

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held July 10, 2025

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair, Statement
Kathryn L. Zerfuss
John F. Coleman, Jr.
Ralph V. Yanora

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

I-2019-3012769

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Bessemer & Lake Erie Railroad Company (B&LE or the Railroad) on February 17, 2025, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) John M. Coogan, issued January 30, 2025, in the above-captioned proceeding. The Commonwealth of Pennsylvania, Department of Transportation (PennDOT), filed Replies to Exceptions on

February 26, 2025. The Commission’s Bureau of Investigation and Enforcement (I&E) filed Replies to Exceptions on February 28, 2025. For the reasons stated below, we shall deny B&LE’s Exceptions, and adopt the ALJ’s Recommended Decision, consistent with this Opinion and Order.

I. History of Proceeding

On October 3, 2019, the 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 B&LE Railroad. One crossing is located in Fairview Township, Butler County, where the railroad tracks are laid through a tunnel that is overlain by SR0268 (State Route 268) (Blackburn Tunnel). The other crossing is located in Brady’s Bend Township, Armstrong County, where SR0068 (State Route 68) crosses, below grade, the track (Brady’s Bend Crossing). R.D. at 2.

On August 1, 2022, the Commission issued a Recommended Decision of ALJ Mary D. Long (*August 2022 Recommended Decision*) at the above docket. Therein, ALJ Long recommended, *inter alia*, 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 also recommended that the Commission assign final costs and future maintenance responsibilities at a future hearing, in the event the Parties were unable to reach an agreement on their own. ALJ Long further recommended that a Joint Stipulation of Settlement (Joint Stipulation) regarding the Brady’s Bend Crossing was reasonable and appropriate and should be approved without modification, and that the Brady’s Bend Crossing should be abolished. R.D. at 2. *August 2022 Recommended Decision* at 2, 36-40.

On December 8, 2022, the Commission entered an Opinion and Order, adopting the *August 2022 Recommended Decision (December 2022 Order)*. R.D. at 2.

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 (TUS,) and all parties involved of completion of the work as required by the *December 2022 Order*. Through its letter, B&LE requested final inspection of the project. R.D. at 2-3.

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. R.D. at 3.

On July 2, 2024, a prehearing conference was convened. R.D. at 3.

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 August 6, 2024, a status conference was held. R.D. at 3.

On September 6, 2024, B&LE, PennDOT, and I&E requested by e-mail that the October 2, 2024, evidentiary hearing be cancelled. R.D. at 4.

On September 13, 2024, B&LE, PennDOT, and I&E filed a Joint Stipulation of Facts (Joint Stipulation of Facts). R.D. at 4.

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. R.D. at 4.

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 November 4, 2024. R.D. at 4.

In the Recommended Decision issued on January 30, 2025, ALJ Coogan recommended that B&LE be assigned responsibility for the \$2,790,496.10 cost of the AECOM Engineering Report and the filling of the Blackburn Tunnel (Tunnel Fill Project). Additionally, ALJ Coogan recommended that B&LE should bear responsibility for the \$27,189.05 costs incurred by PennDOT during the Tunnel Fill Project. Lastly, ALJ Coogan recommended that B&LE be assigned responsibility for any future maintenance and associated costs of the Blackburn Tunnel. R.D. at 33-36.

As noted, *supra*, B&LE filed Exceptions on February 17, 2025. PennDOT filed Replies to Exceptions on February 26, 2025. I&E filed Replies to Exceptions on February 28, 2025.

II. Background

B&LE acquired the railroad line, known as the Western Allegheny Branch, which included the Blackburn Tunnel and Brady's Bend Crossing, from the Western Allegheny Railroad Company in 1967. B&LE discontinued operation of rail service on the Western Allegheny Branch around 1998, and in 2000, the Railroad filed a notice with the Surface Transportation Board (STB) to abandon service along approximately twenty miles of rail line in Butler and Armstrong Counties. The STB authorized the

abandonment of rail service on January 17, 2001. *August 2022 Recommended Decision* at 14.

On May 31, 2001, B&LE filed an Application with the Commission, at Docket No. A-00117858, which sought authorization to abandon twenty-eight grade crossings and the Blackburn Tunnel. Via a Secretarial Letter dated April 30, 2002 (*April 2002 Secretarial Letter*), the Commission granted B&LE's Application to abolish twenty-seven of the grade crossings. However, the Commission did not authorize B&LE to abolish the Blackburn Tunnel or Brady's Bend Crossing.¹ The *April 2002 Secretarial Letter* stated that the Blackburn Tunnel and Brady's Bend Crossing would be addressed by a future Secretarial Letter or formal hearing. The Commission further observed that B&LE and PennDOT were negotiating a disposition of the Blackburn Tunnel. *April 2002 Secretarial Letter* at 4.

On October 24, 2002, B&LE conveyed the property containing the Blackburn Tunnel to the Western Allegheny Landowner's Association (WALA). In 2004, PennDOT, with B&LE's permission, removed the railway bridge that carried the B&LE track over State Route 68 at Brady's Bend Crossing, and realigned the roadway. The final Secretarial Letter at Docket No. A-00117858, dated February 1, 2012, stated that B&LE had completed all work and the case be closed, although the Blackburn Tunnel was not specifically mentioned. No further Commission action was taken at Docket No. A-00117858. *August 2022 Recommended Decision* at 14-16.

In 2018, PennDOT contacted the Commission concerning the disposition of the two crossings. Following an informal investigative field conference on June 26, 2018, which was attended by the Commission's Rail Safety Division, PennDOT, B&LE, and six local homeowners located near the Blackburn Tunnel, the Commission

¹ The Blackburn Tunnel was identified as Crossing No. 27(a) and Brady's Bend Crossing was identified as Crossing No. 28. *April 2002 Secretarial Letter* at ¶ 1.

instituted the investigation described above, on October 3, 2019, regarding the disposition of the Blackburn Tunnel and Brady's Bend Crossing. *August 2022 Recommended Decision* at 14-16.

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 Blackburn Tunnel. On July 30, 2021, B&LE complied with the Interim Order and submitted the AECOM Engineering Report to all Parties, at a cost of \$19,584.10.

In the *December 2022 Order* adopting the *August 2022 Recommended Decision*, the Commission ordered B&LE, at its initial cost and expense, to submit complete detailed construction plans for the work proposed to permanently dewater, seal, and fill the Blackburn Tunnel, from portal to portal. On August 29, 2023, B&LE submitted a Means and Methods proposal and engineering sketch plan to all parties. On September 26, 2023, B&LE provided an engineering plan illustrating the scope of work and construction sequence of filling the Blackburn Tunnel (*i.e.* the Tunnel Fill Project). A Secretarial Letter was issued on October 10, 2023, approving the Plan submitted by B&LE. The Tunnel Fill Project was completed on March 29, 2024, at a cost of \$2,770,912.00.

Pursuant to the *December 2022 Order*, 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. PennDOT incurred an initial cost of \$27,189.05 in complying with the *December 2022 Order*.

A. Positions of the Parties

1. B&LE

B&LE first argued that the Commission does not have jurisdiction to allocate any costs related to the repair, removal, reconstruction, or maintenance of the Blackburn Tunnel because B&LE is no longer a “concerned party”. B&LE averred 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. Additionally, B&LE claimed, a “concerned party” includes a transportation utility that conducts regular operations at a crossing and may enforce an easement-based right of way. B&LE M.B. at 5-8 (citing *Norfolk Southern Ry. Co. v. Pa. PUC*, 77 A.3d 619 (Pa. 2013) (*Norfolk Southern*); *City of Chester v. Pa. PUC*, 798 A.2d 288 (Pa. Cmwlth. 2002) (*City of Chester*)).

Therefore, B&LE argued that a railroad must still be an owner of the crossing facilities to be a “concerned party” where no regular operations are conducted, and where the railroad no longer has an easement-based right of way. B&LE asserted that it has had no ownership of the Blackburn Tunnel since October 24, 2002, it has not operated at the Blackburn Tunnel since 1999, and it has no easement right of way at the Blackburn Tunnel. B&LE M.B. at 9-11.

B&LE opposed any argument that failure to comply with 66 Pa. C.S. § 2709, which requires that rail utilities who intend to dispose of property must provide written notice to certain local governments and state agencies, may void the sale of B&LE’s property to WALA. B&LE further averred that the local governments and PennDOT had received notice of the Railroad’s intent to dispose of the property, but failed to act on any rights they may have had. B&LE also argued that the doctrine of laches and the three-year statute of limitations in Section 3314 of the Public Utility Code

(Code), 66 Pa.C.S. § 3314, prevents voiding the sale of the property to WALA. B&LE M.B. at 12-21.

In the alternative, B&LE argued that 66 Pa. C.S. § 2702, regarding the construction, relocation, suspension and abolition of crossings, is preempted by the Interstate Commerce Commission Termination Act (ICCTA). Namely, B&LE claimed that 49 U.S.C. § 10501(b) demonstrates federal intent to preempt state regulation of railroads; and therefore, the STB has preempted the authority of the Commission to assess any liability against B&LE for the costs related to the repair, removal, reconstruction, or maintenance of the Blackburn Tunnel. B&LE M.B. at 22-23.

2. I&E

I&E disagreed with B&LE's arguments that the Commission has no jurisdiction to require B&LE to perform work to remediate the conditions at the Blackburn Tunnel or assess costs on B&LE. I&E stated that B&LE benefitted from the crossing when it was in operation and was responsible for the deterioration of the tunnel. I&E contended that the ICCTA regulates rail service, but that nothing in the federal statute preempts the Commonwealth's police powers to protect public safety by ensuring the safety of railroad crossings. I&E M.B. at 5-6.

I&E cited to *Greene Township v. Pa. PUC*, 668 A.2d 615 (Pa. Cmwlth. 1995) (*Greene Township*), wherein the Commonwealth Court set forth certain factors relevant to the assignment of costs at rail crossings, to argue that ownership is not a controlling factor considered in allocating costs and maintenance responsibilities. I&E further submitted that in the application of CSX Transportation, Inc., Docket No. A-2019-3013783 (Opinion and Order entered February 3, 2022; Opinion and Order denying Reconsideration entered

November 10, 2022) (*CSX Transportation 2022*), the Commission reinforced the position that ownership is not the only controlling factor in allocating costs. I&E M.B. at 6-8.

I&E averred that B&LE benefitted from the Blackburn Tunnel by using the rail line to move freight and avoid costs and liabilities associated with an at-grade crossing. Additionally, I&E contended that the Railroad was responsible for the deterioration of the Blackburn Tunnel. Therefore, I&E argued that B&LE should bear the cost for the remediation, closure, and abolishment of the Blackburn Tunnel. I&E M.B. at 8-9. However, I&E asserted PennDOT should be responsible for the costs of traffic control at the Blackburn Tunnel. I&E R.B. at 13.

3. PennDOT

PennDOT contended that all costs related to the remediation of the conditions at the Blackburn Tunnel should be assessed on B&LE. PennDOT argued that B&LE, or its predecessor, constructed the tunnel, used the tunnel during its operation, and is responsible for the deterioration and collapse of the tunnel by failing to maintain it. PennDOT averred that it would not be fair to assess any costs to PennDOT because B&LE should not benefit from failing to fill the tunnel and properly abolish the crossing, which would have protected the integrity of State Route 0268. PennDOT further argued that the sale of the Blackburn Tunnel does not divest the Commission of jurisdiction to assign work and assess costs. Rather, PennDOT contended that B&LE should not be rewarded for failing to obtain Commission approval to abolish the crossing. PennDOT M.B. at 8-12.

Moreover, PennDOT asserted that B&LE's Federal preemption argument should be rejected. Citing *Wheeling & Lake Erie Ry. Co. v. Pa. PUC*, 778 A.2d 785 (Pa. Cmwlth. 2001), PennDOT argued that STB jurisdiction and Commission jurisdiction

are distinct, and Federal authority does not preempt the Commission from regulating rail highway crossings. PennDOT M.B. at 12-13.

III. Discussion

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

Sections 2702 and 2704 of the Code, 66 Pa. C.S. §§ 2702 and 2704, set forth the powers of the Commission in cases involving rail-highway crossings. These Sections provide, in pertinent part, as follows:

§ 2702. Construction, relocation, suspension and abolition of crossings.

(a) General rule. -- No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

(b) Acquisition or property and regulation of crossing. -- The commission is hereby vested with exclusive power to

appropriate property for any such crossing, except as to such property as has been or may hereafter be condemned by the Department of Transportation for projects financed entirely by the Commonwealth and for Federal Aid Projects . . . and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossings may be constructed, altered, relocated, suspended or abolished, . . . to effectuate the prevention of accidents and the promotion of the safety of the public...

(c) Mandatory relocation, alteration, suspension or abolition. -- Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, . . . to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. . . The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth...

§ 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings.

(a) General rule. --...[t]he cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid as provided in this section, by the public utilities, municipal corporations...concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

66 Pa. C.S. §§ 2702 and 2704.

Furthermore, the Commission has stated that:

As provided by these Sections of the Code, the Commission has the exclusive jurisdiction to determine whether and how a rail-highway crossing should, as pertinent to this case, be abolished, as well as to determine which party or parties should bear the costs of such abolition. *Department of Transportation v. Pa. PUC*, 282 A.2d 313, 316 (Pa. Cmwlth. 1971). When the Commission exercises its discretion to allocate costs in a rail-highway crossing case, it is not limited to any fixed rule, but takes all relevant factors into consideration, with the fundamental requirement being that its order be just and reasonable. *Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983).

Title 49 U.S.C.A. § 10903, which empowers the Interstate Commerce Commission (ICC) to authorize abandonment of rail lines neither conflicts with, nor preempts the provisions of the Code, 66 Pa. C.S. §§ 2702 and 2704, pertaining to the suspension or abolition of rail-highway crossings, the assignment of responsibility therefor, and the allocation of the costs thereof. Thus, where a railroad has received permission from the ICC to abandon a rail line, or a section thereof, and has exercised that permission by physically removing its tracks and ties from the right-of-way, this Commission retains the jurisdiction to assign maintenance responsibility for the rail-highway crossing and to allocate the costs thereof. In exercising this jurisdiction, the Commission can allocate a portion of the maintenance costs to the railroad which had physically removed its tracks pursuant to the authorization received from the ICC. *CSX Transportation, Inc. v. Pa. PUC*, 558 A.2d 902 (Pa. Cmwlth. 1989), alloc. denied, 567 A.2d 654 (1989). Thus, the fact that the rail line has been abandoned, the tracks and ties removed, or the fact that the railroad transferred the right-of-way at issue in this proceeding to a third party, which is not a public utility, does not oust the jurisdiction of the Commission from enforcing its outstanding Order of October 9, 1961, at Docket No. A-86353, or from entering a new order in this proceeding assigning responsibility for the work to be performed, if any, and allocating the costs thereof. Once the Commission has

determined that there is a rail-highway crossing at a particular location, a rail-highway crossing continues to exist at that location until the Commission, in the exercise of its exclusive power, 66 Pa. C.S. §§ 2702 and 2704, suspends, abolishes, etc., the crossing.

Borough of Ingram v. Consolidated Rail Corporation, Corliss Roadways Corporation, Commonwealth of Pennsylvania Department of Transportation, County of Allegheny, Equitable Gas Company, Western Pennsylvania Water Company, and AT&T Communications of PA, Inc.; and Application of Consolidated Rail Corporation for approval of the abolition of the crossings where the tracks of said Corporation's Pittsburgh-Columbus Main Line and Sheridan Branch cross public highways in the City of Pittsburgh, the Boroughs of Ingram and Crafton, Allegheny County, Docket Nos. C-00861036; A-00107227 (Decision issued May 15, 1991).

1. Abolition of Crossings

The Code provides that no crossing may be abolished without a Commission order. 66 Pa. C.S. § 2702(a). Section 2702 of the Code vests the Commission with the exclusive jurisdiction and “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.” 66 Pa. C.S. § 2702; *Pittsburgh & Lake Erie R. Co. v. Pa. PUC*, 445 A.2d 851, 853 (Pa. Cmwlth. 1982); *see also*, 66 Pa. C.S. § 2702(b); *Pa. Game Commission v. Pa. PUC*, 651 A.2d 596, 603 (Pa. Cmwlth. 1994), *alloc. denied*, 664 A.2d 977 (1995).

2. Crossing Maintenance Work and Cost Allocation

The Commission may order any public utility or municipal corporation concerned or the Commonwealth to perform work associated with any order issued regarding the crossing. 66 Pa. C.S. § 2702(c). The Commission has the exclusive authority to determine and order which parties shall perform the work at the crossing and which parties shall maintain the crossing in the future to prevent accidents and promote the safety of the public. *SEPTA v. Pa. PUC*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied*, 611 A.2d 714 (1992).

The costs of such work may be assessed and allocated among parties “in such proper proportion as the Commission may . . . determine.” 66 Pa. C.S. § 2704(a). The Commission determines which parties are concerned within the meaning of 66 Pa. C.S. § 2704(a) and 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979).

The Commission has considered many factors when allocating highway-rail maintenance responsibilities, such as:

1. The party that originally built the crossing.
2. The party that owned and maintained the crossing.
3. The relative benefit conferred on each party with the construction of the crossing.
4. Whether each party is responsible for the deterioration of the crossing that has led to the need for its repair, replacement, or removal.

5. The relative benefit that each party will receive from the repair, replacement, or removal of the crossing.

N. Lebanon Twp. at 1247 (citing *Greene Township*).

The Commission is not restricted to the above-cited factors.

Millcreek Twp. v. Pa. PUC, 753 A.2d 324 (Pa. Cmwlth. 2000) (citing *AT&T v. Pa. PUC*, 737 A.2d 201 (Pa. 1999)). The Commission can consider other factors such as the availability of state and/or federal funding for a project and the general equities of the case in its determination. *Erie L.R. Co. v. Pa. PUC*, 278 A.2d 188 (Pa. Cmwlth. 1971); *SEPTA v. Pa. PUC*, 802 F. Supp. 1273 (E.D. Pa. 1992); *Application of the City of Wilkes-Barre*, Docket No. A-00101606 (Order entered April 9, 1981). Moreover, the Commission may “determine which factors are relevant in assessing costs within the context of the particular case before it.” *Bell Atl. Pa. v. Pa. PUC*, 672 A.2d 352, 355 (Pa. Cmwlth. 1995).

B. ALJ’s Initial Decision

In his Recommended Decision, ALJ Coogan made twenty-seven Findings of Fact and reached ten Conclusions of Law. R.D. at 4-8, 36-38. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ recommended that the Commission direct B&LE to bear responsibility for the final costs related to work necessary to fill and permanently close the Blackburn Tunnel. Additionally, the ALJ recommended that B&LE be assigned responsibility for future maintenance of the Blackburn Tunnel. Finally, the ALJ

recommended that PennDOT be responsible for the costs to maintain PennDOT facilities at the Blackburn Tunnel. R.D. at 1.

Based on the reasoning in the *August 2022 Recommended Decision* and the *December 2022 Order*, ALJ Coogan agreed with I&E and recommended that the Commission reject B&LE's arguments that: (1) it should not be allocated costs because it is not a "concerned party" to this proceeding; (2) that allocation is barred by the doctrine of laches and the three-year statute of limitations; and (3) this proceeding is preempted by federal law. The ALJ noted B&LE's argument that it is not a "concerned party" because it does not own the crossing, nor does it have a substantial, ongoing use of the crossing. However, ALJ Coogan found that the Commission's "concerned party" analysis in its *December 2022 Order* remains persuasive in this proceeding to determine final costs. By declining to stray from the *December 2022 Order*, the ALJ agreed that B&LE remained a "concerned party" due to its failure to receive Commission approval to abolish the Blackburn Tunnel. R.D. at 30-31. Finally, the ALJ noted that in the *December 2022 Order*, the Commission, in citing *Bronder* and *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991), explained that 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 31 (citing *December 2022 Order* at 33).

The ALJ noted that the *August 2022 Recommended Decision* and the *December 2022 Order* each indicated that B&LE's arguments regarding the doctrine of laches and the three-year statute of limitations under Section 3314 of the Code, 66 Pa.C.S. § 3314, are an extension of its argument that the Railroad is not a "concerned party." Again, ALJ Coogan agreed with the Commission that B&LE is not relieved of its obligation to maintain the Blackburn Tunnel, given that B&LE never received Commission authorization to abolish the Blackburn Tunnel. Consequently, the ALJ recommended that the Commission deny B&LE's arguments regarding the doctrine of laches or the statute of limitations. R.D. at 31.

Next, the ALJ addressed B&LE's argument that the ICCTA preempts Pennsylvania law. ALJ Coogan agreed with the *July 2022 Recommended Decision*, stating "... the Commonwealth Court disposed of this argument and ruled 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." *Id.* at 20-22 (citing *Wheeling*). Therefore, the ALJ found that the ICCTA does not preempt Pennsylvania law based on the Commonwealth Court's decision in *Wheeling*. R.D. at 31-32.

ALJ Coogan then explained that the remaining determination in this case was to balance the various factors to determine which party should be allocated final costs in this proceeding as it relates to the Blackburn Tunnel. I.D. at 32 (citing *Greene Township*). The ALJ noted that in her *August 2022 Recommended Decision*, ALJ Long considered these factors when she recommended that B&LE be assigned the initial cost and expense of remediating the Blackburn Tunnel and that PennDOT should be assessed traffic control costs. R.D. at 32 (citing *August 2022 Recommended Decision* at 34). In considering the positions of the Parties in this current phase of the proceeding, ALJ Coogan agreed 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. R.D. at 33. In reaching this conclusion, ALJ Coogan specifically noted the following findings of ALJ Long in the *August 2022 Recommended Decision*:

...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.

Id. (citing *August 2022 Recommended Decision* at 33-34).

Additionally, ALJ Coogan highlighted the following findings of the Commission in its *December 2022 Order* adopting the *August 2022 Recommended Decision* :

...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.

R.D. at 33 (citing *December 2022 Order* at 35-36).

For the reasons cited by ALJ Long in her *August 2022 Recommended Decision*, and by the Commission in its *December 2022 Order*, ALJ Coogan recommended that the Commission assign B&LE responsibility for the final costs the Railroad incurred for the AECOM Engineering Report and Tunnel Fill Project.

R.D. at 33.

Lastly, the ALJ agreed with PennDOT that B&LE should be responsible for the \$27,189.05 in costs incurred by PennDOT to comply with the traffic control directive recommended by ALJ Long in the *August 2022 Recommended Decision* and noted in the Joint Stipulation of Facts. ALJ Coogan pointed out that in the *August 2022 Recommended Decision*, ALJ recommended that the initial responsibility for traffic control costs be allocated to PennDOT. However, ALJ Coogan noted, ALJ Long did not

provide any discussion with regard to this recommendation, and the *December 2022 Order* did not provide any further discussion regarding traffic control cost. However, ALJ Coogan reasoned that PennDOT only incurred traffic control costs because the Commission ordered B&LE to close the Blackburn Tunnel. Since traffic control was necessary to complete the Tunnel Fill Project, ALJ Coogan opined that such costs are appropriately assigned to B&LE. R.D. at 33-34.

The final issue ALJ Coogan considered is the future maintenance of the Blackburn Tunnel. The ALJ noted that in their Joint Stipulation of Facts, the Parties presented the following:

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.

R.D. at 34 (citing Joint Stipulation of Facts at ¶ 17).

ALJ Coogan explained that he did not adopt the above subparagraphs as findings of fact in his Recommended Decision because he did not find these subparagraphs to be assertions of fact. Rather, the ALJ opined that 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. As such, the ALJ found that some, but not all, of the proposed findings should be adopted as ordering paragraphs. R.D. at 35.

Having decided the recommended final cost allocation, the ALJ agreed that a Secretarial Letter should be issued to formally abolish the Blackburn Tunnel crossing. However, ALJ Coogan disagreed with subparagraph A of the Joint Stipulation of Facts, *supra*, assigning future maintenance and costs of the Blackburn Tunnel to the landowners where the tunnel is located. Based on 66 Pa.C.S. § 2704(a), the ALJ stated that costs are to be assigned to “public utilities, municipal corporations, municipal authority or nonprofit organization..., or [to] the Commonwealth.” Therefore, the ALJ found that he did not have legal authority to recommend that the Commission assign future maintenance and costs to private landowners. For the same reasons he recommended that the Commission assign B&LE responsibility for the final costs of the Tunnel Fill Project, ALJ Coogan recommended that future maintenance and costs be assigned to B&LE. The ALJ agreed with subparagraph B of the Joint Stipulation of Facts and found it appropriate to recommend that PennDOT be assigned future maintenance and costs of its facilities at the Blackburn Tunnel crossing. Lastly, ALJ Coogan found subparagraph C to be unnecessary since the Parties did not provide any information that a non-carrier public utility has or will be affected by the remediation work at issue in this proceeding, and that public utilities are already responsible for maintenance of their own facilities according to 66 Pa.C.S. § 1501. R.D. at 35-36.

C. Exceptions

In its Exception No. 1, B&LE excepts to Conclusion of Law No. 4 of the Recommended Decision, which 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. *East Rockhill Twp. v. Pa. Pub. Util. Comm'n.*, 540 A.2d 600 (Pa. Cmwlth. 1988).

Exc. at 1 (citing R.D. at 37). According to B&LE, Conclusion of Law No. 4 erroneously suggests the Commission may allocate costs to parties who are not considered "concerned parties" and that the Commission has the authority to conduct a concerned party analysis. Exc. at 1 (citing *Norfolk Southern*).

Next in its Exception No. 2, B&LE finds fault with Conclusion of Law No. 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. *Norfolk S. Ry. Co. v. Pub. Util. Comm'n.*, 77 A.3d 619 (Pa. 2013).

Exc. at 2 (citing R.D. at 37). Similar to its arguments in its Exception No. 1, B&LE contends that Conclusion of Law No. 5 erroneously suggests the Commission may allocate costs to parties who are not considered concerned parties and that the

Commission has the authority to conduct a concerned party analysis. Exc. at 2 (citing *Norfolk Southern*).

In its Exception No. 3, B&LE excepts to Conclusion of Law No. 6 of the Recommended Decision, 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. *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).

Exc. at 2 (citing R.D. at 37). B&LE insists that 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. Exc. at 2-3 (citing *City of Chester*). B&LE remains of the opinion that although 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*, there must still be at least a substantial, ongoing use of the crossing by the railroad in order for it to be a “concerned party.” Exc. at 3.

B&LE contends that it does not have a “substantial interest” in the Blackburn Tunnel because it has not conducted operations at the crossing since 1998 and does not use the public highway at the crossing for any purpose. B&LE further contends that it is not a “concerned party,” as that term is defined under the relevant provisions of the Code, because it has had no ownership interest in any facilities at the Blackburn Tunnel since October 24, 2002, has not conducted any operations at the crossing since 1998, and has no easement-based right-of-way to the crossing. B&LE avers that the real property, rail line, and any rail facilities at the Blackburn Tunnel were conveyed to WALA on October 24, 2002, and that it has no ownership interest in real property or

track, signal, communication or other railroad facilities whatsoever at the former crossing. Exc. at 3-4.

B&LE insists that ALJ Coogan mistakenly found non-owner railroads to be a “concerned party,” where the railroad fails to secure the Commission’s authorization to abolish a crossing prior to selling the property. Exc. at 4-5 (citing R.D. at 31 (citing *Bronder* and *Borough of Bridgeville*)). B&LE submits that in *Bronder*, the Commission relied “solely and exclusively” on the Commonwealth Court’s decision in *CSX Transp. Inc. v. Pa. PUC*, 558 A.2d 902 (Pa. Cmwlth. 1989) (*CSX Transp.*) to attach “concerned party” status to a railroad after it sold its property at a crossing. B&LE asserts that in *Bronder*, the Commission wrongly determined that it has the authority to allocate costs to a party regardless if the party is considered a “concerned party” according to Section 2702 of the Code, 66 Pa.C.S. § 2702. Exc. at 5-6 (citing *Bronder* at 17). B&LE further asserts that the Pennsylvania Supreme Court held in *Norfolk Southern* that the Commission’s authority to allocate costs is limited to parties that own facilities at the crossing, or conduct regular operations at the crossing, and have an enforceable easement based right of way. *Id.* at 6 (*Norfolk Southern* at 334). Therefore, B&LE argues that *Bronder* has no precedential value, is not binding on the Commission, and was incorrectly decided. Likewise, B&LE claims the ALJ’s reliance on the decision in *Borough of Bridgeville* to support his finding that the Commission may allocate costs to a non-owner railroad is overruled by *Norfolk Southern* and the Commission cannot rely on *Borough of Bridgeville* for precedential or persuasive authority. Exc. at 6-7.

In its Exception No. 4², B&LE excepts to Conclusion of Law No. 7 of the Recommended Decision, which 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 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).

Exc. at 8 (citing R.D. at 37). B&LE maintains its position that the ICCTA preempts state law regarding regulation of railroads by providing the STB the jurisdiction over abandonment of railroad facilities. Hence, B&LE avers that because the Code is preempted by federal law, the Commission is improperly attempting to regulate the abolishment of the Blackburn Tunnel. Exc. at 8-9.

In its Exception No. 5, B&LE excepts to Conclusion of Law No. 8 of the Recommended Decision, 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. 66 Pa.C.S. §§ 2702, 2704." Exc. at 9 (citing R.D. at 38). B&LE claims that ALJ Coogan erred in making this conclusion since the Commission is precluded from allocating any costs to it for the same reasons the Railroad stated in its Exception Nos. 1-4. B&LE argues that the ALJ did not appropriately consider that the Railroad has not owned the property for twenty years, had no use of it, and had no access or right of access to the Blackburn Tunnel. Therefore, B&LE contends that any deterioration of the subject property is the responsibility of the property owners, and allocating any costs to B&LE would not be just or reasonable. Furthermore, B&LE states that it is being allocated costs in this proceeding simply because it was the former

² B&LE numbered two Exceptions as Exception No 3. The second Exception No. 3, beginning on Page 8, will be considered B&LE's Exception No 4. Each subsequent B&LE Exception will be addressed following this modified numbering sequence.

owner of the Blackburn Tunnel and that such cost allocation is unjust and unreasonable even if the Commission has legal authority to allocate such costs to B&LE. Exc. at 9-10.

In its Exception No. 6, B&LE takes issue with Conclusion of Law No. 9 of the Recommended Decision, which states that “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.” Exc. at 10-11 (citing R.D. at 38). For the same reasons articulated in its Exception Nos. 1-5, B&LE contends that ALJ Coogan erred by recommending the allocation of costs to the Railroad, including future maintenance costs. B&LE reiterates its position that it is being assigned costs because it formerly owned the Blackburn Tunnel. B&LE maintains that it is unjust and unreasonable for the Commission to allocate future costs to B&LE, given that the Railroad does not own the Blackburn Tunnel and does not maintain any right to access the property. Exc. at 11.

In its Exception No. 7, B&LE excepts to Ordering Paragraph No. 1 of the Recommended Decision, which states “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.” Exc. at 11 (citing R.D. at 38). For the same reasons cited in its Exceptions 1-6, B&LE disagrees with the ALJ’s recommendation to allocate the cost of the AECOM Engineering Report to B&LE. Exc. at 11.

In its Exception No. 8, B&LE excepts to Ordering Paragraph No. 2 of the Recommended Decision, which states “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.” Exc. at 11 (citing R.D. at 38). For the same reasons cited in its Exceptions 1-7, B&LE disagrees with the ALJ’s recommendation that the cost of the Tunnel Fill Project be allocated to B&LE. Exc. at 11-12.

In its Exception No. 9, B&LE excepts to Ordering Paragraph No. 3 of the Recommended Decision, which states “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.” Exc. at 12 (citing R.D. at 39). For the same reasons cited in its Exceptions 1-8, B&LE disagrees with the ALJ’s recommendation to allocate the cost of traffic control during the Tunnel Fill Project to B&LE. Exc. at 12.

Finally, in its Exception No. 10, B&LE excepts to Ordering Paragraph No. 4 of the Recommended Decision, which states “That future costs and maintenance of the Blackburn Tunnel will be the responsibility of the Bessemer and Lake Erie Railroad.” Exc. at 12 (citing R.D. at 39). For the same reasons cited in its Exceptions 1-9, B&LE disagrees with the ALJ’s recommendation to allocate the future costs and maintenance of the Blackburn Tunnel to B&LE. Exc. at 12.

D. Reply Exceptions

Initially, in reply to B&LE’s Exceptions, I&E states that the Commission has exclusive power to determine the manner in which rail-highway crossings are abolished. I&E R Exc. at 2 (citing *Pittsburgh & Lake Erie R. Co. v. Pa. PUC* and 66 Pa. C.S. § 2702(b)). I&E notes that the Commission, in its *December 2022 Order*, determined 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.” I&E R Exc. at 3 (citing *December 2022 Order* at 35). Given that the Commission previously found that B&LE is a “concerned party” relating to the abolishment of the Blackburn Tunnel, I&E claims that B&LE may not raise the issue here. I&E R Exc. at 3 (citing 66 Pa.C.S. § 316). Additionally, I&E notes that in its *December 2022 Order*, the Commission previously

rejected B&LE's argument that the STB preempts the Commission's jurisdiction with respect to rail-highway crossings. R. Exc. at 3 (citing *CSX Transp.*).

In reply to B&LE's Exception No. 1, I&E contends that the ALJ correctly stated the law and properly applied it to B&LE. I&E avers that Conclusion of Law No. 4 of the Recommended Decision is a correct statement of law. I&E argues that the Commission has previously determined that B&LE is a "concerned party" regarding the abolishment of the Blackburn Tunnel, based on the law governing cost allocation of rail-highway crossings. R. Exc. at 3-4.

In reply to B&LE's Exception No. 2, I&E argues that the ALJ correctly stated the law and correctly applied the standards used by the Commission in determining maintenance and cost allocation. Again, I&E notes that the Commission has previously determined that B&LE is a "concerned party" regarding the abolishment of the Blackburn Tunnel, based on the law governing cost allocation of rail-highway crossings. R. Exc. at 4.

In reply to B&LE's Exception No. 3, I&E argues that the ALJ correctly found that the Commission is not deprived of jurisdiction because B&LE sold its property to a private entity. I&E states that B&LE's Exception No. 3 is based on B&LE's unique interpretation of *Norfolk Southern*. I&E asserts that in *Norfolk Southern*, the Pennsylvania Supreme Court deemed that a "concerned party" does not need to own the rail-highway crossing under 66 Pa.C.S. § 2704(a). Additionally, I&E claims that the Pennsylvania Supreme Court's decision in *Norfolk Southern* does not limit "concerned party" status to railroads that possess a right-of-way at the crossing or that conduct regular operations at the crossing. I&E avers that *Norfolk Southern* did not address whether the Commission is relieved of jurisdiction over a railroad that stops using or sells a rail-highway crossing. R. Exc. at 4-6 (citing *Norfolk Southern*). I&E notes that in *City of Pittsburgh v. Pa. PUC*, 404 A.2d 786, 790 (Pa. Cmwlth. 1979) (*City of*

Pittsburgh), the Commonwealth Court decided that “the Commission retains jurisdiction over a crossing until permission to abandon operation of the tracks is sought and granted by the Commission.” Finally, I&E argues the Commission rejected B&LE’s position in the *December 2022 Order* when the Commission ruled that B&LE remains a “concerned party” because it did not obtain Commission approval to abolish the Blackburn Tunnel. *Id.* at 6.

Next, in reply to B&LE’s Exception No. 4, I&E argues that the ALJ correctly stated the law and correctly applied it to B&LE when he determined that the Commission has authority to set conditions for the abolition of rail-highway crossings. I&E asserts that the Commonwealth Court in *Wheeling* has agreed that the Commission has jurisdiction over rail-highway crossings, and neither the ICCTA nor the STB’s regulations preempts the Commission’s regulatory authority. Further, I&E states that the Eighth Circuit court stated that the ICCTA does not preempt state regulation of rail-highway crossings. Additionally, I&E claims B&LE is barred from raising this issue as the Commission previously addressed B&LE’s preemption argument in the *December 2022 Order*. R. Exc. at 6-7.

In reply to B&LE’s Exception No. 5, I&E argues that the ALJ correctly found that it is just and reasonable for B&LE to be assigned the final costs of the Tunnel Fill Project. I&E avers that B&LE’s argument that it is not just and reasonable to assign the Railroad costs related to the Tunnel Fill Project is a repackaging of its overarching argument that it is not a “concerned party.” I&E notes it previously addressed B&LE’s claims in its replies to B&LE’s “concerned party” arguments. R. Exc. at 8-9.

Next, in reply to B&LE’s Exception No. 6, I&E contends that the ALJ correctly stated the law when he recommended that B&LE be assigned costs for the future maintenance of the Blackburn Tunnel. I&E agrees with ALJ Coogan’s finding that

the Commission does not have authority to assign future maintenance costs of the Blackburn Tunnel to private landowners. R. Exc. at 9-10 (citing R.D. at 35).

Finally, in reply to B&LE's Exception Nos. 7 through 10, I&E argues that the Ordering Paragraph Nos. 1 through 4 of the Recommended Decision should not be modified. As it stated in its replies to B&LE's other Exceptions, *supra*, I&E claims that the ALJ correctly found that the Commission has jurisdiction to assign costs of the Blackburn Tunnel to B&LE. R. Exc. at 10-11.

In its Replies to B&LE Exception Nos. 1,2, and 3, PennDOT agrees with ALJ Coogan's R.D., the *July 2022 Recommended Decision*, and the *December 2022 Order*, each of which found that B&LE is a "concerned party" for the purposes of allocating the costs of the Blackburn Tunnel. PennDOT claims that if B&LE is not considered a "concerned party," it will open a loophole where railroads may sell their rail-highway crossings instead seeking Commission approval to abolish the crossings and doing so in a proper safe manner. PennDOT R. Exc. at 1-2.

In Reply to B&LE Exception No. 3, PennDOT notes that B&LE's argument claiming the ICCTA preempts state law was rejected in the *July 2022 Recommended Decision* based on *Wheeling*, where Commonwealth Court upheld that the Commission has authority to regulate rail-highway crossings and allocate costs. PennDOT claims that B&LE failed to show how *Wheeling* is distinguished from the instant case. Therefore, PennDOT agrees with the ALJ that the STB under the ICCTA does not preempt Commission jurisdiction. PennDOT R. Exc. at 2-3 (citing *Wheeling*).

In its Replies to B&LE Exceptions Nos. 4 and 7, PennDOT argues the ALJ properly considered the factors used to determine cost allocation and maintenance responsibilities. PennDOT agrees with ALJ Coogan that the factors weighed in this case

show that B&LE is responsible for the cost of the Tunnel Fill Project. PennDOT R. Exc. at 3-4.

In Reply to B&LE Exception Nos. 8 and 9, PennDOT notes that it discussed the “concerned party” argument of B&LE in its Reply to B&LE’s Exception No. 1, *supra*. PennDOT asserts it is not unjust or unreasonable to allocate traffic control costs to B&LE because B&LE would not have had to undertake the Tunnel Fill Project had it continuously and properly maintained the Blackburn Tunnel. Hence, PennDOT concludes that the ALJ justly recommended that traffic control costs that were borne from the Tunnel Fill Project be allocated to B&LE. PennDOT R. Exc. at 5-6.

E. Disposition

Upon our review of the record and arguments, we shall deny B&LE’s Exceptions and adopt the ALJ’s Recommended Decision, consistent with the following discussion. We agree with I&E that B&LE, in its Exceptions, repeats its arguments previously disposed of by the Commission in the *December 2022 Order* relating to “concerned party” status and cost allocation. We determine that the ALJ carefully reviewed and analyzed the Parties’ arguments, including B&LE’s, and that the Recommended Decision is supported by sound legal reasoning and evidence of record. For this reason, we will not modify the Recommended Decision, and we will deny the Railroad’s Exceptions.

B&LE’s position is based upon a flawed general contention that it cannot be assigned costs because it is not a “concerned party” within the meaning of the Code because: (1) it has not conducted any operations at the crossing since 1998; (2) it has had no ownership interest in any facilities at the Blackburn Tunnel since October 2002; and (3) it has no easement-based rights-of-way to the crossing. Therefore, B&LE argues that

the Commission does not have jurisdiction and is precluded from allocating costs to B&LE. However, we reject B&LE's position.

The *December 2022 Order* thoroughly discussed, and denied, B&LE's claims that the Railroad is not a "concerned party" regarding the Blackburn Tunnel. *December 2022 Order* at 31-37. Specifically, the *December 2022 Order* definitively summarized the Commission's authority to regulate rail-highway crossings, where the Commission stated:

The Commission 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. 66 Pa. C.S. § 2702(a)-(b). Further, 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's power regarding rail-highway crossings endures until the Commission issues an order authorizing the abolition of the crossing. *City of Pittsburgh v. Pa. PUC*, 404 A.2d 786 (Pa. Cmwlth. 1979). The Commission determines which parties are "concerned" or "interested" within the meaning of 66 Pa. C.S. §§ 2704(a) & 2702(c). *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Cmwlth. 1979). The Commission is empowered to order the work performed upon such reasonable terms and conditions as it prescribes pursuant to Section 2702. 66 Pa. C.S. § 2702; *Pennsylvania Game Commission v. Pa. PUC*, 651 A.2d 596 (Pa. Cmwlth. 1994).

December 2022 Order at 32.

We agree with the ALJ that B&LE is a “concerned party” because B&LE never properly completed the process to receive authorization to abolish the Blackburn Tunnel. Further, as the Commission articulated in the *December 2022 Order*, the Commission has enforced its authority over railroads where railroads have failed to secure Commission authorization to abolish a crossing before selling the property. *December 2022 Order* at 33 (citing *Bronder*; *Borough of Bridgeville v. Allegheny Cnty.*, 74 P.U.C. 720 (1991)). In order to satisfy the Commission’s mandate to ensure the safety of rail-highway crossings, it is necessary that the Commission hold B&LE accountable for its failure to complete the process to properly abolish the Blackburn Tunnel.

Next, we disagree with B&LE’s argument that the ICCTA preempts the Code. We agree with the ALJ that, as noted in the *July 2022 Recommended Decision*, the Commonwealth Court ruled that the ICCTA 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. R.D. at 31-32, *July 2022 Recommended Decision* at 20-22 (citing *Wheeling*).

Finally, we agree with ALJ Coogan that it is inappropriate for the Commission to assign future maintenance and costs of the Blackburn Tunnel to the landowners where the Blackburn Tunnel is located. The ALJ correctly found that Section 2704 of the Code, 66 Pa.C.S. § 2704, does not give the Commission authority to assign costs to the aforementioned landowners. Further, in cases in which the Commission abolishes a crossing and assigns future costs, the Commission’s authority to enforce the future costs assigned is well established. *See Norfolk Southern Railway Co. v. Pennsylvania Public Utility Commission*, 875 A.2d 1243 (Pa. Cmwlth. 2005) (pertaining to the Commission’s continuing authority to enforce prior orders involving abolishment of rail crossings, where the abolishment order contains directives, *e.g.*, for ongoing maintenance responsibilities). Accordingly, we agree with the ALJ’s recommendation to assign future costs and maintenance of the Blackburn Tunnel to

B&LE. Additionally, we agree with the ALJ's recommendation to assign future maintenance and associated costs of State Route 0268 to PennDOT.

Based on the forgoing, we shall adopt the Recommended Decision of ALJ Coogan. Accordingly, the Exceptions of B&LE are denied.

IV. Conclusion

Based upon our review of the record, the applicable law, and the reasons set forth above, we shall deny the Exceptions of B&LE, and therefore, adopt, the ALJ's Recommended Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Bessemer & Lake Erie Railroad Company, filed on February 17, 2025, to the Recommended Decision of Administrative Law Judge John M. Coogan, issued on January 30, 2025, at this docket, are denied, consistent with this Opinion and Order.

2. That the Recommended Decision of Administrative Law Judge John M. Coogan, issued on January 30, 2025, at this docket, is adopted, consistent with this Opinion and Order.

3. 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.

4. 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.

5. 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.

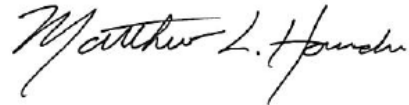
6. That future costs and maintenance of the Blackburn Tunnel will be the responsibility of the Bessemer and Lake Erie Railroad.

7. That the Pennsylvania Department of Transportation, at its sole cost and expense, shall furnish all material and do all work necessary for future maintenance to 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.

8. That the Commission's Secretary shall issue a letter formally abolishing the Blackburn Tunnel crossing.

9. That upon the submission of the Secretarial Letter, as set forth in Ordering Paragraph 8, the Secretary's Bureau shall mark the proceeding at Docket No. I-2019-3012769 closed.

BY THE COMMISSION

A handwritten signature in black ink, reading "Matthew L. Homsher". The signature is written in a cursive style with a large initial "M".

Matthew L. Homsher
Secretary

(SEAL)

ORDER ADOPTED: July 10, 2025

ORDER ENTERED: July 10, 2025