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July 2, 2008

VIA FED EX

Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
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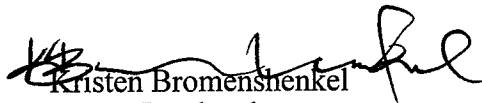
RE: Docket TR-061442
WUTC Crossing No.: 2A1673.50U
USDOT Crossing No.: 084493W

Dear Ms. Washburn:

Enclosed please find the original and 5 full copies of *BNSF'S Reply Brief* for filing in the above referenced docket. The document has also been submitted electronically.

Very truly yours,

Montgomery Scarp MacDougall, PLLC


Kristen Bromenshenkel
Paralegal

Enclosure

cc: Louis N. Chernak (via U.S. Mail)
Jonathan Thompson (via U.S. Mail)
Judge Patricia Clark (via U.S. Mail)

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CHELAN COUNTY,

Petitioner

vs.

BNSF RAILWAY COMPANY,

Respondent

DOCKET NO: TR-061442

**BNSF RAILWAY COMPANY'S
POST-HEARING BRIEF**

July 2, 2008

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I. RELIEF REQUESTED

1 BNSF respectfully requests that the Commission deny Chelan County's petition to
alter the Chumstick Highway underpass bridge. If the Commission does grant any portion of
Chelan's petition, BNSF requests that it impose none of the potential costs on the railroad.

II. STATEMENT OF FACTS

2 This proceeding involves a segment of BNSF's mainline track through Chelan
County, Washington. The track is part of the primary freight and passenger train route linking
Seattle with the Midwest and east coast.¹ Chelan County ("Chelan" or "the County") seeks to
reconstruct and lengthen the span of a deck plate girder bridge supporting BNSF's track,
constructed in 1928 to allow the Chumstick Highway to pass beneath the railroad tracks.²
There is no dispute that the bridge itself is structurally sound.³

3 **Procedural History.** In or about September 2006, Chelan County filed its *Petition for
Alteration and Relocation of a Highway-Rail Under-Crossing* with the WUTC.⁴ The petition
alleged the alteration is necessary to "improve public safety at this location which has a
number of negative public safety factors, including: (1) a high accident rate, (2) limited sight
distances, (3) narrow roadway width, (4) roadway sharing the underpass with Chumstick
Creek, and (5) limited trestle height.⁵ The petition did not describe how the reconstruction
will improve *railway safety*, or state that the County had performed any inspection on its own
to determine the structural integrity of the trestle.⁶ BNSF opposed the petition, and the
Commission conducted an evidentiary hearing before Judge Clark on May 16, 2008, in

¹ Li, Exh. No. 25 p. 3:19-20.

² Exh. No. 19 (Chelan County's *Petition for Alteration and Relocation of a Highway-Rail Under-Crossing*); Roper, TR 135:3-4; Roper, Exh. No. 26 p. 2:18.

³ Roper, Exh. No. 26 p. 2:17-27.

⁴ See Exh. No. 19 (Chelan County's *Petition for Alteration and Relocation of a Highway-Rail Under-Crossing*).

⁵ *Id.*

⁶ Pezoldt, TR 78:3-6; 12-15.

Leavenworth, Washington. At the hearing, it became clear that the County's request was premature at best, not to mention unnecessary. The testimony confirmed better ways to address Chelan's highway safety concerns and its failure to generate viable design proposals or cost projections. The witnesses addressed the adverse effects on BNSF's operations and, perhaps more importantly, the evidence established the complete absence of *any* identifiable railway safety issues.

4 **The Underpass Configuration.** The two-lane Chumstick Highway curves as it passes under BNSF's railroad bridge near Leavenworth, Washington.⁷ The bridge has an overhead height of 15'3" and its abutments are protected by jersey barriers on both sides in both directions.⁸ Chelan County has "signed the curve through the trestle with a warning sign and flashing beacon, posted the curve with a 25 m.p.h. advisory speed, and posted signs warning of the clearance height and curve."⁹ Traffic engineer Gary Norris explained that the roadway conditions near the underpass are "consistent with the roadway geometry along the extent of the Chumstick Highway."

In my field visit, I drove the Chumstick Highway from US 2 to MP 10.00. Along this route I found substandard curves with advisory speeds of 25 m.p.h.; roadway cross-sections at bridges of 24 feet, and railroad trestles with height clearances of 14'2". In fact, in the recently reconstructed section of the Highway noted in Greg Pezoldt's testimony, i.e., south of MP 1.00 there is a substandard curve with a 30 m.p.h. advisory speed sign. Therefore, it is reasonable to assume that motorists traveling the Chumstick Highway would be familiar with the substandard conditions which exist along the corridor and drive accordingly.¹⁰

In fact, the underpass road width, bridge clearance, and general roadway surface condition are superior to other places on the route.¹¹

5 **Highway Safety.** Mr. Norris, a Senior Project Engineer with more than thirty years experience as a consulting engineer/traffic engineer/planner for local governments, was

⁷ Norris, Exh. No. 21 p. 4:18; Pezoldt, Exh. No. 19 at Exhibit 8 ("*BNSF crossing looking south, note Chumstick Cr. on left*").

⁸ *Id.* at p. 4:18-20.

⁹ *Id.* at p. 5:15-19.

¹⁰ Norris, Exh. No. 21 p. 5:23-6:2.

¹¹ *Id.* at pp. 3:20-23; 5:21-25.

“surprised” that the County focused on this section of the Chumstick Highway as a priority.¹² He determined that this section of the Chumstick Highway is not “unsafe” or “dangerous” based on comparing its collision history with similar locations:

[T]his section of Chumstick Highway had a collision rate of 1.30 collisions per million vehicle miles. . . .If we compare the rate against the rate for all roads in Chelan County, we find the County rate of 2.03 collisions per million vehicle miles Compared to this rate, this section of the Chumstick Highway appears to be relatively “safe” and not particularly “dangerous.” If we compare the Chumstick historical rates against the rate for State Highways in Chelan County (1.78 collisions per million vehicle miles), we again find the Chumstick Highway relatively safe. If we compare the rate for Rural Collectors in the State of Washington (1.55 collisions per million vehicle miles), the Chumstick history is significantly less.¹³

Seven of the eight accidents near the underpass (over a seven year period) involved traffic violations, with three involving alcohol, indicating the collisions resulted from driver error rather than a roadway deficiency.¹⁴

6 If Chelan is determined to alter the underpass, Mr. Norris suggested several reasonable alternatives to improve traffic circulation without reconstructing the BNSF bridge: better centerline and edge of roadway delineation, installing buttons to catch drivers’ attention, mounting flashing beacons in the curve, and increasing the number of chevrons to draw attention to the angle of the curve.¹⁵ Although afforded the opportunity to do so, Chelan County did not file any rebuttal testimony to refute Mr. Norris’ suggestions.

7 **Railway Safety.** BNSF Structures Supervisor Bruce Roper’s department inspects the bridge twice a year.¹⁶ The bridge has *no* structural defects.¹⁷ Dan MacDonald, BNSF Manager Engineering, confirmed that the bridge “is serviceable in its current condition and acceptable for unrestricted use by railway traffic.”¹⁸

¹² Norris, Exh. No. 21 p. 2:2-3; 4:23-24.

¹³ Norris, Exh. No. 21 p. 8:14-9:2.

¹⁴ *Id.* at p. 7:20-27.

¹⁵ *Id.* at p. 9:17-26.

¹⁶ Roper, Exh. No. 26 p. 2:12-13.

¹⁷ *Id.* at 2:17-27.

¹⁸ MacDonald, Exh. No. 29 p. 3:13-14.

Chelan's only witness, Mr. Pezoldt, acknowledged that the County has not identified any rail or highway safety concern with the structural condition of the bridge.¹⁹ Mr. Pezoldt also admitted that the bridge replacement project does not benefit BNSF:

Q. And all of the factors listed [in the Petition] including, one, a high accident rate, limited site distances, narrow roadway width, roadway sharing the underpass with the creek, and trestle height, those are -- those are all *highway traffic* improvement factors; aren't they?

A. Yes, they are.

Q. All right. I've already asked you about the structural integrity of the trestle itself, and I guess my question is you're not aware of any *railway safety* factors that are implicated by the current configuration of the trestle; are you?

A. No.²⁰

Chelan's Seven Sketches. Chelan provided seven "conceptual drawings with no real engineering or specifications associated with them" that "were generated in basically about one or two days" to suggest how such a project could look.²¹ These sketches do not resolve the County's design concerns. As Mr. Norris testified, six of the seven options provide a "substandard" design and each alternative has significant impacts which have not yet been addressed by Chelan.²² The issues range from impacts on Chumstick Creek; whether to lower the roadway or raise the bridge to increase bridge clearance; impacts to the water table; right-of-way requirements; the effects of relocating the nearby Freund Canyon Road; overall impact to ground topography; and the effects to the Richard Schroeder water well easement on the north end of the project. As Mr. Li put it, the County has not done its "homework" by hiring a design firm and providing a concrete plan.

Effect on Railroad Operations. An interruption of service during the bridge construction could materially affect BNSF's rail operations. Specifically, over an unknown time period, BNSF would either have to temporarily shut down the stretch of track that passes over the Chumstick Highway, or build a shoo-fly track to reroute its trains around the

¹⁹ *Id.*, TR 78:12-15.

²⁰ Pezoldt, TR 82:17-83:4 (emphasis added).

²¹ Pezoldt, TR 87:11-14; *see* Norris, Exh. No. 24.

²² Norris, Exh. No. 21 p. 10:19-20.

construction zone.²³ If a shoo-fly was constructed, BNSF likely would have to operate trains at reduced speeds.²⁴ It is unreasonable to simply presume BNSF can shut down its main line track where the bridge is located for a construction project of this magnitude without having a significant effect on BNSF's rail transportation, and without incurring significant costs. The County has not done its "homework" by determining the scope of the project or its corresponding effects on railroad operations.

11 **BNSF's Bridge Replacement Program.** Requiring BNSF to replace structurally-safe bridges may also interrupt the railroad's five-year bridge replacement plan. BNSF Structures Supervisor Mr. Roper described how BNSF has to plan and prioritize bridge replacements *years* in advance:

BNSF uses the term "useful life" when a bridge approaches the time it needs to be replaced. Typically, a bridge is either structurally sufficient, or BNSF will assign it a five-year (or shorter) useful life. Many factors are taken into account when BNSF determines a bridge has a five-year (or less) useful life, including the condition of the substructure and superstructure, whether the bridge is rusting or has large cracks, how much the bridge is moving when a train crosses, whether the bridge's foundations are settling, or similar characteristics. A bridge's age is not an automatic measure of whether that bridge is still structurally sound. BNSF does not replace bridges solely because they have been used for a set number of years. BNSF replaces a bridge when there is a structural deficiency and an update or replacement is required.

BNSF has a five-year time line plan for bridges starting to get close to the time replacement will be needed. BNSF prioritizes the bridge replacements on the five-year time line, according to each bridge's remaining useful life. If the useful life of one bridge is shorter or running out quicker than anticipated, that bridge would move up in five-year plan for earlier replacement. . . .²⁵

Mr. Roper then testified that the bridge at issue is not calendared for replacement:

Even though the bridge at issue in this case was built in 1928, it has not been identified as one with a short useful life. The bridge is structurally sufficient. It is not on BNSF's five-year replacement plan. Thus, BNSF does not plan to replace the bridge in the foreseeable future.²⁶

12 BNSF Manager Engineering Dan MacDonald projected that the bridge likely has 20 or more years of use before potential replacement:

²³ MacDonald, Exh. No. 29 p. 8:2-6.

²⁴ Li, TR 124:14-19.

²⁵ Roper, Exh. No. 26 p. 2:21-3:7.

²⁶ Roper, Exh. No. 26 p. 3:17-19.

BNSF designs its steel bridge structures for a minimum of 100+ year service life. Maintenance and/or repair of certain components can sometimes extend a bridge's useful life considerably past 100 years. Since this bridge was built in 1928, it is my understanding that it has a minimum of 20 years of remaining design life, with potentially more service life. The bridge currently meets all BNSF requirements and has no FRA deficiencies noted. It is inspected in accordance with Federal requirements; no structural safety exceptions have been noted.²⁷

13 Should state and local tribunals interject unnecessary bridge reconstruction projects into BNSF's replacement program, if anything it would tend to delay more pressing replacement projects. This not only circumvents BNSF's operational planning, but it could have the effect of interfering with the system-wide bridge maintenance program.

14 **Cost Projection and Source(s) of Funding.** Chelan has not performed or produced any independent design analysis for replacing the bridge, and it has not solicited or received cost bids from contractors or provided the Commission with an independent cost projection. BNSF has roughly approximated cost somewhere in excess of \$5,000,000 to \$8,000,000.²⁸ A shoo-fly alone could cost approximately \$2,500,000 to \$3,000,000 to build, since it would be required to span the entire highway and creek parallel to the new bridge.²⁹ Chelan has proposed to pay only \$1,000,000 towards the trestle replacement, yet it unabashedly asks the Commission to order BNSF to pay for what may exceed \$7,000,000 or more to replace a structurally sound bridge.

15 Chelan has not determined whether additional sources of funding are available.³⁰ Importantly, the County has neither researched the availability of nor applied for federal funding:

Q. . . . And my question is if the estimate for replacing the trestle and track leading up to it and reconfiguring it is 10 million dollars, does the County have any more money?

A. We don't have any guaranteed money at this time, but like I said depending on our budget there may be – there may or may not be funds available with County funds.

²⁷ MacDonald, Exh. No. 29 p. 3:3-9.

²⁸ MacDonald, Exh. No. 29 p. 8:8-15.

²⁹ *Id.*

³⁰ Pezoldt, Exh. No. 11 p. 6:5-9.

Q. All right. Have you sought other funding?

A. Not actively. Just pending the results of this action I guess.³¹

Once again, the County has not done its “homework” by projecting and sourcing the funding it asks the Commission to split.

III. STATEMENT OF ISSUES

16 Whether the Commission should deny Chelan County’s petition to alter the
Chumstick Highway underpass bridge?

17 Whether, if the Commission grants the County’s petition, it should decline to order
BNSF to pay all or part of the costs to reconstruct and lengthen the bridge span?

IV. EVIDENCE RELIED UPON

18 BNSF relies upon the pleadings, transcripts and exhibits contained in the record.

V. AUTHORITY AND ARGUMENT

19 Chelan County initiated this proceeding by filing a petition with the Washington
Utilities and Transportation Commission (“WUTC” or “Commission”) in accordance with
RCW 81.53.060, which states that:

the legislative authority of any county within which there exists an under-
crossing . . . may file with the commission . . . [a] petition in writing, alleging
that the public safety requires . . . an alteration in the method and manner of
[the] existing crossing and its approaches, or in the style and nature of
construction of [the] existing . . . under-crossing. . . .³²

20 The Commission is directed to respond to the County’s petition under RCW
81.53.070:

At the conclusion of the hearing the commission shall make and file its written
findings of fact concerning the matters inquired into. . . . The commission shall
also enter its order based upon said findings of fact, which shall specify . . .
whether the style and nature of construction of an existing crossing shall be

³¹ Pezoldt, TR 89:9-15.

³² RCW 81.53.060.

changed . . . or any other change that the commission may find advisable or necessary. . . .³³

The WUTC cannot impose an order related to rail safety or operations, however, if such an order would be preempted by federal law (based on the facts of each individual case). If an order is *not* preempted by federal law, the Commission should not impose costs on the railroad where the sole reason for the project is to increase the highway safety of a road that is reasonably safe in its current configuration.

1. Chelan Has Not Demonstrated That the Project is Justified.

21 First and foremost, the County has not provided sufficient justification to warrant alteration or replacement of the railroad bridge at this location. The County must prove that “the public safety requires” bridge replacement, in contrast to less drastic, less expensive roadway improvements (or none at all).³⁴ The United States Supreme Court has held that danger to the public will not “justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger.”³⁵

22 Although Chelan claims reconstruction is necessary because the location has a high accident rate, the accident rate is approximately *36% lower* than the rate for all roads in Chelan County. The rate is approximately *27% lower* than the rate for State Highways in Chelan County. And the accident rate is approximately *17% lower* than the rate for Rural Collector roads in the State of Washington. Moreover, the collisions at this location resulted from driver error rather than a roadway deficiency.³⁶

23 This is simply not a 50 m.p.h. highway containing one substandard curve under BNSF’s bridge. The entire Chumstick Highway corridor contains “substandard” curves with advisory speeds of 25 and 30 miles per hour. The alternatives to rebuilding BNSF’s bridge suggested by Mr. Norris are reasonable and sufficient, and the County has provided no

³³ RCW 81.53.070.

³⁴ See RCW 81.53.060.

³⁵ *Lehigh V. R. Co. v. Board of Public Utility Comm’rs*, 278 U.S. 24, 34 (1928).

³⁶ Norris, Exh. No. 21 p. 7:26-27.

evidence suggesting otherwise. When viable suggestions involve less expenditure and can reasonably accomplish Chelan's objectives without rebuilding BNSF's bridge, an order requiring BNSF to contribute to the cost of replacement is not justified under the law.

2. It Is Not "Fair and Reasonable" To Require BNSF To Shoulder Some of The Cost of Chelan's Unnecessary Highway Improvement Project.

24 The Washington legislature has directed the Commission to apportion the cost of changing an existing undercrossing between the railroad and County "in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement."³⁷ Allocation of costs must be "fair and reasonable," and the "police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."³⁸

25 Here, the "establishment, reason for and construction" of a new railroad bridge involves no rail safety issue or benefit to BNSF. The United States Supreme Court has stated that "[w]hile moneys raised by general taxation may be constitutionally applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."³⁹

26 Chelan may argue that *Wheeling v. Lake Erie Ry. Co. v. Pennsylvania Pub. Utility Commission* enables the WUTC to impose costs on the railroad even without any railroad benefit.⁴⁰ In *Wheeling*, the Supreme Court of Pennsylvania affirmed a commission order requiring the Wheeling Railway to replace a road overpass over its tracks.⁴¹ The Railway, however, had assumed an ongoing obligation to maintain the bridge at its sole cost as a

³⁷ RCW 81.53.110.

³⁸ *Atchison, T. & S. F. R. Co. v. Public Utilities Com.*, 346 U.S. 346, 352 (1953).

³⁹ *Nashville, C. & St. L. Ry. v. Walters*, 55 S.Ct. 486, 495 (1935) ("[W]hen particular individuals are singled out to bear the cost of advancing public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.").

⁴⁰ *Wheeling v. Lake Erie Ry. Co. v. Pennsylvania Pub. Utility Comm.*, 778 A.2d 785 (Pa. 2001).

⁴¹ *Wheeling*, 778 A.2d at 795.

condition of the bridge's initial construction.⁴² Here, Chelan has shown no such contract or assumption of duty. In *Wheeling*, there was concern that the bridge could collapse.⁴³ In this case, the bridge has no structural flaws. Chelan may also rely on a Supreme Court quote cited in *Wheeling*:

The railroad tracks are in the street not as a matter of right but by permission from the State or its subdivisions. . . . Having brought about the problem [of danger to the public], the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.⁴⁴

But the County has not shown that BNSF crosses the Chumstick Highway "by permission from the State or its subdivisions." There is no evidence that the Chumstick Highway predates the railroad trestle. It appears that both parties worked together in a "collaboration" to design the layout of the tracks and road, and that BNSF's predecessor railroad, Great Northern Railway Company, acquired the right-of-way from private parties R.T. Burkey and J.W. Styles in 1928.⁴⁵

27 Chelan asks the Commission to order BNSF to pay \$7,000,000 or more.⁴⁶ This is an undeniably expensive price tag. To impose that financial burden on a party with no identifiable rail safety concern and no need for a new bridge is manifestly unreasonable. The WUTC should impose all costs on Chelan if it still wants to lengthen the bridge span.

3. It Is Premature to Apportion Part of the Cost to BNSF Because Such an Order May Be Preempted.⁴⁷

28 At least two statutory schemes could ultimately preempt an order requiring BNSF to pay for or rebuild its bridge once the County presents a realistic design and determines whether additional funding is available. First, Chelan's cost-sharing request would be

⁴² *Id.* at 788.

⁴³ *Id.* at 794.

⁴⁴ *Id.* (quoting *Atchison*, 346 U.S. at 352-353, 355). Notably, *Atchison* was decided before Congress passed the ICCTA.

⁴⁵ Pezoldt, Exh. No. 11 p. 3:7-10; Exh. No. 15.

⁴⁶ See Pezoldt, Exh. No. 11 p. 5:16-18.

⁴⁷ "A statute valid as to one set of facts may be invalid as to another." *San Francisco v. Market Street R. Co.*, 98 F.2d 628, 633 (9th Cir.1938).

preempted under the Federal Railroad Safety Act if federal funds are secured for the bridge reconstruction project.⁴⁸ Second, the County's project would be preempted under the Interstate Commerce Commission Termination Act if the design plans show the project will unreasonably interfere with BNSF's operations or with interstate commerce.

29 In general, "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way."⁴⁹ There are three circumstances in which a state or local law, ordinance or regulation is preempted by federal law: (1) express preemption, that is, where Congress explicitly defines the extent to which a statute preempts state law; (2) field preemption, that is, where Congress' regulation of a field is so pervasive or the federal interest is so dominant that an intent to occupy the entire field can be inferred; and (3) conflict preemption, that is, where it is impossible to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment of the federal statute's purposes and objectives.⁵⁰

A. The Federal Railroad Safety Act ("FRSA").

30 To the extent that RCW 81.53.060 is related to railroad safety or potentially implicates rail safety concerns, preemption analysis is undertaken under the Federal Railroad Safety Act ("FRSA"). The FRSA gives the Secretary of Transportation broad authority to "promote safety in all areas of railroad operations," and specifically addresses "the railroad grade crossing problem."⁵¹ The Federal Railway Safety Act states that:

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

⁴⁸ See 23 C.F.R. § 646; see also *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993).

⁴⁹ *Easterwood*, 507 U.S. at 663.

⁵⁰ *English v. General Electric Co.*, 496 U.S. 72, 78-80 (1990).

⁵¹ 49 U.S.C. § 20101; 49 U.S.C. § 20134(a).

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.⁵²

31 The United States Supreme Court has held that the FRSA preempts state regulation of railroad crossing safety when projects are federally funded.⁵³ Where United States funds contribute to part of a project's cost, the regulations set forth at 23 C.F.R. § 646.210(a)(2) control. That regulation states if "reconstruction of existing grade separations" are accomplished with federal funds, "there shall be no required railroad share of the costs, unless the railroad has a specific contractual obligation with the State . . . to share in the costs."⁵⁴ The federal regulations expressly provide that projects to reconstruct existing grade separations (e.g., bridges) "are deemed to generally be of no ascertainable net benefit to the railroad. . . ."⁵⁵

32 Chelan's petition is premature because the County does not know whether some of the project capital could be federally funded.⁵⁶ It has shown no contract binding BNSF to share in the cost of a federally-funded crossing project. Should Chelan County ultimately obtain federal funding, "[s]tate laws requiring [BNSF] to pay or share those costs. . . would then be expressly preempted."⁵⁷ It follows that a Commission order requiring BNSF to finance a portion of the reconstruction under RCW 81.53.110 would be invalid under the law.

⁵² 49 U.S.C. § 20106.

⁵³ 23 C.F.R. § 646.210(a); *Easterwood*, 507 U.S. at 665-71; *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 352-57 (2000).

⁵⁴ 23 C.F.R. 646.210(a)(2).

⁵⁵ *Id.*

⁵⁶ Pezoldt, TR 89:9-15.

⁵⁷ *Iowa, Chicago & R.R. Corp. v. Washington County*, 384 F.3d 557, 561 (8th Cir. 2004).

i. The “Essentially Local Safety or Security Hazard” Exception.

33 The Eighth Circuit has stated that existing “federal statutes . . . specifically address the problem of deteriorating or inadequate rail-highway bridges.”⁵⁸ If this is true, and if the Commission rules that the case involves an issue of railroad safety, 49 U.S.C. § 20106(2)(A) and (C) will apply. The WUTC’s order must be necessary to “eliminate or reduce an essentially local safety or security hazard,” and cannot unreasonably burden interstate commerce.⁵⁹

34 In this vein of reasoning, at least one jurisdiction has held that the FRSA requires a commission find that an “essentially local safety or security hazard” exists before holding a railroad responsible for changing its bridge based on a highway safety issue. In *Union Pac. R. Co. v. City of Des Plaines*, Union Pacific and Wisconsin Central (jointly “Union Pacific”) sought a declaration that they were not responsible for changing a railroad bridge their trains ran over.⁶⁰ The physical configuration of the bridge and underpass were similar to the configuration in the instant case:

The railroad bridge is a span over U.S. 14 as the road winds its way through Des Plaines. The Illinois Department of Transportation (and the City of Des Plaines) would like to make Route 14 straighter to improve the flow of traffic, as would anyone . . . who has ever encountered that particular S curve. To do this, they need to have the railroad bridge replaced with two new bridges.⁶¹

The Illinois Department of Transportation and City wanted the railroads to pay.⁶² Union Pacific “took the position that the proposal was primarily a highway project with no real benefit to the railroad. The existing railroad bridge had twenty years of life left and served well enough for railroad operations.”⁶³

⁵⁸ *Iowa*, 384 F.3d at 560.

⁵⁹ 49 U.S.C. § 20106.

⁶⁰ *Union Pac. R. Co. v. City of Des Plaines*, Not Reported in F.Supp.2d, 2003 WL 22597631 (N.D. Ill. 2003). An Illinois statute gave the Illinois Commerce Commission “power...to require the reconstruction...of any crossing...of any railroad across any highway...by overhead structure...whenever the Commission finds...that such reconstruction...is necessary to preserve or promote the safety or convenience of the public....”

⁶¹ *Id.* at *1.

⁶² *Id.*

⁶³ *Id.*

35 The court directed the Illinois Commerce Commission to determine “whether or not the project which requires the building of two new bridges is ‘necessary to eliminate or reduce an essentially local safety hazard’”:

It is my opinion that § 20106 precludes the declaratory and injunctive relief sought here. I agree with the railroads that it is unlikely that construction of the bridges could be taxed to them because it is unlikely that what is at stake here is a local safety or security hazard within the meaning of the law. But, by passage of § 20106, Congress has authorized agencies like the ICC to hear and decide the question. What is or is not an essentially local hazard is a question of fact and nothing in the federal law precludes the ICC from deciding it in the first instance.⁶⁴

36 Here, similar to the *Des Plaines* case, it does not appear that BNSF’s bridge creates an “essentially local safety or security hazard” and Chelan has not claimed that it does.⁶⁵ The *Des Plaines* reasoning directs the Commission to “decide the question,” however, before ordering BNSF to pay costs.⁶⁶ If the bridge is not an “essentially local safety hazard,” which it is not, the WUTC cannot promulgate an “additional or more stringent” order relating to railroad safety.

ii. An Order Cannot “Unreasonably Burden Interstate Commerce.”

37 If Chelan’s petition is accepted, BNSF would not only be faced with the specter of replacing one expensive bridge, but potentially any bridge built in Washington before widespread motor vehicle use. At least one court has ruled that, where the precedence set by an order could ultimately require a railroad to pay an unknown number of similar claims, “it

⁶⁴ *Des Plaines* at *3.

⁶⁵ An “essentially local safety hazard” is one which is not statewide in character and cannot be encompassed within national uniform standards. *Union Pacific R. Co. v. Ca. Pub. Utilities Comm’n*, 346 F.3d 851, 860 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 1040 (2004); *see Union Pacific R. Co. v. Pub. Utility Comm’n of Oregon*, 723 F. Supp. 526 (D. Or. 1989); *Burlington Northern R. Co. v. State of Mont.*, 805 F. Supp. 1522 (D. Mont. 1992). In *Union Pacific*, the court ruled that a 10-mile segment of rail with an abnormally high derailment rate, 14% curve and steep grade did not meet the “essentially local safety hazard” exception to FRSA preemption. The court reasoned that all steep grades and sharp curves increase the risk of derailment, so the high derailment rate was unremarkable. *Union Pacific R. Co. v. Ca. Pub. Utilities Comm’n* at 860. There were many curves within the U.S. that shared the same characteristics. Moreover, the court noted that the federal government could easily address concerns about curve/steep grade combinations with national standards. *Id.* at 861. Last, the court reasoned that the risk of severe derailment consequences was not fundamentally local in nature since the risk was not one that was fundamentally different from those of other locations. *Id.*

⁶⁶ There is nothing “fundamentally local” about the Chumstick Highway underpass/railroad bridge. Bridges are not unique and they occur in many places of Washington and throughout the United States and are not peculiar to a particular locality.

is decidedly unreasonable to assume that a railroad would not be significantly impacted.”⁶⁷

Here, the economic impact of allowing any town, city, county or state to invoke this state law remedy, potentially at \$7,000,000 or more a pop, would be staggering.

38 It would be improper for the WUTC to rule that granting Chelan’s petition would not unreasonably burden interstate commerce, because the cost of the project is unknown, the total amount of funding Chelan will secure from state or local sources is unknown, and whether and to what extent federal funds are available is unknown.⁶⁸ Chelan’s petition is incomplete until it can fill in the missing information.

B. The Interstate Commerce Commission Termination Act (“ICCTA”).

39 Congress and the courts have “long recognized a need to regulate railroad operations at the federal level,” and “Congress’ authority under the Commerce Clause to regulate the railroads is well established.”⁶⁹ To the extent that Chelan’s project could regulate BNSF’s operations (e.g., shut down a section of BNSF’s mainline track or re-route BNSF’s trains to a shoo-fly), preemption analysis is appropriate under the Interstate Commerce Commission Termination Act (“ICCTA”).⁷⁰

40 The ICCTA contains a clear preemption clause, granting the Surface Transportation Board (“STB”) exclusive jurisdiction over nearly all matters of rail regulation.⁷¹ Under 49 U.S.C. § 10501(b), the STB has exclusive jurisdiction over:

(1) *transportation by rail carriers*, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including

⁶⁷ *A & W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 350 (Tex. App. 2006) (explaining that a ruling requiring the railroad to replace its bridge based on a neighboring landowner’s flooding concerns could allow an unknown number of landowners to recover a half million dollars each from the railroad for similar situations).

⁶⁸ Mr. Pezoldt testified that “[w]e don’t have any guaranteed [additional] money at this time, but like I said depending on our budget there may be – there may or may not be funds available with County funds.” Pezoldt, TR 89:9-12. *See also id.*, at 86:23-25 (“How much money we have available for any project is sort of determined on our year-to-year budget.”).

⁶⁹ *City of Auburn v. U.S. Govt.*, 154 F.3d 1025, 1029 (9th Cir. 1998). “Regulation” is defined as the “act or process of controlling by rule or restriction; A rule or order, having legal force, usu[ally] issued by an administrative agency.” BLACKS’ LAW DICTIONARY at 1064 (8th Ed.).

⁷⁰ *See* 49 U.S.C. § 10501(b).

⁷¹ Congress enacted the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995 to deregulate the railroad industry. *See* 49 U.S.C. § 10101 *et seq.*

car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; *and*

(2) *the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State. . . .*

41 Moreover, the ICCTA contains an express preemption clause which states:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation *are exclusive and preempt the remedies provided under Federal or State law.*⁷²

Congress “made no blanket exception for a state’s police power when describing the ICCTA’s preemptive scope.”⁷³

42 One of the first cases to analyze ICCTA preemption held “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”⁷⁴ Since then, the preemptive effect of the last sentence of section 10501(b) has been examined by courts in virtually every jurisdiction, which have consistently ruled that the ICCTA preempts state and local statutes, regulations and ordinances which regulate railroad operations.⁷⁵

i. Potential Impact on BNSF’s Operations.

43 It is hard to imagine how Chelan’s project would *not* affect BNSF’s operations. This is not a project with a temporary flagger posted at an at-grade crossing while passive warning devices are upgraded to flashing lights and gates. It does not involve remodeling a roadway bridge over train tracks, with little or no effect on trains traveling under the overpass. In this

⁷² 49 U.S.C. § 10501(b) (emphasis added). The definition section of the ICCTA states “rail carriers” include persons providing “railroad transportation” for compensation, and that “railroad” includes a bridge used by or in connection with a railroad. 49 U.S.C. § 10102(5), (6)(A).

⁷³ *A & W Properties*, 200 S.W.3d at 347 (Tex. App. 2006).

⁷⁴ *CSX Transp., Inc. v. Georgia Pub. Serv. Comm.*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). ICCTA preemption is not preconditioned on either an effect on interstate commerce or compelled capital expenditures by BNSF. See *CSX Transp. v. AEP Kentucky Coal*, 360 F.Supp.2d 836, 843 (E.D. Ky. 2004).

⁷⁵ See, e.g., *City of Auburn*, 154 F.3d at 1031 (ICCTA preempts state and local environmental review laws as applied to reopening of rail line); *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 668, 41 P.3d 1169 (2002) (city’s anti-blocking statute preempted by ICCTA); *R.R. Ventures, Inc. v. STB*, 299 F.3d 523, 563 (6th Cir. 2002) (state statutes allowing towns to regulate land use and requiring public roads be kept open and nuisance-free preempted by ICCTA to the extent said laws impinge upon the STB’s exclusive jurisdiction over rail transportation); *Cedarapids Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F.Supp.2d 1005, 1015 (N.D. Iowa 2003) (state law providing for reversion of railroad right-of-way after railroad abandonment preempted).

case, twenty five trains cross this railroad bridge every day.⁷⁶ The bridge makes up part of the major track route from Seattle to the Midwest and east coast.⁷⁷ Freight and passenger trains alike would either be prevented from using the track during construction for an unknown period of time, or an alternate route would have to be temporarily built to bypass the bridge during construction.⁷⁸ Switching track operation from the main line to a shoo-fly (and ultimately back again) will involve some interruption to BNSF's operations.⁷⁹ And to the extent that a shoo-fly will necessitate a lower speed limit than the main line track, it is considered an interruption to BNSF's normal operation.⁸⁰ Chelan's petition is premature because if the project does disrupt BNSF's operations to the level of regulating rail transportation, *which is unknown without a project plan*, it will be preempted by broad reach of the ICCTA.⁸¹

ii. Economic Impact.

44 The ICCTA expressly preempts state or local economic regulation of railroads.⁸² The ICCTA preemption argument in this case is not a blanket challenge to the WUTC's authority to order BNSF to take specific action with respect to a specific crossing. Instead, it addresses the obvious economic impact on BNSF that would result from interpreting RCW 81.53.070

⁷⁶ Li, Exh. No. 25 p. 3:18-19.

⁷⁷ *Id.*

⁷⁸ *Id.* at p.3:19-22.

⁷⁹ Li, TR 124:11-13.

⁸⁰ *Id.* at 124:16-19.

⁸¹ The ICCTA expansively defines the term "transportation" to include:

(A) a locomotive car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail*, regardless of ownership or an agreement concerning use, and
(B) *services related to that movement. . . .*

49 U.S.C. § 10102(9) (emphasis added). Chelan's claim falls squarely within the definition of "transportation" by rail carriers.

⁸² *See, e.g., Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288, 1296 (D. Mont. 1997) ("The statutory language and accompanying legislative record evidence Congress' clear and manifest intent to occupy the entire field of economic regulation of rail transportation.").

(the Commission may specify “ any . . . change that the commission may find advisable or necessary”) and RCW 81.53.110 (allocating costs between municipality and railroad) in a manner which essentially could require BNSF to (1) modify every structurally-sound bridge or underpass in Washington on the whim of a municipality wanting a facelift for an underpass roadway, and (2) pay exorbitant costs for projects that are unnecessary from a rail safety standpoint (and, perhaps, unnecessary from a highway safety standpoint).

45 It is BNSF’s position that ordering the railroad to pay millions for one unnecessary bridge rises to the level of economic regulation. Worse, a domino effect of similar petitions and subsequent orders will rise far above the level of incidental economic regulation. It is that economic impact which triggers preemption under the Interstate Commerce Commission Termination Act if the statutes are construed in such an unrestrained manner.

4. ***Iowa, Chicago & Eastern Railroad Corp. v. Washington County is Distinguishable and Non-Binding.***

46 It is anticipated that Chelan County will again rely heavily on the Eight Circuit case *Iowa Chicago & E. R.R. Corp. v. Washington County*.⁸³ The Eight Circuit’s opinion is not binding on Washington tribunals and its holding was particularly narrow. It held simply that the administrative proceeding could continue. It did not hold, as Chelan may well urge the Commission to believe, that a state can unilaterally order a railroad to replace its bridge. It did not hold that the ICCTA does not preempt state regulation of bridges if an unreasonable burden is imposed on the railroad. And, finally, it did not hold that a state could order a bridge replaced without any federal involvement. The court explained the limits of its ruling as follows:

Our holding is necessarily narrow because the state proceedings are incomplete and the ***States do not operate in this arena free of federal involvement***. For example, should the parties obtain federal funding for one or more of these bridge projects, federal law would apportion the project costs. State laws requiring IC&E to pay or share those costs . . . would then be expressly preempted.⁸⁴

⁸³ *Iowa*, 384 F.3d 557 (8th Cir. 2004). The reasoning of much of the *Iowa* decision does not withstand scrutiny. For example, the court summarily rejected the argument that bridge replacement can affect only “highway improvement” without impacting railroad safety. As the instant case makes clear (and Mr. Pezoldt admitted), a County may seek to replace a bridge that is completely safe and structurally adequate with respect to railway safety.

⁸⁴ *Iowa* at 561-62 (emphasis added).

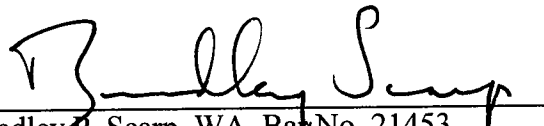
Here, it appears that Chelan is attempting to regulate BNSF's rail facilities "free of federal involvement." The County does not point to an existing federal regulatory scheme from which its request to regulate the size of BNSF's bridge stems. For whatever reason, the County may have decided to cast its line in the Commission's pool to see how much railroad funding the WUTC will set on its hook, before casting into federal waters. Regardless, the petition is premature and though the relief sought is potentially preempted, it should still be denied.

VI. CONCLUSION

Chelan has not met its burden of showing that its proposal is necessary. But that aside, until Chelan provides a viable design and cost estimate, there is no basis to grant its petition to alter BNSF's bridge, let alone at BNSF's expense. Chelan may consider hiring an engineering firm to address the outstanding issues, determine whether reconstruction is even still desired, choose and refine a design, solicit bid proposals, apply for federal funding, project the ultimate cost, and re-approach BNSF to cooperate in the project before proceeding through the WUTC. Therefore, the petition should be denied as unnecessary and premature, but if the WUTC does grant any portion of Chelan's petition, it should not impose any of the costs on BNSF.

DATED this 2nd day of July, 2008.

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CERTIFICATE OF SERVICE

I am over the age of 18; and not a party to this action. I am the assistant to an attorney with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite 2700, Seattle, Washington, 98101.

I hereby certify that the original and 5 copies of BNSF'S REPLY BRIEF have been sent by FedEx to Carole J. Washburn at WUTC and a PDF version sent by electronic mail. I also certify that true and complete copies have been sent via electronic mail and U.S. Mail to the following interested parties:

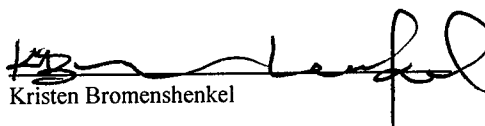
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I declare under penalty under the laws of the State of Washington that the foregoing information is true and correct.

DATED this 2nd day of July, 2008 at Seattle, Washington.


Kristen Bromenshenkel