



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

February 26, 2025

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street 2nd FL
Harrisburg, PA 17120

RE: Investigation upon the Commission's motion into matters pertaining to the Proper safety of the traveling public and disposition of the crossing where State Route SR0268, crosses over a railroad tunnel formally used by Bessemer and Lake Erie Railroad in Fairview Township, Butler County and where State Route SR0268 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County

Docket No. I-2019-3012769

Dear Secretary Chiavetta,

Enclosed for electronic filing please find the Department's *Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation* in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Sincerely,

A handwritten signature in black ink, appearing to read "LJB", written over a horizontal line.

Leah Jo Bobula
Assistant Counsel

cc: Parties of Record
Jeffrey Matko, Grade Crossing Administrator (via email)
Sarah Fenton, PennDOT Engineer (via email)
Mark Chappell, P.E., Chief of Utilities & Row Section (via email)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation upon the Commission's motion into : I-2019-3012769
matters pertaining to the proper safety of the :
traveling public and disposition of the crossing :
where State Route SR0268, crosses over a railroad :
tunnel formally used by Bessemer and Lake Erie :
Railroad in Fairview Township, Butler County and :
where State Route SR0068 formally crosses, below :
grade, the track of Bessemer and Lake Erie :
Railroad in Bradys Bend Township, Armstrong :
County :

**REPLY EXCEPTIONS OF THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION**

The Department of Transportation (Department), by and through its counsel, Leah Jo Bobula, Esquire, hereby files this Reply Exceptions of the Commonwealth of Pennsylvania, Department of Transportation in reply to Bessemer & Lake Erie Railroad Company's (B&LE) February 17, 2025 Exceptions of B&LE (B&LE Exceptions) to Recommended Decision of Administrative Law Judge (ALJ) John M. Coogan (Coogan) dated January 30, 2025 (B&LE Exceptions).

1. In B&LE Exceptions 1, 2, and 3¹, B&LE excepts to Conclusions of Law Nos. 4, 5, and 6, claiming that the ALJ's decision implies that the Public Utility Commission's (Commission) cost allocation authority is not limited to concerned parties and that analysis falls within the Commission's administrative discretion. B&LE Exceptions at 1-8. B&LE continues to state they are not a "concerned party." *Id.* The Department agrees with ALJ Coogan's January 2025 Recommended Decision, the July 2022 Recommended Decision, and the Commission's December

¹ Note that B&LE misnumbered and there are two number 3's. This paragraph refers to the first number 3 of B&LE's Exceptions.

2022 Order adopting the July 2022 Recommended Decision finding that B&LE is a “concerned party.” December 2022 Order at 31-37; January 2025 Recommended Decision at 30-32. Most notably, that:

B[&]LE cannot escape from its responsibilities for the safety of rail crossings by simply abandoning service at the [Surface Transportation Board] STB and selling the property. Such a conclusion would fly in the face of the Commission’s well-recognized authority to ensure the safety of the public at rail-highway crossings and reward B[&]LE for deliberately failing to comply with its statutory and regulatory obligations.

December 2022 Order at 35.

The January 2025 Recommended Decision appropriately finds that B&LE is still a “concerned party” for cost allocation purposes. Specifically, the January 2025 Recommended Decision also denies B&LE’s arguments regarding laches and statute of limitations. January 2025 Recommended Decision at 31. To not hold B&LE accountable for their actions and inactions would open up a loophole where railroad companies could simply sell their land where a troublesome grade crossing is situated instead of having to abolish the grade crossing properly and safely. That loophole would put the safety of the public in jeopardy because it could lead to more partial collapses and unsafe conditions due to improper maintenance.

The Department incorporates its argument regarding “concerned parties” from the Department April 2022 Main Brief, pages 5-7. The Department respectfully requests that the Commission reject B&LE’s Exceptions 1, 2, and 3 and find that the ALJ properly concluded that B&LE is a “concerned party.”

2. B&LE Exception 3² excepts to the Conclusion of Law No. 7, claiming that ICCTA preempts any state law and “STB has exclusive jurisdiction over ‘transportation by rail carrier’ and its regulation of rail carriers preempts state regulation with respect to rail transportation.” B&LE

² Note that B&LE misnumbered and there are two number 3’s. This paragraph refers to the second number 3 of B&LE’s Exceptions.

Exceptions at 8-9 citing *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 305 (3d Cir. 2004) (citing 49 U.S.C. § 10501(b)). This argument was previously discarded in the July 2022 Recommended Decision because of a binding Commonwealth Court case stating that the Commission does have authority to regulate rail-highway crossings as well as allocate associated costs for its safety and maintenance, which is not preempted by federal law. January 2025 Recommended Decision at 31-32; July 2022 Recommended Decision at 20-22; *Wheeling & Lake Erie Railway Company v. Pa. PUC*, 778 A.2d 785 (Pa. Cmwlth. 2001). As B&LE failed to cite any distinguishing facts from that case nor show that the holding was overruled, the Department agrees that the STB under ICCTA does not preempt the Commission in this case. December 2022 Order at 17.

Additionally, though not binding, another state has similarly held that “ICCTA does not preempt ‘non-discriminatory’ public health and safety regulations that do not foreclose or restrict a railroad’s ability to conduct its operations.” *Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 65 (N.J. 2000). Here, B&LE had already ceased operations, so regulating based on safety could not “foreclose or restrict” B&LE’s operations. *Id.*

The Department incorporates its argument from the Department April 2022 Main Brief, pages 3-5. The Department respectfully requests that the Commission reject B&LE’s Exception 3³ and find that the ALJ properly concluded that the Commission’s authority is distinct from the STB’s jurisdiction under ICCTA.

3. B&LE Exception 4 excepts to Conclusion of Law No. 8, claiming that B&LE should not be assigned the full final costs related to filling in the Blackburn Tunnel (Tunnel Fill Project) because it is not just and reasonable. B&LE Exceptions at 9-10; *East Rockhill Twp. v. PA. Pub. Util.*

³ Note that B&LE misnumbered and there are two number 3’s. This paragraph refers to the second number 3 of B&LE’s Exceptions.

Comm'n., 540 A.2d 600 (Pa. Cmwlth 1988). B&LE Exception 7 excepts to Recommended Order No. 2, also claiming that B&LE should not be assigned the full final costs related to the Tunnel Fill Project because it is not just and reasonable. When analyzing the amount and to whom maintenance responsibilities and costs should be allocated, the Commission can consider 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; and 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). While those factors are typically taken into consideration by the Commission, 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).

In this case, the *Greene* factors were discussed at length in the Department's April 2022 Main Brief, the July 2022 Recommended Decision, the December 2022 Order, the Department's October 2024 Cost Allocation Main Brief (Department's 2024 Main Brief), the Bureau of Investigation and Enforcement's (I&E) October 2024 Cost Allocation Main Brief (I&E's 2024 Main Brief), and finally in the January 2025 Recommended Decision. Department April 2022 Main Brief at 7-13; July 2022 Recommended Decision at 32-34; December 2022 Order at 15-16, 35-37; Department's 2024 Main Brief at 7-13; I&E's 2024 Main Brief at 6-11; January 2025 Recommended Decision at 11, 32-33. Those discussions overwhelmingly show that B&LE should bear the full cost of the Tunnel Fill Project at \$2,790,496.10.

The Department incorporates its argument from the Department 2024 Main Brief, pages 7-13. The Department respectfully requests that the Commission reject B&LE's Exceptions 4 and 7 and find that the ALJ properly concluded that B&LE should be allocated the full cost of the Tunnel Fill Project.

4. B&LE Exception 6 excepts to Recommended Order No. 1, claiming that the costs incurred for the AECOM Engineering Report (Engineering Report) at \$19,584.10 should not be borne by B&LE because that would be unjust and unreasonable. B&LE Exceptions at 11. As B&LE is a “concerned party” and was in the best position for almost a century to maintain the Blackburn Tunnel, the lack of maintenance necessarily led to the need for the Engineering Report to determine the amount of damage and discuss remediation options. Department 2024 Main Brief at 11. B&LE saved money by not maintaining the tunnel from 2001 after B&LE sold the property without properly abolishing the crossing. *Id.* Where maintenance would have been assigned to the railroad, the total cost of making the tunnel safe should be assigned to the railroad. *Wheeling, supra.* 778 A.2d 785. The Engineering Report is part of the total cost of making the tunnel safe because it was necessary to understand the engineering details and safety concerns of the tunnel in order to make it safe.

The Department respectfully requests that the Commission reject B&LE’s Exception 6 and find that the ALJ properly concluded that B&LE should be allocated the cost of the Engineering Report.

5. B&LE Exceptions 8 and 9 excepts to Recommended Order Nos. 3 and 4, claiming the traffic control costs incurred during the Tunnel Fill Project initially by the Department should be allocated and borne by the “concerned parties” and not B&LE because that would not be just and reasonable. B&LE Exceptions at 12. The “concerned parties” issue was discussed above in No. 1. It is not unjust and unreasonable to allocate \$27,189.05 to B&LE for the traffic costs incurred initially by the Department during the Tunnel Fill Project because but for the negligent upkeep of the tunnel by B&LE, there should not have been a need to fill in the tunnel. If tunnel maintenance was kept up with properly, then no traffic control would have been needed because the tunnel may not have partially collapsed and for safety purposes, subsequently needed to be filled in. The

traffic control costs are part of the total cost required to make the tunnel safe. *See Wheeling, supra.*
778 A.2d 785.

The Department respectfully requests that the Commission reject B&LE's Exceptions 8 and 9 and find that the ALJ properly concluded that B&LE should be allocated the costs for traffic control initially incurred by the Department during the Tunnel Fill Project.

WHEREFORE, the Department respectfully requests that the Commission dismiss B&LE's Exceptions 1-4 and 6-9⁴, accepting Administrative Law Judge Coogan's Recommended Decision on those matters and enter an order adopting those portions of the Recommended Decision as final.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: February 26, 2025

⁴ As the Department previously entered into a Joint Stipulation regarding the subject matter of B&LE's Exception 5, the Department does not have a reply regarding this Exception.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below, in accordance with the requirements of 52 Pa. Code §1.54, by electronic mail:

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Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
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