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February 17, 2025

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:

On behalf of the Bessemer & Lake Erie Railroad Company in the above referenced matter, enclosed please find for electronic filing with the Commission, Exceptions of Bessemer & Lake Erie Railroad Company to the Recommended Decision. As evidenced by the attached Certificate of Service, the Exceptions are 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/cml
Enclosures
cc: All Interested Parties of Record (per attached service list)
Administrative Law Judge John M. Coogan
Commission's OSA, via ra-OSA@pa.gov

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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EXCEPTIONS OF BESSEMER & LAKE ERIE RAILROAD COMPANY TO RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. COOGAN DATED JANUARY 30, 2025

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation upon the Commission's motion into matters pertaining to the proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in 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

EXCEPTIONS OF BESSEMER & LAKE ERIE RAILROAD COMPANY TO RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. COOGAN DATED JANUARY 30, 2025

BESSEMER & LAKE ERIE RAILROAD COMPANY ("B&LE"), by and through its counsel, BURNS WHITE LLC, hereby files the following Exceptions to the Recommended Decision of Administrative Law Judge John M. Coogan, issued January 30, 2025, pursuant to the provisions of 52 Pa. Code § 5.533, as follows:

1. B&LE excepts to Conclusion of Law No. 4 on Page 37 of the *January 2025 Recommended Decision*, which states: "[i]n 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 Rockhilll Twp. v. Pa. Pub. Util. Comm'n.,* 540 A.2d 600 (Pa. Cmwlth. 1988)." An Exception is taken to the extent Conclusion of Law No. 4 implies that the Commission's cost allocation authority is not limited to concerned parties and to the extent Conclusion of Law No. 4 implies the Commission's concerned party analysis falls within the Commission's administrative discretion. *See Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619. (Pa. 2013).

2. B&LE excepts to Conclusion of Law No. 5 on Page 7 of the *January 2025 Recommended Decision*, which states: "[t]he 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)."

B&LE takes exception to the extent Conclusion of Law No. 5 implies that the Commission's cost allocation authority is not limited to concerned parties and to the extent Conclusion of Law No. 5 implies the Commission's concerned party analysis falls within the Commission's administrative discretion. See *Norfolk Southern*, 77 A.3d 619.

3. B&LE excepts to Conclusion of Law No. 6 on Page 7 of the *January 2025 Recommended Decision*, which states: "[t]he 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 an Order entered Nov. 6, 1996); *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991). B&LE takes exception to Conclusion of Law No. 6 on the basis that it ignores the longstanding Pennsylvania rule that the Commission's cost allocation authority is limited to concerned parties, and that the bases for this conclusion of law are two non-precedential decisions which are directly contradicted by a later Pennsylvania Supreme Court decision.

The longstanding rule in Pennsylvania has been that a railroad must own property or facilities at a crossing in order to be considered a "concerned party" to whom the Commission has authority to allocate any costs associated with the crossing. *See City of Chester v. Pennsylvania Public Utility Comm'n*, 798 A.2d 288, 294 (Pa. Commw. 2002) (*citing Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n*, 55 Pa.Cmwlth. 576, 423 A.2d 110 (1980); *Pennsylvania Public Utility Comm'n v. Southeastern Pa. Transp. Auth.*, 21 Pa.Cmwlth. 106, 343 A.2d 371 (1975); and *Lehigh Valley R.R. v. Pennsylvania Public Utility Comm'n*, 161 A. 422 (Pa. Super. Ct. 1932)).

The Pennsylvania Supreme Court expanded the definition of a "concerned party" for purposes of the Commission's cost-allocation jurisdiction and authority in *Norfolk Southern Railway Company v. Public Utility Commission*:

> 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).

As noted in B&LE'S briefing, 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," 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." A railroad which does not own, operate at, or have any right of way interest in a rail-highway crossing thus does not have "a substantial interest in" the same "beyond that which is coterminous with members of the general

public at large (such as the interest of motor common carriers merely using the public highway at a crossing for deliveries, i.e. the *City of Chester* example)." *Norfolk Southern*, at 631. B&LE does not have a "substantial interest" in the SR0268 crossing, and B&LE's "interest" in the SR0268 crossing is 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 the *City of Chester*. *See City of Chester v. Pennsylvania Pub. Util. Comm'n*, 798 A.2d 288 (Pa. Commw. Ct. 2002), *abrogated by Norfolk S. Ry. Co. v. Pub. Util. Comm'n*, 77 A.3d 619 (Pa. 2013).

Clearly, B&LE is not a "concerned party" as the term is defined under the relevant provisions of Pennsylvania's Public Utility Code. 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 1998; and has no easement-based right of way to the SR0268 crossing. The Real Property, rail line, and any rail facilities at the SR09268 grade crossing were conveyed to WALA on October 24, 2002.[1] 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.

Despite these facts, Administrative Law Judge ("ALJ") Coogan declined to depart from the Commission's *December 2022 Order*, finding B&LE to be a "concerned party" due to B&LE's failure to obtain the Commission's approval to abolish the Blackburn Tunnel. In support of this

[1] The Blackburn Tunnel is 744 feet long and is located chiefly in the four parcels (later sold by WALA to individual landowners and identified in exhibits 6,7,8, and 9 of B&LE's main brief) that total 34.02 acres. See Also Exhibit 5. These four individual parcels, represent a mere 8.6% of the total acreage (394 acres) B&LE sold to WALA in October 2002. The remaining 359.98 acres (91.8%) are not related to the tunnel and not addressed in either the July 2022 Recommended Decision of ALJ Long or the January 2025 Recommended Decision of ALJ Coogan.

determination, ALJ Coogan posits that the Commission has held railroads accountable, i.e. found non-owner railroads to be a concerned party within the meaning of § 2704, in instances where the railroad fails to secure the Commission's authorization to abolish a crossing prior to selling the property, citing *Bronder v. Armstrong Cnty. Rails to Trails*, Docket C-00956690 (Opinion and Order entered Nov. 6, 1996) and *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720. *January 2025 Rec. Dec.* at 31. This reasoning provides no consideration to the Pennsylvania Supreme Courts' analysis in *Norfolk Southern* and is based on a misguided application of the Commission's prior decisions in *Bronder* and *Borough of Bridgeville*.

Bronder v. Armstrong Cnty. Rails to Trails has no precedential value, is not binding on this Commission, and was incorrectly decided. *See January 2025 Rec. Dec.* at 36. In *Bronder*, the Commission found Conrail to be a concerned party within the meaning of § 702, even though Conrail had previously conveyed all property interests held in the subject crossing. In support of this determination, the *Bronder* Commission relied solely and exclusively on the commonwealth court's decision in *CSX Transportation Inc. v. Pa. P.U.C.*, citing it for the proposition that a railroad's sale of all property interests at a subject crossing does not relieve the railroad of concerned party status. 558 A.2d 902 (Pa Cmwlth. 1989) (citations omitted). The *Bronder* Commission's reliance on *CSX Transportation* for this proposition is misplaced.

CSX Transportation does not stand for the proposition that the Commission has the authority to assign costs to a non-owner railroad. Unlike in *Bronder*, the railroad in *CSX Transportation* maintained an ownership interest in the form of a right of way throughout the entirety of the proceeding. *CSX Transp.*, at 908. In holding the Commission has the authority to

allocate costs to a non-owner railroad, the *Bronder* Commission failed to engage in the required concerned party analysis.

Essentially, the *Bronder* Commission improperly reasoned that where the Commission has authority over the crossing it *ipso facto* has the authority to assign costs to the various parties in the proceeding, irrespective of whether the various parties are concerned within the meaning of §702. *Bronder* Docket C-00956690 at 17 ("Similarly here, the Commission retains authority over the rail-highway crossings to the extent that it does not conflict with ICC authority. This means that the Commission can assign responsibility to Conrail, as well as to the other parties to this proceeding."). Such a finding is directly contradicted by the Pennsylvania Supreme Court's decision in in *Norfolk Southern*, which held the Commission's cost-allocation jurisdiction and authority is limited to parties that own facilities at the crossing, or at least conduct regular operations at the crossing and have an enforceable easement based right of way. 77 A.3d at334. Therefore, to the extent *Bronder* stands for the proposition that the Commission can allocate costs to a non-owner railroad, said proposition is directly overruled by *Norfolk Southern*. *Id.*

Similarly, it is respectfully submitted that ALJ Coogan's reliance on *Borough of Bridgeville* as an example of the Commission's authority to allocate costs to a non-owner railroad is also overruled by *Norfolk Southern*. In *Borough of Bridgeville*, the Commission held "[t]he sale of the rail line does not relieve the railroad of the Commission's jurisdiction. The Commission may assign part of the project costs to the railroad, even after the sale of the line, ***as long as the allocation is just and reasonable***." Borough of Bridgeville v. Allegheny Cnty., 74 Pa.P.U.C. 720 (emphasis added). This analysis – that the Commission's jurisdiction to allocate costs is discretionary – is expressly overruled by the Pennsylvania Supreme Court in *Norfolk Southern*.

> The position of the Commission and Intervenors – which seeks to place the determination of concerned-party status under the same umbrella of administrative discretion as the proper-proportions inquiry – does not track the language of the statue[.]
>
> ***
>
> While the PUC's interpretation of its own enabling statute is entitled to some deference, [citation omitted] here, the PUC's position that concerned-party status is entirely discretionary with the Commission is not a sound one.

Norfolk Southern, 77 A.3d at 628-629.

Therefore, *Borough of Bridgeville* is no longer good law and cannot be relied upon by this Commission as precedential or persuasive authority.

It is respectfully submitted that similar to the Commission's position in *Borough of Bridgeville*, ALJ Coogan impermissibly treats the concerned party analysis as if it is entirely discretionary. This reasoning is apparent when examining ALJ Coogan's dismissal of B&LE's assertion of the defense of laches. *January 2025 Recommended Decision* at 31. As an equitable defense, unlike the concerned party analysis, the decision to sustain the defense of laches is within the Commission's administrative discretion. Tellingly, in recommending that B&LE's defense of laches not be sustained, ALJ Coogan equates his analysis of laches, an equitable defense, to his concerned party analysis. *January 2025 Recommended Decision* at 31 ("this argument is essentially an extension of [B&LE's] argument that it is not a "concerned party[.]"). In equating his rationale underlying the concerned party analysis to that of an equitable defense, he concedes

that his treatment of the concerned party analysis is discretionary. Therefore, the *January 2025 Recommended Decision* conflicts with the controlling precedent of *Norfolk Southern* and should not be adopted by this Commission.

3. B&LE excepts to Conclusion of Law No. 7 on Page 37 of the *January 2025 Recommended Decision*, which states: "[t] 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 rails service or transportation, and is therefore not pre-empted by Federal Authority."

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 Surface Transportation Board ("STB") to decide such issues. *See* 49 U.S.C. § 10501(b). Indeed, the "remedies" provided for under ICCTA with respect to "regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id*. The term "transportation" includes "a . . . property, facility, instrumentality, or *equipment of any kind related to the movement of passengers or property*, or both by rail, *regardless of ownership* or an agreement concerning use . . . ." *Id*. at § 10102(9)(A) (emphasis added).

Federal courts have held that, "Under the ICCTA, the STB has exclusive jurisdiction over 'transportation by rail carrier' and its regulation of rail carriers preempts state regulation with respect to rail transportation." *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (*citing* 49 U.S.C. § 10501(b)).

Here, the relevant issue relates to BL&E's abandonment, discontinuance and attempted abolishment of a railroad crossing involving an underground tunnel, which travels beneath State Route 268. Without question, the tunnel underneath SR0268 constitutes property related to the movement of passengers or property by rail and, therefore, is within ICCTA's definition of "rail transportation". Furthermore, ICCTA expressly preempts any state law, which would attempt to regulate the abandonment and/or discontinuance of railroad facilities. Accordingly, 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 *et seq*.) is expressly preempted by federal law.

4. B&LE excepts to Conclusion of Law No. 8 on Page 38 of the *January 2025 Recommended Decision*, which states: "[i]t 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."

B&LE first notes that the Commission is precluded from allocating any cost to it for the reasons cited in its Exceptions 1-5, which are incorporated herein by reference. As the Commission is precluded from allocating costs to B&LE, no allocation of cost to B&LE could be "just". Even if the Commission were not precluded by the precedents cited herein *supra*, which is denied, allocating any costs to B&LE in this proceeding would be neither "just" nor "reasonable." When apportioning costs, the standard is that the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement being that its Order "is just and

reasonable." *Greene Towneship*, 668 A.2d at 618. It is respectfully submitted that in making his determination, ALJ Coogan 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.

Further, it is respectively submitted ALJ Coogan's assignment of all final costs to B&LE, a non-owner railroad, is unprecedented. Setting aside B&LE's objections to the precedential value of *Bronder* and *Borough of Bridgeville*, neither case involved the Commission allocating more than 25% of the final costs to the non-owner railroad, let alone 100%. In *Bronder*, the non-owner railroad was assigned 25% of the final costs. *Bronder*, Docket C-00956690, Recommended Order at ¶12. Likewise, in *Borough of Bridgeville*, the non-owner railroad was assigned 10% of the final costs. *Borough of Bridgeville*, 74 P.U.C. 720, Recommended Order at ¶1. Further, neither *Bronder* nor *Borough of Bridgeville* can be read so as to justify the allocation of all costs to a non-owner railroad.

It is respectfully suggested that B&LE is being allocated costs in this proceeding simply because it was the former owner of the Blackburn Tunnel crossing at issue. To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so.

5. B&LE excepts to Conclusion of Law No. 9 on Page 38 of the *January 2025 Recommended Decision*, which states: "[i]t 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.

B&LE first notes that the Commission is precluded from allocating any cost to it, including future costs, for the reasons cited in Exception No. 5, which are incorporated herein by reference. It is respectfully suggested that B&LE is being allocated future costs in this proceeding simply because it was the former owner of the Blackburn Tunnel. However, B&LE holds no property interest in or at the Blackburn Tunnel whatsoever. Neither does B&LE maintain access or a right of access to the Blackburn Tunnel. Therefore, it would not be just and reasonable for the Commission to allocate future maintenance costs to B&LE for a tunnel that B&LE has no legal right to access.

6. B&LE excepts to Recommended Order No. 1 on Page 38 of the *January 2025 Recommended Decision*, which states: "[t]has 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." B&LE respectfully disagrees with ALJ Coogan's Recommended Order No. 1. For the reasons cited in B&LE's Exceptions 1-6 above, which are incorporated herein by reference as if stated in full. To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so. Therefore, ALJ's Recommended Order directing costs be allocated to B&LE should be reallocated and borne by the concerned parties.

7. B&LE excepts to Recommended Order No. 2 on Page 38 of the *January 2025 Recommended Decision*, which states: "[t]has 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." B&LE respectfully disagrees with ALJ Coogan's Recommended Order No. 2. For the reasons cited in B&LE's Exceptions 1-7 above, which are

incorporated herein by reference as if stated in full. To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so. Therefore, ALJ's Recommended Order directing costs be allocated to B&LE should be reallocated and borne by the concerned parties.

8. B&LE excepts to Recommended Order No. 3 on Page 39 of the *January 2025 Recommended Decision*, which states: "[t]has Bessemer and Lake Erie Railroad, at its sole cost and expense, reimburse the Pennsylvania Department of Transportation for costs incurred for traffic control during the Tunnel Fill Project, totaling $27,189.05." B&LE respectfully disagrees with ALJ Coogan's Recommended Order No. 3. For the reasons cited in B&LE's Exceptions 1-8 above, which are incorporated herein by reference as if stated in full. To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so. Therefore, ALJ's Recommended Order directing costs be allocated to B&LE should be reallocated and borne by the concerned parties.

9. B&LE excepts to Recommended Order No. 4 on Page 39 of the *January 2025 Recommended Decision*, which states: "[t]has Bessemer and Lake Erie Railroad, at its sole cost and expense, reimburse the Pennsylvania Department of Transportation for costs incurred for traffic control during the Tunnel Fill Project, totaling $27,189.05." B&LE respectfully disagrees with ALJ Coogan's Recommended Order No. 4. For the reasons cited in B&LE's Exceptions 1-9 above, which are incorporated herein by reference as if stated in full. To make a cost allocation to B&LE in these circumstances would be exceedingly unjust and unreasonable, even if the Commission were not legally precluded from doing so. Therefore, ALJ's Recommended Order directing costs be allocated to B&LE should be reallocated and borne by the concerned parties.

Respectfully submitted,

BURNS WHITE LLC

By: */s/ John M. Steidle*

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation upon the Commission's motion into matters pertaining to the Proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Brady's 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 **EXCEPTIONS TO RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. COOGAN** dated February 17, 2025, on 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
Commonwealth Keystone Building
Harrisburg, PA 17120
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Respectfully submitted,

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