

**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 : I-2019-3012769
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 :

RECOMMENDED DECISION

Before
John M. Coogan
Administrative Law Judge

INTRODUCTION

This decision recommends that the Commission assign the Bessemer and Lake Erie Railroad responsibility for the final costs related to work necessary to fill and permanently close the Blackburn Tunnel in Butler County; assign Bessemer and Lake Erie Railroad responsibility for the costs related to future maintenance of the Blackburn Tunnel; and assign the Pennsylvania Department of Transportation responsibility for the costs to maintain Pennsylvania Department of Transportation facilities at the Blackburn Tunnel crossing.

HISTORY OF THE PROCEEDINGS

By order entered October 3, 2019, the Pennsylvania Public Utility Commission (Commission) instituted an investigation for the purpose of determining all matters relating to the abolition and safety of two crossings on an abandoned line of the Bessemer and Lake Erie Railroad (B&LE). One crossing is located in Fairview Township, Butler County where the railroad tracks are laid through a tunnel that is overlain by State Route SR0268 (Blackburn Tunnel). The other crossing is located in Brady's Bend Township, Armstrong County, where SR0068 crosses, below grade, the track (Brady's Bend Crossing).

On July 29, 2022, Administrative Law Judge Mary D. Long (ALJ Long) issued a Recommended Decision (*July 2022 Recommended Decision*), recommending that: (1) the Blackburn Tunnel should be filled and the work should largely be performed by the railroad; (2) the initial costs should be assigned to the railroad; and (3) upon completion of the work to the satisfaction of the Commission, the crossing should be formally abolished. ALJ Long recommended that the Commission assign final costs and future maintenance responsibilities at a future hearing, in the event the parties cannot reach an agreement on their own. ALJ Long further recommended that the Joint Stipulation regarding the Brady's Bend Crossing was reasonable and appropriate and should be approved without modification, and the Brady's Bend Crossing should be abolished.

On December 8, 2022, the Commission entered an Opinion and Order, adopting ALJ's Long's Recommended Decision (*December 2022 Order*).

On April 3, 2024, counsel for B&LE filed a letter with the Commission, notifying the Commission, the Commission's Bureau of Technical Utility Services and

all involved parties of completion of the work as required by the *December 2022 Order*. B&LE's letter requested final inspection of the project.

On May 7, 2024, counsel for B&LE filed a Petition requesting a hearing for the purpose of allocating costs associated with the Commission's *December 2022 Order*, and determining responsibility for future maintenance of the Blackburn Tunnel.

On May 29, 2024, the Commission issued a telephonic prehearing conference notice, setting this proceeding for a prehearing conference on July 2, 2024 at 10:00 a.m. Also on May 29, 2024, a prehearing conference order was issued outlining various procedural matters to be addressed at the prehearing conference.

The prehearing conference convened on July 2, 2024 as scheduled. Counsel appeared on behalf of B&LE, the Pennsylvania Commonwealth Department of Transportation (PennDOT), the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement (I&E), Fairview Township, and Butler County. Additionally, Kay Barnhart appeared, *pro se*.

On July 9, 2024, a Scheduling Order was issued, memorializing matters discussed during the prehearing conference and setting forth the procedural rules for this proceeding

On July 25, 2024, a Supplemental Scheduling Order was issued, removing Fairview Township and Butler County as parties to this proceeding, at their request. No party objected to these requests.

A status conference was held on August 6, 2024. Counsel for B&LE, PennDOT, and I&E appeared. Additionally, Kay Barnhart appeared, *pro se*.

On August 14, 2024, a Second Supplemental Scheduling Order was issued, removing Kay Barnhart as a party to this proceeding, at her request. No party objected to this request.

On September 6, 2024, B&LE, PennDOT, and I&E requested by e-mail that the October 2, 2024 evidentiary hearing be cancelled.

On September 13, 2024, B&LE, PennDOT, and I&E filed a Joint Stipulation of Facts (Joint Stipulation of Facts).

On September 16, 2024, an Order Admitting Joint Stipulation of Facts was issued. Also on September 16, 2024, an Order on Briefs and Closing the Record was issued.

B&LE, PennDOT, and I&E filed Main Briefs on October 25, 2024. B&LE and I&E filed Reply Briefs on November 4, 2024. The record of this proceeding closed on the due date for filing Reply Briefs.

FINDINGS OF FACT

1. B&LE acquired the Western Allegheny Branch Line which included the Blackburn Tunnel and the Brady's Bend Crossing from the Western Allegheny Railroad Company in 1967. *December 2022 Order* (adopting *July 2022 Recommended Decision* Finding of Fact No. 1)

2. B&LE discontinued operation of rail service on the Western Allegheny Branch around 1998 and in 2000 filed a notice with the Surface Transportation Board (STB) to abandon service along approximately 20 miles in Butler

and Armstrong Counties. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 2*)

3. The STB authorized the abandonment of rail service on the Western Allegheny Branch Line on January 17, 2001. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 3*)

4. On May 31, 2001, B&LE filed an application with the Commission which sought authorization to abandon 28 grade crossings and one tunnel on the Western Allegheny Branch Line, a total of 29 crossings. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 4*)

5. The application listed the grade crossings in Exhibit A and identified the tunnel in Paragraph 5 of the application. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 5*)

6. The Commission docketed the application at A-00117858. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 6*)

7. By Secretarial Letter dated April 30, 2002, the Commission granted B&LE's application to abolish 27 of the at-grade and below-grade crossings. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 7*)

8. The Commission did not grant the application to abolish the Blackburn Tunnel or the Brady's Bend Crossing, a below-grade crossing. *December 2022 Order* (adopting *July 2022 Recommended Decision Finding of Fact No. 8*)

9. B&LE sold the property which includes the tunnel to the Western Allegheny Landowner's Association (WALA) on October 24, 2002. *December 2022 Order* (adopting *July 2022 Recommended Decision* Finding of Fact No. 9)

10. Sometime after the sale to WALA, B&LE removed the railroad track and ties at the Blackburn Tunnel. *December 2022 Order* (adopting *July 2022 Recommended Decision* Finding of Fact No. 10)

11. WALA subsequently conveyed the property to four individuals, including Ann Marie Sherwin. *December 2022 Order* (adopting *July 2022 Recommended Decision* Finding of Fact No. 11)

12. Pursuant to the Interim Order entered January 4, 2021, B&LE was ordered at its initial cost and expense to prepare and submit to the Commission and all parties of record for examination, an engineering report detailing the current condition of the tunnel structure at the crossing located in Fairview Township, Butler County. Joint Stipulation of Facts, ¶ 1.

13. The report was ordered to be completed by a certified professional engineer, and to include an engineer's professional opinion about the current integrity of the structure, a recommended disposition of the structure, including preliminary cost estimates and any other matter of material or serious concern. Joint Stipulation of Facts, ¶ 2.

14. B&LE complied with the directives of the Interim Order and submitted the AECOM Engineering Report to all parties on July 30, 2021. Joint Stipulation of Facts, ¶ 3.

15. The costs incurred by B&LE for the AECOM Engineering Report was \$19,584.10. Copies of the invoices for the AECOM Engineering Report are

attached to the Joint Stipulation of Facts as Joint Stipulation (JS) – 1. Joint Stipulation of Facts, ¶ 4.

16. Pursuant to the *December 2022 Order* adopting the *July 2022 Recommended Decision*, B&LE was ordered at its initial cost and expense to submit complete detailed construction plans for the work proposed to permanently dewater, seal, and fill the entire subject tunnel structure at State Route 268, from portal to portal. Joint Stipulation of Facts, ¶ 5.

17. B&LE engaged Swank Construction to complete the construction and remediation directives as ordered. Joint Stipulation of Facts, ¶ 6.

18. B&LE submitted a Means and Methods proposal and engineering sketch plan (“Plan”) to all parties on August 29, 2023. Joint Stipulation of Facts, ¶ 7.

19. A Secretarial Letter was issued on October 10, 2023, approving the Plan submitted by B&LE. Joint Stipulation of Facts, ¶ 8.

20. Swank Construction began the Tunnel Fill Project on October 23, 2023. Joint Stipulation of Facts, ¶ 9.

21. Swank Construction completed the Tunnel Fill Project on March 29, 2024. Joint Stipulation of Facts, ¶ 10.

22. The costs incurred by B&LE for the Tunnel Fill Project totaled \$2,770,912.00. Copies of the invoices for the Tunnel Fill Project are attached to the Joint Stipulation of Facts as JS-2. Joint Stipulation of Facts, ¶ 11.

23. Pursuant to the *December 2022 Order* adopting the *July 2022 Recommended Decision*, PennDOT was ordered, 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. Joint Stipulation of Facts, ¶ 12.

24. The initial costs incurred by PennDOT in complying with the traffic control directive totaled \$27,189.05. Copies of PennDOT's invoices for traffic control are attached to the Joint Stipulation of Facts as JS-3. Joint Stipulation of Facts, ¶ 13.

25. 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. Joint Stipulation of Facts, ¶ 14.

26. 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"). Joint Stipulation of Facts, ¶ 15.

27. The Property Owners affected by the Tunnel Fill Project are satisfied with the completed remediation efforts as it relates to their respective properties as each has been restored to its pre-construction condition. Copies of the letters confirming the Property Owners' satisfaction are attached to the Joint Stipulation of Facts as JS-4. Joint Stipulation of Facts, ¶ 16.

DISCUSSION

The *July 2022 Recommended Decision* provided the following background regarding the crossings at issue in this proceeding:

BLE acquired the line, known as the Western Allegheny Branch, which included the Blackburn Tunnel and the

Brady's Bend Crossing, from the Western Allegheny Railroad Company in 1967. BLE discontinued operation of rail service on the Western Allegheny Branch around 1998 and in 2000 filed a notice with the Surface Transportation Board (STB) to abandon service along approximately 20 miles of rail line in Butler and Armstrong Counties. The STB authorized the abandonment of rail service on January 17, 2001.

On May 31, 2001, BLE filed an application with the Commission which sought authorization to abandon 28 grade crossings and one tunnel. The application listed the grade crossings in Exhibit A and identified the tunnel in Paragraph 5 of the application. The Commission docketed the application at A-00117858.

By Secretarial Letter dated April 30, 2002, the Commission granted BLE's application to abolish 27 of the grade crossings. The Commission did not authorize BLE to abolish the Blackburn Tunnel or the Brady's Bend Crossing. The April 30, 2002 Secretarial Letter further directed BLE and other parties to perform certain work necessary to abolish the 27 crossings, set deadlines for the work and assigned costs. The April 30, 2002 Secretarial Letter stated that Blackburn Tunnel and the Brady's Bend Crossing would be addressed with a future secretarial letter or formal hearing. The Commission noted that PennDOT was in the process of planning the removal of the railroad bridge at Brady's Bend in connection with a roadway improvement project. The Commission further observed that BLE and PennDOT were negotiating at disposition of the Blackburn Tunnel. April 30, 2002 Secretarial Letter at p. 4.

On October 24, 2002, BLE conveyed the property containing the Blackburn Tunnel to the Western Allegheny Landowner's Association (WALA).

Sometime in 2004, PennDOT, with BLE's permission, removed the railway bridge that carried the BLE track over SR0068, Brady's Bend Crossing, and realigned the roadway. *See Joint Stipulation, Para. 9.*

Although the Commission issued subsequent secretarial letters at Docket A- 00117858, there was no specific mention of either the Blackburn Tunnel or the Brady's Bend Crossing. These letters, perhaps imprecisely, addressed the Commission's response to the requests of various parties to alter the work order or deadlines set by the Commission in connection with the abolished crossings identified in the April 30, 2002 Secretarial Letter. *See* PennDOT Ex. B.

The final secretarial letter that was presented for the record was dated February 1, 2012. That letter stated that BLE had been directed to abolish "various crossings" in Armstrong and Butler Counties and noted that "[a]ll work has been completed." The letter then provided "since all work has been completed, the case be "CLOSED." Neither the Blackburn Tunnel nor the Brady's Bend Crossing were specifically mentioned. PennDOT Ex. B.

No further Commission action was taken at Docket A-00117858. In 2018, the Commission was contacted by PennDOT concerning the disposition of the two crossings. An informal investigative field conference was held on June 26, 2018, and attended by the Rail Safety Division, PennDOT, BLE and six local homeowners located near the Blackburn Tunnel. Joint Stipulation, p. 3. *See also* PennDOT St. 2 at 3. Thereafter, as noted above, the Commission instituted an investigation on October 3, 2019, regarding the disposition of the Blackburn Tunnel and the Brady's Bend Crossing.

July 2022 Recommended Decision at 14-16.

The Commission's *December 2022 Order* disposed of the safety of the crossings, the future disposition of the crossings upon their abolition, and what work shall be performed at these crossings. The sole remaining issues concern the final allocation of the costs of work associated with the Blackburn Tunnel, as well as future maintenance of the Blackburn Tunnel.

The Public Utility Code provides the Commission with the exclusive authority to assess the costs of any work ordered to be performed upon the concerned public utilities or municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2704(a). Pursuant to its statutory authority under 66 Pa.C.S. § 2704(a) to allocate maintenance responsibilities and costs at a rail-highway crossing, the Commission traditionally considers the following factors:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefits initially conferred by the construction of the crossing.
4. The party responsible for the deterioration of the crossing.
5. The benefits accrued from the reconstruction of the crossing.

Greene Twp. v. Pa. Pub. Util. Comm'n, 668 A.2d 615, 619 (Pa. Cmwlth. 1995) (*Greene*).

Despite often using these factors, the Commission is not required to set forth an analysis of these five factors as courts have held such a practice would ultimately infringe upon the discretionary aspect of the Commission's decisions. *Millcreek Twp. v. Pa. Pub. Util. Comm'n*, 753 A.2d 324 (Pa. Cmwlth. 2000) (quoting *AT&T v. Pa. Pub. Util. Comm'n*, 737 A.2d 201 (Pa. 1999) (*AT&T*)). These five factors are "neither mandatory nor exclusive of other considerations." *Norfolk & Southern Ry. v. Pa. Pub. Util. Comm'n*, 971 A.2d 545, 551 (Pa. Cmwlth. 2009) (citing *AT&T* at 209). The only requirement is that the Commission's Order be just and reasonable. *East Rockhill Twp. v. Pa. Pub. Util. Comm'n*, 540 A.2d 600 (Pa. Cmwlth. 1988).

Positions of the Parties

1. B&LE

B&LE provides four arguments why it should not be allocated costs in this proceeding. First, B&LE argues that no costs may be allocated to B&LE because B&LE is not a “concerned party” under state law. Second, to the extent the Commission finds I&E’s evidence more persuasive, the doctrine of laches and/or the applicable statute of limitations collectively bar any attempt at law or in equity by the Commission or the parties to this proceeding to void the October 24, 2002 conveyance of the SR0268 crossing to WALA. Third, B&LE argues that the Commission’s attempt to regulate the crossing at issue is preempted by federal law, which provides exclusive jurisdiction to the STB to decide such matters. Fourth, B&LE argues that, even if the Commission were not precluded by precedent, allocation of costs to B&LE would be neither just nor reasonable. B&LE Main Brief (MB) at 4-26.

B&LE as Concerned Party

B&LE asserts that the longstanding rule in Pennsylvania was that a railroad must own property or facilities at a crossing to be considered a “concerned party” to whom the Commission has authority to allocate any costs associated with the crossing. B&LE avers that in *City of Chester*, the Commonwealth Court held that, “*it is the ownership interest at the crossing, not mere usage that gives the Commission the authority to allocate costs*” associated with a crossing, including repairs, removal, reconstruction or maintenance, to a railroad. *City of Chester v. Pa. Pub. Util. Comm’n*, 798 A.2d 288, 294 (Pa. Cmwlth. 2002) (emphasis added by B&LE). B&LE states that the Pennsylvania courts have uniformly held since 1932 that “it is the *presence and ownership* of the track involved . . . which places the liability on the railroad.” *Id.* at 292, n.6 (quoting *Lehigh Valley R.R. v. Pa. Pub. Util. Comm’n*, 161 A. 422, 424 (Pa.

Super. 1932) (*Lehigh Valley*) (emphasis added by B&LE)). B&LE argues that the Pennsylvania Public Utility Commission has likewise consistently followed this rule in numerous proceedings. B&LE MB at 5-6.

B&LE cites to *Norfolk Southern Railway Co. v. Pennsylvania Public Utility Commission* 77 A.3d 619 (Pa. 2013) (*Norfolk Southern*), where the Supreme Court of Pennsylvania expanded the definition of a concerned party for purposes of the Commission’s cost-allocation jurisdiction and authority:

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.*

77 A.3d at 633 (emphasis added by B&LE). B&LE asserts that, although the *Norfolk Southern* court expanded the class of entities (*i.e.*, beyond owners of rail-highway crossing facilities) that can be considered “concerned parties;” it remains the case that there must be *at least* (*i.e.*, in the absence of any ownership) a substantial, ongoing use of the crossing by the railroad in order for it to be a “concerned party.” Stated differently – a railroad must still be an owner of the relevant facilities at issue to be a “concerned party” where no regular operations are conducted and where the railroad no longer enjoys an easement-based right of way. B&LE argues that the *Norfolk Southern* court’s holding is consistent with Section 2704(a) of the Public Utility Code, which expressly limits any cost allocation relative to the abolition of a crossing to only those facilities that “*are used* in any kind of public utility service.” (emphasis added by B&LE). B&LE MB at 6-7.

Additionally, B&LE argues that *Norfolk Southern*’s holding 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” does not abrogate the prior holdings of *Pittsburgh Railways Co. v. Pennsylvania Public Utility Commission*, 237 A.2d 602, 606 (Pa. 1967) (*Pittsburgh Railways*) and *Lehigh Valley*, and that the holdings of *Pittsburgh Railways* and *Lehigh Valley* are still binding upon the Commission to the extent the facts in those cases mirror the facts presented here. B&LE MB at 7-8.

B&LE avers that the facts in *Pittsburgh Railways* are highly analogous to (if not on all fours with) the facts presented here. In *Pittsburgh Railways*, the Commission attempted to allocate the costs of replacing and maintaining a rail-highway crossing known as “Black’s Bridge” to the Port Authority of Allegheny County. However, the evidence was clear that the Port Authority enjoyed no ownership interest and/or right of way interest in either the crossing or its related facilities, nor was the Port Authority operating any transportation utility services over the relevant railroad line, which had been previously abandoned by a railroad company. B&LE MB at 8-9.

B&LE argues that there is no factual dispute that all real property interests held by B&LE at the SR0268 grade crossing were part of the total conveyance to WALA on October 24, 2002. It is likewise undisputed that B&LE has no ownership interest in real property or track, signal, communication or other railroad facilities whatsoever at the former crossing. Indeed, B&LE has had no ownership interest in any facilities of the SR0268 crossing since October 24, 2002; has not conducted any operations at the SR0268 crossing since 1999; and has no easement-based right of way to the SR0268 crossing. B&LE MB at 9-10.

B&LE concludes that the holdings in *Norfolk Southern* and *Pittsburgh Railways* collectively control the cost allocation calculus of the instant investigation relative to B&LE. B&LE argues that these cases collectively require a finding that B&LE is not a “concerned party” as the term is defined under the Public Utility Code,

because B&LE: (1) has no ownership interest in the SR0268 crossing, (2) has no right of way interest in the SR0268 crossing, and (3) does not conduct transportation utility operations at the SR0268 crossing. B&LE MB at 10-11.

B&LE argues that ALJ Long's citation to *Bronder v. Armstrong County Rails to Trails*, Docket No. C-00956690 (Opinion and Order entered Nov. 6, 1996) (*Bronder*) in her Recommended Decision has no precedential value and is not binding on this Commission. *July 2022 Recommended Decision* at 25. The Commission does not have discretion to alter the *Norfolk Southern* court's definition of the term "concerned party" to assess costs against a party that does not own the subject property, nor maintain a right of way over said property. B&LE avers that at no point did ALJ Long determine that B&LE is a concerned party under the law, and no analysis on that point is included in the recommended decision. Moreover, the *Bronder* decision heavily relies upon the factually dissimilar *CSX Transportation Inc. v. Pennsylvania Public Utility Commission*, 558 A.2d 902 (Pa. Cmwlth. 1989) (*CSX Transportation 1989*). B&LE states that a close reading of *CSX Transportation 1989* demonstrates that it is entirely distinguishable from the facts of this matter. Specifically, B&LE argues that, unlike *CSX Transportation 1989*, B&LE did receive STB authorization to abandon service and does not have any right of way interest in the SR0268 crossing. B&LE avers that Section 2704(a) reflects the common-sense judgment of the General Assembly that an entity that abandoned all ownership and usage rights of a rail crossing should not be charged with responsibility for repairs to the crossing. Therefore, B&LE respectfully requests that judgment be entered in its favor as a matter of law. B&LE MB at 11-12.

66 Pa.C.S. § 2709, Laches, & Statute of Limitations

B&LE asserts that the Commission should deny arguments that it failed to follow the notice requirements found under 66 Pa.C.S. § 2709 and that the October 22,

2002 conveyance to WALA or any of the subsequent conveyances within the same chain of title be voided. B&LE MB at 12-16.

In the alternative, B&LE argues that the doctrine of laches and/or the applicable statute of limitations bars any attempt to set aside a conveyance of real property approximately twenty years after the fact where: (1) B&LE changed its position in reliance upon the validity of the October 24, 2002 conveyance to WALA, and (2) the parties with statutory standing who would attempt to void the transaction “knew or should have known” about the conveyance back in 2002. B&LE MB at 16-18.

B&LE asserts that “ALL PARTIES” to the Commission proceeding docketed at A-00117858 (including Fairview Township and Butler County officials in addition to the Commission and DOT) knew of B&LE’s intent to dispose of the SR0268 crossing approximately six months before B&LE conveyed the same to WALA. B&LE states that moreover, there is no factual dispute amongst the parties that the Commission, local authorities and state agencies enumerated in Section 2709 were all put on record notice as of November 8, 2002 that B&LE conveyed the SR0268 crossing to WALA. B&LE avers that the only parties with standing under Section 2709 who could attempt to void the relevant transfer knew or should have known through the exercise of reasonable diligence that B&LE conveyed the property to WALA almost twenty years ago. B&LE argues that if nine-to-eleven years constituted a sufficient time period for the doctrine of laches to apply in *Fulton v. Fulton*, 106 A.3d 127 (Pa. Super. 2014), then certainly, twice that period of time (20 years) should be sufficient for the doctrine of laches to apply in the instant matter. B&LE 18-19.

B&LE contends that, furthermore, reasonable minds would agree that setting aside B&LE’s conveyance to WALA twenty-years after the fact would be highly prejudicial to all parties involved in the October 24, 2002 transaction, not to mention the prejudice to subsequent grantees that would result from setting aside the May 21, 2003

conveyances within the same chain of title. B&LE avers that the only concrete evidence adduced of record is the April 30, 2002 Secretarial Letter, which proves that local authorities, the Commission and DOT all had actual notice of B&LE's intent to dispose of the SR0268 crossing. B&LE argues that the Commission would have substantial difficulty doing justice in this matter where the original transaction is so obscured by the passage of time as to render the ascertainment of whether proper Section 2709 notice was given very challenging if not impossible. B&LE MB at 19.

B&LE avers that further prejudice is evident by B&LE's change of its position in reliance upon the validity of the October 24, 2002 conveyance to WALA. B&LE has had no possessory interest in or right of access to the SR0268 crossing since 2002. Accordingly, B&LE asserts it has not been in a position to properly maintain and/or prevent the SR0268 crossing from deteriorating over time such that at least a portion of the tunnel at this crossing has collapsed. B&LE concludes that it would be unjust and inequitable to assess any costs of abolishment, repair or maintenance to B&LE inclusive of any affirmative or ameliorative waste, which WALA or any subsequent property owners undoubtedly caused. B&LE MB at 19-20.

Regarding the statute of limitations, B&LE states that no action "for the recovery of any penalties or forfeitures incurred under the provisions of" and no prosecutions related to "any matter or thing mentioned in" the Public Utility Code "shall be maintained unless brought within three years from the date at which the liability therefor arose." 66 Pa.C.S. § 3314(a). Pennsylvania law favors strict application of the statute of limitations. B&LE MB at 20.

B&LE's position is that any attempt to set aside the October 24, 2002 conveyance to WALA is time-barred by the applicable three-year statute of limitations. B&LE argues that there is no factual dispute that the Commission, PennDOT and "ALL PARTIES" (including Butler County and Fairview Township) to the proceeding at

Docket A-00117858 had actual notice of B&LE's intent to dispose of the SR0268 crossing on or about April 30, 2002 as evidenced by the Secretarial Letter of the same date. Additionally, all parties, PennDOT and the Commission were subsequently put on record notice of the conveyance of the SR0268 crossing to WALA when the same was publicly recorded in the Butler County, Pennsylvania Recorder of Deeds Office on November 8, 2002. B&LE argues that, consequently, the three-year statute of limitations began to run no later than November 8, 2002, and that no actions by PennDOT (or any other party) nor any enforcement proceedings related to Section 2709 have been commenced by the Commission to date. B&LE concludes that the statute of limitations expired on November 8, 2005, and any attempt to pursue such a proceeding now is time-barred as a matter of law. B&LE MB at 20-21.

Preemption

B&LE states that the Interstate Commerce Commission Termination Act (ICCTA) preempts Pennsylvania law relative to the "abandonment, or discontinuance of . . . [railroad] facilities," because ICCTA provides "exclusive" jurisdiction to the STB to decide such issues. *See* 49 U.S.C. § 10501(b). B&LE's position is that the Commission's attempt to regulate the disposition of SR0268 and allocation of repair/maintenance costs for SR0268 against B&LE is improper because the Commission lacks jurisdiction to do so as Pennsylvania's Public Utility Code (i.e., 66 Pa.C.S. §§ 101–3316) is expressly preempted by federal law. B&LE MB at 22-23.

Unjust and Unreasonable Allocation of Costs

B&LE asserts that, even if the Commission were not precluded by the precedents cited in its Main Brief, allocating any costs to B&LE in this proceeding would be neither "just" nor "reasonable." B&LE avers that ALJ Long did not sufficiently

consider that B&LE has not owned the property for 20 years, had no use of it, and had no access or right of access to it, thus any deterioration on the subject property was the responsibility of the property owners. B&LE states that it is being allocated costs in this proceeding simply because it was the former owner of the SR0268 crossing at issue. B&LE avers that, regardless of whether or not B&LE would have the ability to recoup its costs in another forum, it would be unjust and unreasonable for the Commission to put B&LE to that expense and trouble. Therefore, B&LE argues that the ALJ's Recommended Order directing initial costs be allocated to the B&LE should be reallocated and borne by the concerned parties, namely, PennDOT, Butler County and Fairview Township. B&LE MB at 23-24.

B&LE contends that, with the sole exception that B&LE's predecessor in interest originally built the crossing at issue and that B&LE received an initial benefit from the construction of the SR0268 crossing, all remaining factors set forth in *Greene* all favor B&LE. Therefore, B&LE should not be assessed any costs of repair, maintenance or abolition in relationship to the SR0268 crossing. B&LE states that, moreover, it has not owned the SR0268 crossing or the surrounding 394 acres of land since it conveyed the property in fee simple absolute to WALA on October 24, 2002, and B&LE reserved no right of way interest in the SR0268 crossing. Neither WALA nor its counsel negotiated maintenance responsibilities for the SR0268 crossing with B&LE. The SR0268 crossing became the private property of WALA and then subsequent grantees within the same chain of title, and all ownership and maintenance responsibilities belong to the private property owners as a matter of law. B&LE MB at 24.

B&LE argues that, 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. B&LE's position is that it did not cause and could not have

caused any deterioration to the SR0268 crossing that occurred over the last twenty years when B&LE no longer possessed the same. B&LE MB at 24-25.

B&LE states that it would derive zero benefit from abolishing or removing the SR0268 crossing. B&LE asserts that the parties who would benefit from abolishment or removal are the private property owners and PennDOT. B&LE MB at 25.

B&LE contests I&E's reliance on *Application of CSX Transportation, Inc.*, Docket No. A-2019-3013783 (Opinion and Order entered Oct. 10, 2022) (*CSX Transportation 2022*) for the proposition that the Commission can assign remediation costs to a non-owner utility, contending that, throughout the entirety of the proceeding, CSXT actively owned and operated railroad tracks at the crossing in question. B&LE also contests I&E's reliance on *In re: Application of Penn Central Transportation Co.*, Docket No. A-00098891 (Order entered May 8, 1975) (*Penn Central*), 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 because that case concerned a private cost-allocation contract between the Pennsylvania Turnpike Commission and Penn Central Transportation Company. B&LE RB (I&E) at 7-12.¹

In addition, B&LE specifically contests PennDOT's reliance on *Wheeling & Lake Erie Railway Co. v. Pennsylvania Public Utility Commission*, 778 A.2d 785 (Pa. Cmwlth. 2001) (*Wheeling*) for the proposition that where a railroad's predecessor in interest is assigned maintenance responsibilities but allows the crossing to fall into disrepair, the assignment of full remediation cost to the predecessor in interest is equitable. B&LE asserts that Wheeling Railway expressly "assumed the obligation of [predecessor-in-interest] to maintain the subject bridge at its sole costs" and Wheeling Railway maintained its ownership interest and actively utilized the railroad tracks at the

¹ B&LE filed two separate reply briefs: one in response to I&E and one in response to PennDOT.

crossing throughout the entirety of the proceeding. B&LE RB (PennDOT) at 9-10 (citing *Wheeling* at 788). B&LE argues that, unlike the rail company in *Wheeling*, B&LE has not assumed any maintenance obligation from its predecessor.

2. I&E

I&E avers that B&LE should bear the cost for the remediation, closure, and abolishment of the below-grade crossing of its rail line at State Route 268 in Fairview Township, Butler County because 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. I&E also avers that PennDOT should bear its own costs for traffic control at the crossing. I&E MB at 5-6.

In citing the factors relevant to allocating costs, I&E argues that ownership is not a controlling factor considered in allocating costs and maintenance responsibilities. I&E avers that the Commission recently reinforced the position that ownership is not the sole controlling factor in allocating cost in *CSX Transportation 2022*. I&E MB at 6-8.

I&E asserts that 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. B&LE has not inspected or maintained the tunnel since 2002 and is the sole party responsible for the deterioration of the tunnel. I&E MB at 8 (citing *December 2022 Order* at 36).

I&E states that, moreover, Anna Marie 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. Ms. Sherwin was also advised by B&LE representatives that she and the other landowners had no right to the tunnel and that B&LE was going to fill the tunnel. I&E MB at 8.

I&E notes that 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 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.” I&E also notes that ALJ Long 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). I&E MB at 9-10 (citing *July 2022 Recommended Decision* at 33).

I&E asserts that 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 *Penn Central*, 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. Accordingly, the Commission ordered the railroad company, at its sole cost and expense, to completely backfill the tunnel with suitable material to fill all voids and to seal the tunnel openings with sand and cement grout. I&E MB at 10-11.

I&E concludes that 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. I&E MB at 11.

In its Reply Brief, I&E argues that B&LE seeks to relitigate issues that have already been decided in this matter. Specifically, I&E avers that in its *December 2022 Order*, the Commission addressed all the issues raised by B&LE that it now re-argues in this proceeding via its October 25, 2024 Cost Allocation Main Brief, including the Commission's authority to regulate rail-highway crossings and B&LE's status as a concerned party. I&E asserts that the Public Utility Code, 66 Pa.C.S. § 316, expressly provides that whenever the Commission makes any "finding, determination or order...[it] shall remain conclusive and binding on all parties affected thereby, unless set aside, modified or annulled on judicial review." I&E RB at 2-3.

I&E further states, in its May 7, 2024, petition, that B&LE requested this proceeding expressly "**for the purpose of allocating the costs incurred by B&LE and future maintenance in connection with the above-captioned matter.**" (emphasis added by I&E). I&E notes that B&LE did not request the Court or the Commission re-address its arguments that it is not a "concerned party," federal preemption, or any other arguments it raised in its Exceptions to the *July 2022 Recommended Decision* and the subsequent *December 2022 Order*. I&E argues that therefore, those issues are not properly before the Court to consider. To the extent that they are properly before the Court, they are *res judicata*, barred by the doctrine of collateral estoppel, and proscribed by Section 316 of the Public Utility Code as they have already been addressed in this litigation. I&E RB at 3.

I&E avers that the only issue that B&LE proffers that is not *res judicata* is the final allocations of costs. I&E states that B&LE argues that it is not a concerned

party and therefore cannot be assessed any costs. I&E asserts that in its *December 2022 Order*, the Commission addressed this contention and found that “[t]he Commission’s power regarding rail-highway crossings endures until the Commission issues an order authorizing the abolition of the crossing.” *December 2022 Order* at 32. The Commission determines which parties are “concerned” or “interested” within the meaning of 66 Pa.C.S. §§ 2704(a) & 2702(c).” *December 2022 Order* at 32. I&E RB at 3-4.

I&E also states that B&LE argues that the doctrine of laches and the three-year statute of limitations bar any Commission action regarding the conveyance of the property that includes the Blackburn Tunnel. B&LE MB at 16-21. I&E asserts that this issue was raised by B&LE before ALJ Long and the Commission previously in this litigation. The Commission rejected, without discussion, these arguments. *December 2022 Order* at 8. The Commission ruled that that is irrelevant in determining who is a “concerned party,” explaining “the Commission has held railroads accountable in cases where a railroad fails to secure Commission authorization to abolish a crossing but sells the property.” *December 2022 Order* at 33. I&E RB at 5.

I&E further states that B&LE argues that this preceding is preempted by federal law and that the Commission is therefore deprived of jurisdiction and authority to allocate costs for or assess liability for the Blackburn Tunnel. B&LE MB at 22-23. I&E asserts that the Commission, in its *December 2022 Order*, adopted the Recommended Decision of ALJ Long that “federal law regulating rail service does not preempt the Commission’s authority to regulate rail-highway crossings and to allocate costs related to the safety and maintenance of rail-highway crossings.” *December 2022 Order* at 17. Further, the Commission ruled that it “is vested with exclusive jurisdiction to determine and prescribe the manner in which rail-highway crossings may be constructed, altered, relocated, suspended or abolished, and no rail-highway crossing may be altered,

relocated, suspended or abolished without Commission authorization. *December 2022 Order* at 32. I&E RB at 5.

I&E argues that all of the elements of *res judicata* are met in the instant case, and bar relitigation of B&LE's arguments. I&E RB at 6-7. I&E also argues that all of the elements of collateral estoppel are met in the instant case, and bar relitigation of B&LE's issues. I&E RB at 7-8. Finally, I&E argues that Section 316 of the Public Utility Code prohibits relitigation of the issues raised by B&LE I&E RB at 8-9.

I&E contends that the most equitable outcome would be to have the railroad bear the final costs of filling, sealing, and abandoning its tunnel, as it is the party who benefitted most from the tunnel, used the tunnel, was aware of the tunnel's particular conditions (having moved its freight through it), and was in a better position to maintain the tunnel. I&E RB at 9-11.

I&E states that the local governments that B&LE identifies as those who should bear the costs of the Tunnel Fill Project — Butler County and Fairview Township — are no longer parties to this proceeding. Butler County and Fairview Township were not on the service list for any of the remaining parties' conferences, the Joint Stipulation of Facts, the Briefing Order, or the Main Briefs. Had B&LE intended to have Butler County and Fairview Township bear some of the cost of the Tunnel Fill Project, I&E contends it should have requested the Commission join them as necessary or indispensable parties. B&LE failed to do so, and thereby waived its right to now argue that non-parties be assigned the final cost allocation to remediate a tunnel that, as the Commission determined in its *December 2022 Order*, was the responsibility of B&LE. I&E RB at 11-12.

I&E contends that other arguments by B&LE as to why it should not be allocated the final costs of the Tunnel Fill Project should also fall on deaf ears. The

argument that the railroad should not be allocated costs because it has since sold the land underneath which the Blackburn Tunnel once ran was also addressed in the Commission's *December 2022 Order*, in both the context as a controlling factor in assigning costs and as a prerequisite to determining "concerned party" status. However, as the Commission noted in its *December 2022 Order*, ownership is not a controlling factor in assessing costs. I&E RB at 12 (citing *December 2022 Order* at 32-33).

B&LE argues that it "did not cause and could not have caused any deterioration to the [Blackburn Tunnel] that occurred over the last twenty years when B&LE no longer possessed the same." However, the Commission's *December 2022 Order* has already determined that "the lack of maintenance by B&LE over the past twenty years has contributed to the Blackburn Tunnel's deterioration and partial collapse" and that "B&LE admitted to not maintaining or inspecting the Blackburn Tunnel since 2002." I&E RB at 12 (citing B&LE MB at 25; *December 2022 Order* at 35-36).

3. PennDOT

PennDOT takes the position that all costs incurred for the engineering report, Tunnel Fill Project, and traffic control, should be allocated to B&LE because B&LE benefitted the most from the separated crossing from its initial construction and is primarily responsible for the deterioration. PennDOT states that it is therefore just and reasonable to allocate all costs to B&LE. PennDOT MB at 6.

PennDOT argues that the initial factor that the Commission should consider is: "[t]he party that originally built the crossing." *Greene* at 619. 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. PennDOT MB at 8.

PennDOT avers that B&LE (or its predecessor-in-interest) constructed the Blackburn Tunnel crossing in 1906. The tunnel was constructed under an existing state route. PennDOT states that it 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. PennDOT argues that because there was already an existing state route, the Blackburn Tunnel was not erected to benefit PennDOT. The railroad line was utilized by B&LE until 1998 and abandoned in January of 2001. PennDOT avers that, 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, and that the unrebutted evidence presented demonstrates that the tunnel was owned and operated by B&LE. PennDOT MB at 8-9.

PennDOT asserts that the Commission can consider the initial benefits of the crossing between the parties. In the present case, PennDOT argues that it is clear that the railroad received all of the initial benefits of the crossing. PennDOT asserts that courts have found an inherent benefit to railroads from the creation and maintenance of separated grade crossings. PennDOT argues that while it 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. PennDOT states that, 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. PennDOT concludes that it is therefore just and reasonable to allocate costs to B&LE. PennDOT MB at 9-10.

PennDOT also avers that the party who is responsible for the deterioration of the crossing is a factor that should be considered in allocating costs. 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. PennDOT MB at 10-11.

PennDOT states that, 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. 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, PennDOT, 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. PennDOT argues that 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 having 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. PennDOT MB at 11.

PennDOT concludes that the Commission should follow the precedent in *Wheeling* 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. 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. 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. 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. PennDOT MB at 11-12.

Finally, PennDOT argues that the “equities of a particular situation” is a factor that can be considered. PennDOT asserts that equity dictates that it is just and reasonable to assign any cost allocation onto B&LE. PennDOT’s 50-foot right of way for SR 0268 does not even extend to the tunnel openings. 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 sold the property, thereby depriving the Commission and PennDOT of the ability to fully address the safety of the tunnel. PennDOT contends that 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*. B&LE only completed the Tunnel Fill Project to close the Blackburn Tunnel after being ordered by the Commission to do so. *December 2022 Order* at 37. As such, PennDOT argues it should bear no responsibility for any expenses relating to the abolishment of Blackburn Tunnel, including flagging costs incurred during the Tunnel Fill Project. PennDOT concludes that, 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 PennDOT for the associated flagging costs. PennDOT MB at 12-13.

Analysis

As all parties recognize, the purpose of this proceeding is to determine responsibility for the final allocation of costs related to work associated with the Blackburn Tunnel, as well as future maintenance of the Blackburn Tunnel. The parties agree that the final allocation of costs include \$2,790,496.10 incurred by B&LE for the AECOM Engineering Report and Tunnel Fill Project, and \$27,189.05 incurred by PennDOT in complying with the traffic control directive. Joint Stipulation of Facts, ¶¶ 4, 11, 13. The other issues associated with this proceeding have been resolved pursuant to the Commission's *December 2022 Order*. I&E argues that positions raised by B&LE in its Main Brief that were previously raised and acted on by the Commission in its *December 2022 Order* are barred by *res judicata*, collateral estoppel, and 66 Pa.C.S. § 316. I&E RB at 6-9. I disagree with I&E that *res judicata*, collateral estoppel, or Section 316 of the Public Utility Code strictly bar B&LE from raising arguments similar to those raised in the prior stage of this proceeding. There has yet to be a judgment on the merits regarding the issue of final cost allocation, or future maintenance of the Blackburn Tunnel.

However, for the reasons discussed in both the *July 2022 Recommended Decision* and the *December 2022 Order*, which adopted the *July 2022 Recommended Decision*, I agree with I&E that B&LE's arguments that it should not be allocated costs because it is not a "concerned party" to this proceeding; that allocation is barred by the doctrine of laches and the three year statute of limitations; and this proceeding is preempted by federal law; should be rejected. The Commission extensively analyzed B&LE's arguments that it is not a "concerned party" to this proceeding. *December 2022 Order* at 31-37. B&LE underscores its argument that it is not a "concerned party" because it is neither an owner of the crossing nor does it have a substantial, ongoing use of the crossing. B&LE MB at 5-7. Although I do not find that B&LE is barred from raising arguments related to its status as a "concerned party" in this proceeding as regards

the final allocation of costs, I find that the facts underlying the Commission's determination in its *December 2022 Order* remain conclusive upon the parties to this proceeding. 66 Pa.C.S. § 316.² I decline to depart from the Commission's analysis, and agree that B&LE remains a concerned party to this proceeding because it failed to follow the proper procedure to receive Commission approval to abolish the Blackburn Tunnel. *December 2022 Order* at 35. As the Commission explained in its *December 2022 Order*, the Commission has held railroads accountable in cases where a railroad fails to secure Commission authorization to abolish a crossing but sells the property. *Id.* at 33 (citing *Bronder; Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991)).

The *July 2022 Recommended Decision* and *December 2022 Order* did not discuss B&LE's arguments regarding laches or the three-year statute of limitations in detail. However, as the Commission intimated, this argument is essentially an extension of its argument that it is not a "concerned party" because it has had no ownership interest in facilities related to the Blackburn Tunnel since October 2002, has no easement-based rights-of-way to the crossing, nor has it conducted any operations at the crossing since the late 1990s. *See December 2022 Order* at 31-32. I again agree with the Commission that, for similar reasons discussed above regarding why B&LE remains a "concerned party," B&LE is not absolved from responsibility of maintaining the Blackburn Tunnel since B&LE never properly completed the process to receive authorization to abolish the Blackburn Tunnel. *Id.* at 35. Therefore, B&LE's arguments regarding laches or the statute of limitations should not be sustained.

B&LE finally argues that it should not be allocated any costs because the ICCTA preempt Pennsylvania law. B&LE MB at 22-23. As noted in the *July 2022 Recommended Decision*, the Commonwealth Court disposed of this argument and ruled that federal law regulating rail service does not preempt the Commission's authority to

² These findings are replicated in relevant part in the paragraphs one through 11 of the findings of fact above.

regulate rail-highway crossings and to allocate costs related to the safety and maintenance of rail-highway crossings. *Id.* at 20-22 (citing *Wheeling*). Accordingly, I agree with the Commonwealth Court and find the ICCTA does not preempt Pennsylvania law in this matter.

After considering the above arguments, the remaining determination in this case is balancing the various factors to determine which party should be allocated final costs in this proceeding as it relates to the Blackburn Tunnel. *Greene*. In considering these factors, ALJ Long concluded that B&LE should be assigned the initial cost and expense of remediating the Blackburn Tunnel. *July 2022 Recommended Decision* at 34. ALJ Long also determined that PennDOT should be assessed costs related to traffic control. *Id.*

B&LE argues that, with the sole exception that its predecessor in interest built the crossing at issue and B&LE received an initial benefit, all of the remaining factors in *Greene* favor B&LE since it has not owned the property for 20 years, had no use of it, and had no access or right of access to it. B&LE MB at 23-25. Instead, the property owners and PennDOT benefit from abolishment or removal of the crossing. *Id.* at 25. B&LE concludes that PennDOT, Butler County and Fairview Township should be allocated the costs incurred by B&LE. *Id.* at 24. I&E argues that, because B&LE is the entity responsible for the tunnel's deteriorated condition and the entity which benefited the most from the tunnel's existence, it should bear the costs of the work that was performed to remediate and then abolish it. I&E MB at 11. I&E avers that PennDOT should bear its own costs for traffic control at the crossing. I&E MB at 6. PennDOT asserts that all costs, including costs related to traffic control, should be allocated to B&LE because B&LE benefited most from the separated crossing and is primarily responsible for its deterioration. PennDOT MB at 6.

I agree with I&E and PennDOT that B&LE should be assigned final responsibility for the \$2,790,496.10 in costs it incurred for the AECOM Engineering Report and Tunnel Fill Project. Although ALJ Long found that PennDOT and municipalities received some benefit from the Blackburn Tunnel, her analysis of various factors resulted in finding that B&LE should be responsible for the initial costs to remediate the Blackburn Tunnel. Notably, ALJ Long found that B&LE's predecessor built Blackburn Tunnel over 100 years ago; the crossing allowed the unimpeded transportation of freight; B&LE benefited from cost savings resulting from failure to maintain the crossing; and B&LE is responsible for the deterioration to the Blackburn Tunnel because it failed to secure Commission authority to abandon the tunnel. *July 2022 Recommended Decision* at 33-34. In adopting the *July 2022 Recommended Decision*, the Commission's *December 2022 Order* noted that the lack of maintenance of B&LE over the past twenty years has contributed to the Blackburn Tunnel's deterioration and partial collapse; B&LE has admitted to not maintaining or inspecting the Blackburn Tunnel since 2002; B&LE primarily benefitted from the Blackburn Tunnel by transporting freight through the crossing for many years prior to selling the land to WALA; and B&LE benefited from cost savings for many years by not expending resources to maintain the crossing. *December 2022 Order* at 35-36. For these reasons cited by ALJ Long and the Commission, I recommend that the Commission assign B&LE responsibility for the final costs to remediate the Blackburn Tunnel.

Furthermore, I agree with PennDOT that B&LE should bear responsibility for the \$27,189.05 in costs incurred by PennDOT in complying with the traffic control directive. Although the *July 2022 Recommended Decision* allocated initial responsibility for such costs to PennDOT, ALJ Long did not provide any discussion for her recommendation, and the *December 2022 Order* did not provide any further discussion regarding this cost. I&E asserts that PennDOT should bear its own costs for traffic control of the crossing, but does not provide detailed support for its position. I&E MB at 6. PennDOT only incurred traffic control costs because B&LE was ordered by the

Commission to close the Blackburn Tunnel. As explained above, I find that B&LE is appropriately assigned final responsibility for costs associated with the AECOM Engineering Report and Tunnel Fill Project. The traffic control was a necessary component to completion of the Tunnel Fill Project, and therefore the associated costs are appropriately assigned to B&LE.

The final consideration is future costs and maintenance related to the Blackburn Tunnel crossing. The parties presented the following in their Joint Stipulation of Facts regarding the future of the Blackburn Tunnel crossing:

17. After a final cost allocation is determined and all litigation concerning this matter is finally adjudicated:
 - A) A Secretarial Letter will be issued formerly [sic] abolishing the Blackburn Tunnel crossing. At that time, the Commission will no longer have jurisdiction over the crossing that encompasses the Blackburn Tunnel, and the future costs and maintenance of the tunnel will be the responsibility of the private landowners on which the tunnel resides.
 - B) 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.
 - C) 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 crossing.

Joint Stipulation of Facts, ¶ 17.

I did not adopt these sub-paragraphs as findings of fact in this Recommended Decision because I do not find them to be assertions of fact nor do I believe these proposed sub-paragraphs are merited in whole.³ Instead, these sub-paragraphs all relate to proposed future actions and obligations of different entities that are better suited to be placed in ordering paragraphs, if appropriate. I find that some, but not all, of these proposed findings should be adopted into ordering paragraphs.

First, I agree that, with the issue of final cost allocation having been decided, a Secretarial Letter should be issued to formally abolish the Blackburn Tunnel crossing. However, I disagree that it would be appropriate to assign future costs and maintenance of the tunnel to the private landowners on which the tunnel resides. Four private owners were impacted by the tunnel fill project, and these property owners are satisfied with the completed remediation efforts as it relates to their respective properties. Findings of Fact, ¶¶ 11, 26, 27. Additionally, these private owners were provided notice of this proceeding but, with the exception of Kay Barnhart, did not participate in this proceeding.⁴ However, I do not find that I have legal authority to recommend assignment of future costs and maintenance of the crossing to these private landowners. As is provided in 66 Pa.C.S. § 2704(a), costs are to be assigned to “public utilities, municipal corporations, municipal authority or nonprofit organization..., or [to] the Commonwealth.” Instead, for the same reasons cited above regarding why B&LE should be assigned responsibility for the final costs associated with the Tunnel Fill Project, I

³ An Order admitting the Joint Stipulation of Facts into the record was issued on September 16, 2024. As noted therein, I granted the request to admit the Joint Stipulation of Facts into the record as I found the request to be reasonable. However, as with any proceeding before the Commission, not all facts admitted into the record are necessarily adopted as findings of fact.

⁴ Ms. Barnhart attended the July 2, 2024 prehearing conference and August 6, 2024 status conference but she was removed as a party to this proceeding at her request by order issued on August 14, 2024. The Prehearing Conference Order issued on May 29, 2024 notified parties that if they did not participate in the July 2, 2024 prehearing conference, they may be removed from the service list of this proceeding.

recommend that future costs and maintenance of the tunnel be the responsibility of B&LE.

Although I recommend that B&LE be responsible for future maintenance and costs thereof of the tunnel, I agree that it is appropriate to assign PennDOT future maintenance and costs thereof of their own facilities at the crossing. However, I find it unnecessary and unsupported to order non-carrier public utilities to maintain their respective facilities through the area of the former crossing since parties provided no basis to find that a non-carrier public utility has or will be affected by the remediation work at issue in this proceeding, and public utilities are already responsible for maintenance of their own facilities by law. 66 Pa.C.S. § 1501.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter to this proceeding. 66 Pa.C.S. §§ 2702, 2704.
2. The Commission has the authority to order the construction, reconstruction, alteration, relocation, repair, maintenance, protection, suspension or abolition of railroad crossings, 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, 2704.
3. The Public Utility Code provides the Commission with the exclusive authority to assess the costs of any work ordered performed upon the concerned public utilities or municipal corporations, or the Commonwealth, in such proper proportions as it may determine. 66 Pa.C.S. § 2704(a).

4. In apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule but takes all relevant factors into consideration. The only requirement is that the Commission's Order be just and reasonable. *East Rockhill Twp. v. Pa. Pub. Util. Comm'n.*, 540 A.2d 600 (Pa. Cmwlth. 1988).

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. *Norfolk S. Ry. Co. v. Pub. Util. Comm'n.*, 77 A.3d 619 (Pa. 2013).

6. The Commission is not deprived of jurisdiction to assign work and allocate costs to B&LE because B&LE sold its property to a private organization. *Bronder v. Armstrong Cnty. Rails to Trails*, Docket C-00956690 (Opinion and Order entered Nov. 6, 1996); *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991).

7. 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. Pa. Pub. Util. Comm'n.*, 778 A.2d 785 (Pa. Cmwlth. 2001).

8. It is just and reasonable that B&LE be assigned responsibility for the final costs related to work necessary to fill and permanently close the Blackburn Tunnel. 66 Pa.C.S. §§ 2702, 2704.

9. It is just and reasonable that B&LE be assigned responsibility for the costs related to future maintenance of the Blackburn Tunnel. 66 Pa.C.S. §§ 2702, 2704.

10. It is just and reasonable that PennDOT be assigned responsibility for the costs to future maintenance of their own facilities at the Blackburn Tunnel crossing. 66 Pa.C.S. §§ 2702, 2704.

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.

