



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
COMMONWEALTH KEYSTONE BUILDING  
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

February 28, 2025

**Via Electronic Filing**

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
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 SR0068 formerly crossed, below grade, the track of Bessemer and Lake Erie Railroad in Bradys Bend Township, Armstrong County  
Docket No. I-2019-3012769  
**I&E Reply to Exceptions**

Dear Secretary Chiavetta:

Enclosed for electronic filing are the **Reply to Exceptions** of the Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,

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Enclosures

cc: Per Certificate of Service  
Michael L. Swindler, Deputy Chief Prosecutor (via email – [mwindler@pa.gov](mailto:mwindler@pa.gov))  
Administrative Law Judge John M. Coogan (via email – [jcoogan@pa.gov](mailto:jcoogan@pa.gov))  
Office of Special Assistants (via email – [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov))

**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 :           Docket No. I-2019-3012769  
Fairview Township, Butler County and :  
where State Route SR0068 formerly :  
crossed, below grade, the track of Bessemer :  
and Lake Erie Railroad in Bradys Bend :  
Township, Armstrong County :

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**THE BUREAU OF INVESTIGATION AND ENFORCEMENT'S  
REPLY TO EXCEPTIONS OF  
THE BESSEMER & LAKE ERIE RAILROAD COMPANY**

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Bureau of Investigation and Enforcement  
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Dated: February 28, 2025

## **I. INTRODUCTION**

On January 30, 2025, Administrative Law Judge John M. Coogan (“ALJ Coogan” or “the ALJ”) issued the Recommended Decision in the instant proceeding to allocate costs associated with the remediation of the below-grade railway crossing underneath State Road 0268, better known as the Blackburn Tunnel. The Recommended Decision recommended that all final costs be borne by the Bessemer & Lake Erie Railroad Company (“B&LE”).

On February 17, 2025, B&LE filed Exceptions pursuant to 52 Pa. Code § 5.533. Specifically, B&LE raises Exceptions to the Recommended Decision’s Conclusion of Law 4, Conclusion of Law 5, Conclusion of Law 6, Conclusion of Law 7, Conclusion of Law 8, and Conclusion of Law 9. B&LE also raised Exceptions to Recommended Orders 1 through 4.

B&LE’s Exceptions revolve around the assertion that it is not a “concerned party” and thus the Commission is deprived of jurisdiction to allocate costs to it. B&LE also argues that the Commission’s authority is pre-empted by the federal Surface Transportation Board (“STB”), and that in any event, the allocation of costs to B&LE is unjust and unreasonable.

B&LE also raised four Exceptions to the Ordering Paragraphs of the Recommended Decision — specifically, Ordering Paragraphs 1 through 4. These Ordering Paragraphs recommend that B&LE, at its sole cost and expense, be responsible for the cost of the AECOM engineering report, the cost to fill Blackburn Tunnel, and PennDOT’s costs incurred for traffic control during the construction and tunnel fill project, as well as assigning B&LE future costs and maintenance, if any, on the now-filled tunnel.

Pursuant to 52 Pa. Code § 5.535, I&E now files its Reply to B&LE’s Exceptions. For the reasons set forth herein, I&E respectfully requests that the Pennsylvania Public Utility

Commission (“Commission”) deny B&LE’s Exceptions and adopt the ALJ’s Recommended Decision without modification.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates by reference I&E’s Main Brief, including the Appendices, that it filed in the instant proceeding on March 31, 2022 (“March 31, 2022 Brief”). I&E also hereby incorporates by reference the earlier Commission Opinion and Order in this matter dated December 8, 2022 (“December 2022 Order”).

## **II. SUMMARY OF ARGUMENT**

The Commission has “exclusive power to determine and prescribe, by regulation or order, the manner in which highway-rail crossings may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated and protected to effectuate the prevention of accidents and the promotion of public safety.” *Pittsburgh & Lake Erie R. Co. v. Pa. PUC*, 445 A.2d 851, 853 (Pa. Cmwlth. 1982); *see also* 66 Pa. C.S. § 2702(b).

The Commission “may order the construction, relocation, alteration, protection, suspension or abolition of any crossing to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth,” in such proportions as the Commission, after notice and hearing, determines. 66 Pa. C.S. § 2702(c). “The Commission retains jurisdiction over a crossing until permission to abandon operation of the tracks is sought and granted by the Commission.” *City of Pittsburgh v. Pa. PUC*, 404 A.2d 786, 790 (Pa. Cmwlth. 1979).

In its December 2022 Order, the Commission adopted the July 29, 2022, Recommended Decision of Administrative Law Judge Mary D. Long (“July 2022

Recommended Decision”). The July 2022 Recommended Decision found that the Commission has jurisdiction over B&LE and the subject matter of the proceeding. *December 2022 Order, Ordering Paragraphs 1 and 2, p. 37.* Specifically, the Commission concluded that “B&LE remains a concerned party based upon the active status of the Blackburn Tunnel crossing because it failed to follow the proper procedure to receive Commission approval to abolish the Blackburn Tunnel.” *December 2022 Order, p. 35.*

Because the Commission has already determined that B&LE is a “concerned party” for the purpose of ordering it to complete the work necessary to abolish the Blackburn Tunnel below-grade crossing, that issue may not be re-litigated here. “Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” 66 Pa.C.S. § 316.

The Commission also rejected the argument that the STB preempts the Commission’s jurisdiction over rail-highway crossings, citing *CSX Transp., Inc. v. Pa. PUC* for the proposition that the federal statute does not preempt the Code with respect to the abandonment of rail-highway crossings. *December 2022 Order, p. 34* (citing *CSX Transp., Inc. v. Pa. PUC*, 558 A.2d 902, 907 (Pa. Cmwlth. 1989)). This argument, too, is barred from reconsideration by 66 Pa.C.S. § 316.

### **III. I&E REPLY TO EXCEPTIONS**

#### **1. I&E Reply to B&LE Exception 1 to Conclusion of Law 4: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE excepts to Conclusion of Law 4 of the Recommended Decision. Conclusion of Law 4 states that “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" (quoting *East Rockhill Twp. v. Pa. Pub. Util. Comm'n.*, 540 A.2d 600 (Pa. Cmwlth. 1988)). I&E respectfully submits that Conclusion of Law 4 is a correct statement of the law. I&E further states that the law regarding apportioning costs is applicable to B&LE because the Commission has already ruled that it is a concerned party for purposes of this litigation.

**2. I&E Reply to B&LE Exception 2 to Conclusion of Law 5: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE excepts to Conclusion of Law 5 of the Recommended Decision, which states that 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."

I&E respectfully submits that Conclusion of Law 5 is a correct statement of the law. I&E further states that the law regarding the relevant factors for the allocation of highway-rail maintenance responsibilities and costs is applicable to B&LE because the Commission has already ruled that it is a concerned party for purposes of this litigation.

**3. I&E Reply to B&LE Exception 3 to Conclusion of Law 6: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE excepts to Conclusion of Law 6, which states that 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” (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 (1991)). R.D. at 37. Specifically, ALJ Coogan stated that he “agree[d] 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.” R.D. at 31.

B&LE’s exception to Conclusion of Law 6 is predicated on its reading of *Norfolk Southern Ry. Co. v. Pa. P.U.C.*, 77 A.3d 619 (Pa. 2013). In *Norfolk Southern*, the Supreme Court held that ownership of a rail-highway crossing is not needed to be a concerned party under 66 Pa.C.S. § 2704(a) — the right-of-way Norfolk Southern held on Amtrack’s rail line was sufficient to make it a concerned party for the purposes of allocating costs associated with the crossing at issue. This holding overruled a previous case, *City of Chester v. Pa. P.U.C.*, 798 A.2d 288 (Pa. Cmwlth. 2002), which had held that ownership of the rail line was necessary to make a rail utility a concerned party.

*Norfolk Southern* simply stands for the principle that ownership of a rail-highway crossing is not necessary for a rail utility to be considered a concerned party. It did not limit concerned party status to those rail utilities possessing a right-of-way at a rail-highway crossing or conducting active operations at the rail-highway crossing. Indeed, the Supreme Court defined “concerned parties” as those “parties having a substantial interest in rail-highway crossing sites and projects, beyond that which is coterminous with members of the general public at large,” *Norfolk Southern* at 631, a much broader category than use or ownership.

*Norfolk Southern* did not directly address whether disuse or sale of the property on which the rail-highway crossing lies could divest the Commission of jurisdiction over the rail utility which had previously utilized and owned such a crossing. However, other cases have suggested that only the abolition of the crossing would divest the Commission of such jurisdiction. In *City of Pittsburgh*, the Commonwealth Court held that “the Commission retains jurisdiction over a crossing until permission to abandon operation of the tracks is sought and granted by the Commission.” *City of Pittsburgh*, 404 A.2d at 790.

Further, the Commission, in its December 2022 Order, already considered B&LE’s argument and rejected it. The Commission has already ruled that in this matter B&LE remains a concerned party because it did not follow established procedure and obtain Commission approval to abandon the rail crossing.

I&E respectfully submits that Conclusion of Law 6 is a correct statement of the law. I&E also respectfully submits that the issue of B&LE’s status as a concerned party has already been addressed in this litigation and that its relitigation is barred by 66 Pa.C.S. § 316.

**4. I&E Reply to B&LE Exception 4<sup>1</sup> to Conclusion of Law 7: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE also excepts to Conclusion of Law 7, which, citing *Wheeling & Lake Erie Ry. Co. v. Pa. Pub. Util. Comm’n*, 778 A.2d 785 (Pa. Cmwlth. 2001), states 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

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<sup>1</sup> This Exception is labelled as the Third Exception in B&LE’s Exceptions on Page 8. However, there is a previous “Third Exception” beginning on Page 2. Therefore, this Exception on Page 8 will be considered as the Fourth Exception by I&E for purposes of this Reply to Exceptions.

transportation, and is therefore not pre-empted by Federal authority.” (citation omitted). R.D. at 37.

B&LE’s argument is that Interstate Commerce Commission Termination Act (“ICCTA”) preempts state regulation of railroads, and the fact that B&LE had abandoned its rail line with the STB divests the Commission of jurisdiction to regulate rail-highway crossings such as the Blackburn Tunnel.

However, the Commonwealth Court in *Wheeling* has already held that the Commission’s regulatory authority over rail-highways crossings is *not* preempted by the ICCTA or the STB’s regulations. Until further guidance from the Pennsylvania appellate courts or the federal courts, that is the controlling law and ALJ Coogan was correct to recognize it as such.

The only federal circuit court to consider the issue of ICCTA preemption of rail-highway crossings held that state regulation of rail-highway crossings specifically is not preempted by that statute. Citing a lengthy history of federal-state cooperation in the realm of highway and railroad safety, the Eighth Circuit stated:

Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. ICCTA did not address these problems. Its silence cannot reflect the requisite “clear and manifest purpose of Congress” to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.

*Iowa, Chicago & Eastern R.R. Corp v. Washington County, Iowa*, 343 F.3d 557, 561 (8<sup>th</sup> Cir. 2004) (internal citation omitted).

I&E respectfully submits that Conclusion of Law 7 is a correct statement of law.

Additionally, I&E respectfully submits that B&LE is barred from rearguing that Commission jurisdiction is preempted, as it had previously raised this issue during the course of this litigation and its argument was addressed by the Commission in its December 2022 Order. 66 Pa.C.S. § 316 (“[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”).

**5. I&E Reply to B&LE Exception 5 to Conclusion of Law 8: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE excepts to Conclusion of Law 8, which states that 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.” R.D. at 37 (citations omitted).

B&LE’s argument that it would not be just and reasonable to assign it costs related to the Blackburn Tunnel fill project is simply a repackaging of its earlier argument that it cannot be allocated costs because it is not a concerned party. Those arguments were addressed in the Commission’s December 2022 Order, ALJ Coogan’s Recommended Decision, and in this Reply to Exceptions *infra*.

B&LE also argues that the Recommended Decision did not give sufficient weight to its argument that it has not owned the land underneath which the tunnel runs for approximately 20 years. However, ALJ Coogan addressed that issue, and found that this consideration was outweighed by the fact that B&LE was the party who benefited the most from the construction and use of the tunnel prior to the 2002 sale of the property. R.D. at 33.

Additionally, B&LE was in the best position to secure the tunnel and prophylactically act to prevent its deterioration.

I&E respectfully submits that Conclusion of Law 8 is a correct statement of law, and that B&LE was correctly assigned the responsibility for the final costs related to work necessary to fill and permanently close the Blackburn Tunnel.

**6. I&E Reply to B&LE Exception 6 to Conclusion of Law 9: The ALJ correctly stated the law and correctly applied it to B&LE.**

B&LE excepts to Conclusion of Law 9, which states that “[i]t is just and reasonable that B&LE be assigned responsibility for the costs related to future maintenance of the Blackburn Tunnel.” R.D. at 38. Here, as with every exception to the Recommended Decision, B&LE asserts that the Commission is without jurisdiction to assign it costs. However, even if the Commission has jurisdiction, B&LE asserts that ALJ Coogan erred by assigning to B&LE the responsibility for future maintenance costs of the now-filled Blackburn Tunnel.

Prior to the issuance of the Recommended Decision, B&LE, PennDOT, and I&E submitted a Joint Stipulation of Facts for ALJ Coogan’s consideration. Joint Stipulation of Fact 17(a) provided that at the conclusion of this litigation and the abandonment of the Blackburn Tunnel crossing, “the future costs and maintenance of the tunnel will be the responsibility of the private landowners on which the tunnel resides.”

However, the Recommended Decision rejected that Joint Stipulation, finding it not to be an assertion of fact but rather a proposed future action. The ALJ stated that “I do not find that I have legal authority to recommend assignment of future costs and maintenance of the crossing to these private landowners.” R.D. at 35. Citing to 66 Pa.C.S. §2704(a), the ALJ

noted that costs are to be assigned to “public utilities, municipal corporations, municipal authority or nonprofit organization..., or [to] the Commonwealth.” R.D. at 35 (quoting § 2704(a)) (alterations in original). Private landowners or individuals are conspicuously absent from this list of entities which may be assigned future costs and maintenance.

I&E respectfully submits that the Recommended Decision correctly stated the law and applied it to B&LE in allocating the responsibility for future costs and maintenance to B&LE.

I&E additionally respectfully submits that B&LE’s argument that the Commission lacks jurisdiction has already been previously addressed by the Commission December 2022 Order.

**7. I&E Reply to B&LE Exceptions 7 through 10 to Recommended Orders 1 through 4: The ALJ’s Recommended Orders 1 through 4 should be adopted in whole without modification.**

B&LE’s Excepts to Recommended Orders 1 through 4, which state:<sup>2</sup>

1. That Bessemer and Lake Erie Railroad, at its sole cost and expense, be responsible for the costs incurred for the AECOM Engineering Report, totaling \$19,584.10.
2. That Bessemer and Lake Erie Railroad, at its sole cost and expense, be responsible for the costs incurred for the Tunnel Fill Project, completed by Swank Construction, totaling \$2,770,912.00.
3. That Bessemer and Lake Erie Railroad, at its sole cost and expense, reimburse the Pennsylvania Department of Transportation for costs incurred for traffic control during the Tunnel Fill Project, totaling \$27,189.05.
4. That future costs and maintenance of the Blackburn Tunnel will be the responsibility of the Bessemer and Lake Erie Railroad.

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<sup>2</sup> In B&LE’s Exceptions, these are numbered Exceptions 6 through 9 on Pages 11 and 12 of its Exceptions; However, because there are two Third Exceptions, I&E is referring to these as Exceptions 7 through 10.

B&LE's Exceptions to Recommended Orders 1 through 4 are a recitation of its Exceptions to Conclusions of Law 5 and 6. I&E therefore would refer to its Reply to Exceptions 5 and 6 on pages 8 through 10, *infra*, for any substantive response to B&LE's Exceptions 7 through 10.

I&E respectfully submits that Recommended Orders 1 through 4 are just, reasonable, and should be adopted by the Commission without modification.

#### IV. CONCLUSION

For the reasons set forth above, I&E respectfully requests that the Commission deny the Exceptions of the Bessemer & Lake Erie Railroad Company and adopt the Recommended Decision without modification.

Respectfully submitted,



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Fairview Township, Butler County and :  
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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 **Reply to Exceptions** dated February 28, 2025, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**Service by Electronic Mail:**

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