintenance responsibilities belong to the private property owners as a matter of law. The ownership/maintenance factor favors B&LE.

Factor 4 — Deterioration Responsibility Does Not Belong to B&LE

It is BIE's position that B&LE is responsible for the deterioration of the SR0268 crossing despite the fact that B&LE has had no ownership interest in, right of access to or control over said crossing since 2002. *See* BIE Main Brief at pg. 7. In support of its position, BIE cites the non-precedential opinion of the Commission in *Application of CSX Transportation, Inc.*, Docket No. A-2019-3013783 for the proposition that the Commission can assign remediation costs to a non-owner utility. This conclusion is an incorrect extension of the Commission's decision. Throughout the entirety of the proceeding, CSXT actively owned and operated railroad tracks at the crossing in question. *See Id.* at p. 5. At no point did CSXT contend that it had no ownership interest at the

railroad crossing. It is for this reason that the Commission chose not to address CSXT's argument that it did not own the bridge "where Cemetery Avenue crosses above grade the tracks of CSX Transportation, Inc." *See Id.* at CAPTION.

BIE's reliance upon *In re: Application of Penn Central Transportation Company*, Docket No. A-98891, for the proposition that the Commission has previously, based solely on the equities, allocated full remediation costs to a railroad for the backfilling of a tunnel crossing is similarly misplaced.[7] The primary objection asserted by Pennsylvania Turnpike Commission to Penn Central's application to abolish the tunnel crossing was the enforcement of a private agreement. *Id.* at 6 ("Pennsylvania Turnpike Commission's position is that the agreement executed between it and Penn Central Transportation Company, or its predecessors should be adhered to with respect to backfilling the tunnel.") Consistent with current Pennsylvania Case law the Commission gave substantial weight to the private agreement by the parties. *See Id.* at 7 ("Therefore, we will order the Penn Central Transportation Company to assume the costs of backfilling the tunnel as well as the cost of abolition of the other crossings **which they have agreed to assume.**") (emphasis added); *Consol. Rail Corp. v. City of Harrisburg*, 842 A.2d 369, 377 (Pa. 2004) (allowing for the Commission to fully consider and give due and appropriate weight to clear and binding private cost-allocation contracts). No such private cost-allocation contract exists between B&LE and DOT.

Moreover, the underlying facts in *Application of CSX Transportation, Inc.* and *Application of Penn Central* and are not sufficiently analogous to the current proceeding. Unlike CSXT and Penn Central, B&LE observed its responsibility to ensure the SR0268 crossing did not deteriorate throughout B&LE's ownership of property at the SR0268 crossing, prior to the October 24, 2002

[7] *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).

conveyance to WALA. BIE acknowledges in its April 18, 2022 Main Brief that B&LE inspected the SR0268 crossing (inclusive of the tunnel) in 2001. *See* BIE April 18, 2022 Main Brief at p. 23. Furthermore, WALA (as represented by competent counsel of its own choosing) had a full and fair opportunity to inspect the property it was purchasing, including the SR0268 crossing, prior to the October 24, 2002 conveyance. If WALA had found issues with the condition of the SR0268 crossing at that time, it could have avoided the conveyance altogether. WALA chose to go through with the transaction upon the advice of its counsel, which suggests that WALA found no issues with the condition of the SR0268 crossing prior to or as of October 24, 2002.

As of the October 24, 2002 conveyance, WALA and its subsequent grantees within the same chain of title assumed maintenance responsibilities for the SR0268 crossing. *See* B&LE Ex.5. B&LE has had no legal right to use or enter upon the private property of WALA for any purpose since October 24, 2002 let alone for the purposes of inspecting, altering, maintaining and/or repairing the SR0268 crossing. Since B&LE has had no right of control over the SR0268 crossing since October 24, 2002, it was not in a position to prevent or correct any deterioration that has occurred. Therefore, B&LE is not responsible for any ameliorative waste that has occurred.

Indeed, it cannot be meaningfully argued that B&LE *(i.e.,* a party with no legal right to inspect, alter, maintain, repair or access the SR0268 crossing) caused any deterioration to the SR0268 crossing that occurred over the last twenty years when B&LE no longer possessed the same. At all relevant times, either WALA or subsequent grantees within the same chain of title were in possession of the SR0268 crossing. It logically follows then that either WALA or its subsequent grantees caused any deterioration to the SR0268 crossing that has occurred since October 24, 2002. Deterioration responsibility belongs to WALA—not B&LE.[8] Therefore, this

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[8] Counsel for BIE cites to testimony of Ms. Sherwin for the proposition that representatives of B&LE made certain oral representations regarding maintenance responsibility for the SR0268 crossing and tunnel prior to the October 24, 2002 conveyance. *See* BIE Main Brief at pg. 23. Ms. Sherwin's testimony is not credible as she cannot remember any particulars regarding her purported interactions with representatives of B&LE. *See* Jan. 18, 2022 H.T. at pp. 224, 226-

factor favors B&LE's position that it should not be assessed any costs relative to the SR0268 crossing.

Factor 5 — The Benefit of Abolishing or Removing the SR0268 Crossing

Zero benefit would be conferred upon B&LE from abolishing or removing the SR0268 crossing. B&LE no longer owns, uses or has any right of access to the SR0268 crossing or any of the adjacent land. The parties who would benefit from abolishment or removal are the private property owners and DOT. Without question, this final factor also favors B&LE's position that it should not be assessed any costs relative to the SR0268 crossing.

Doctrine of Laches

In addition to the factors cited by the Commonwealth Court in *Greene Twp. Bd. Of Sup'rs,* B&LE also asserts the doctrine of laches as an equitable defense to the assessment of any costs.'[9] It has been approximately twenty (20) years since B&LE: (1) put the Commission, DOT and other parties on notice of its intent to dispose of the SR0268 crossing, as evidenced by the then negotiations between DOT and B&LE for the same, (2) conveyed its property interests in the SR0268 crossing and surrounding land to WALA, and (3) put the entire world on record notice that it no longer owned, had access to or had any right of control over the SR0268 crossing. *See* B&LE Ex. 3, 5. Furthermore, it has been approximately ten (10) years since the Commission sent notice

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27. For example, Ms. Sherwin cannot even remember if the person she spoke with was a man or woman stating, "I have no idea." *Id.* at pg. 224.

Additionally, the October 24, 2002 Quitclaim Deed is a completely integrated document. Therefore, Pennsylvania's parol evidence rule bars any consideration of Ms. Sherwin's testimony. Evidence of oral representations made prior to or contemporaneously with the transaction may not be introduced as substantive evidence that would materially alter the terms of the October 24, 2002 Quitclaim Deed. *See Yocca v. Pittsburgh Steelers Sports, Inc.,* 854 A.2d 425, 436 (Pa. 2004) (emphasis added) (quoting *Gianni v. Russell & Co.,* 126 A. 791, 792 (Pa. 1924)).

Moreover, Pennsylvania law does not permit claims of fraud in the inducement as an exception to the parol evidence rule's operation. *See e.g., Toy v. Metro. Life Ins. Co.,* 928 A.2d 186, 206 (Pa. 2007); *see also Berardine v. Weiner,* 198 F. Supp. 3d 439, 444 (E.D. Pa. 2016) (emphasis added) (citing *HCB Contractors v. Liberty Place Hotel Assocs.,* 652 A.2d 1278, 1279 (Pa. 1995)). Similarly, Pennsylvania's two-year statute of limitations operates to time-bar any assertion of fraud in the execution. *See* 42 Pa.C.S. § 5524(7).

[9] B&LE incorporates by reference herein as if the same were set forth fully and at length its recitation of the rule and its rule explanation for the doctrine of laches as stated in its Main Brief. *See* B&LE Main Brief at pp. 16-20.

to "ALL PARTIES" regarding B&LE's Application to Abolish the SR0268 crossing and advising all parties that: "All work has been completed" and "CLOSED" the case. *See* B&LE Ex. 16.

It was not until October 3, 2019 that the Commission instituted an investigation relative to the safety and abolition of the SR0268 crossing. Apparently, the matter "fell through the cracks" or "off the radar screens" of the concerned parties to this proceeding. Regardless, BIE, DOT and the private property owners of SR0268 crossing slept on their rights, if any, for almost two decades and did not timely challenge B&LE's status as a purported "concerned party" or assert any alleged responsibility for B&LE to pay for the maintenance, repair or abolishment of the SR0268 crossing.

B&LE would suffer great prejudice if the costs of abolition and/or deterioration of the SR0268 crossing and tunnel were assessed in any amount to B&LE. B&LE properly maintained and inspected the SR0268 crossing and tunnel prior to conveying the same to WALA. The October 24, 2002 conveyance and deed does not impose any legal obligation upon B&LE to inspect or maintain the SR0268 crossing. WALA was represented by competent counsel for purposes of this transaction and, yet, WALA did not negotiate maintenance responsibilities as part of the conveyance. Accordingly, B&LE changed its position in reliance upon the validity of the October 24, 2002 fee simple conveyance and stopped inspecting and/or maintaining the SR0268 crossing.

Any deterioration that has occurred since B&LE has been out of possession is the direct and proximate result of the private property owners' and/or DOT's failure to properly maintain the SR0268 crossing consistent with their legal obligations to do so. BIE, DOT and the private property owners did not act with the vigilance that the law requires of similarly situated parties. The SR0268 crossing is an open and obvious facility and any deterioration that was occurring thereto over the last twenty (20) years happened in an open and obvious manner for the whole world to see. The private property owners knew or should of known from the relevant sales agreement and quitclaim deed as soon as the October 24, 2002 conveyance was finalized and publicly recorded that they

retained maintenance responsibilities for the SR0268 crossing and tunnel. Furthermore, all parties knew or should have known from the Commission's February 1, 2012 closing letter and the Commission's April 30, 2002 Secretarial letter that the SR0268 crossing's prospective abolishment fell through the cracks. *See* B&LE Ex. 3, 16.

The passage of twenty (20) years has made any claims of BIE, DOT, or the private property owners against B&LE stale. These parties failed to exercise due diligence and, therefore, they should not be surprised to awake to the consequence that any rights they had to advocate for an assessment of costs against B&LE have disappeared.

In summation, it would not be just and reasonable for the Commission to assess any costs to B&LE relative the SR0268 crossing. An objective balancing of the equities reveals that the majority of relevant factors favors B&LE's position. Therefore, B&LE respectfully requests in the alternative that it not be assessed any costs relative to the SR0268 crossing.

III. Conclusion

For all of the foregoing reasons and for all of the reasons previously stated in B&LE's Main Brief, Motion for Summary Judgment and brief in support thereof (all of which are expressly incorporated herein by reference as if set forth fully and at length), B&LE respectfully requests that judgment be entered in its favor and that no costs of any kind be assessed to B&LE relative to the tunnel located at the SR0268 grade crossing.

Respectfully submitted,

BURNS WHITE LLC

By: */s/ John M. Steidle*

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Railroad Company

BEFORE THE
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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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Reply Brief** dated November 4, 2024 upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (related to service by a party).

Service by Electronic Mail Only:

The Honorable John M. Coogan
Administrative Law Judge
Pennsylvania Public Utility
Commission 400 North Street
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Harrisburg, PA 17120
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