

1 The City’s position is unsupported by the law and the record before this Commission, and the
2 Petition and the Complaint should be dismissed in their entirety.

3 **A. The City Failed to Meet its Burden of Proof**

4 *1. The Petition Fails to Allege Public Safety Necessitates the Proposed Modification*

5 The City has petitioned this Commission for approval of a grade modification pursuant to
6 RCW 81.53.261. Section .261 requires first that the City “shall deem that the public safety
7 requires,” traffic warning devices at a crossing. RCW 81.53.261. Next, the City is required to
8 file “a petition in writing, *alleging that the public safety requires* the ... specified changes in the
9 method and manner of existing crossing warning devices.” *Id.* (emphasis added). City witness
10 Robert Lochmiller, who signed the subject Petition (Exhibit RL-4X), acknowledged that the
11 Petition fails to allege a public safety requirement:

12 Q. Sir, can you take a look at RL-4X, your petition in this case, and tell me
13 whether the petition references public safety.

14 A. It does not state that.

15 Q. In fact, the petition doesn't include the word "safety," does it?

16 A. I don't think so.

17 Q. And the petition does not allege that the public safety requires the installation
18 of the proposed modification, correct?

19 A. Correct.¹

20 There is no factual dispute on this issue. The plain language of the Petition manifestly
21 fails under the statute, and the Petition should be denied in its entirety.

22 *2. The Petition Fails to Detail Proposed Costs/Allocation*

23 RCW 81.53.271 details the required contents of a Petition for Grade Modification,
24 providing, in part, that the petition “shall set forth...the necessity from the standpoint of public
25 safety for such installation, the approximate cost of installation and related work, and the
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27 ¹ Declaration of Rachel Tallon Reynolds (“Reynolds Decl.”), Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Page 62:5 to 62:15)).

1 approximate annual cost of maintenance.” *Id.* Again, the City’s Petition fails. The Petition is
2 devoid of reference to the costs of installation and maintenance. Accordingly, the Petition is
3 facially deficient and should be denied. Further, the City’s Complaint is derivative of the
4 Petition, seeking to impose the entire cost of maintenance onto UPRR. Because the Petition
5 itself is deficient, the City’s Complaint necessarily fails.

6 *3. The Petition Requests Reinstallation of an Already Safe Grade Crossing System*

7 The City argues that RCW 81.53.295 requires UPRR to pay the entire cost of maintaining
8 the proposed modified grade crossing. But the City’s reading of Section .295 is overly
9 simplified and inconsistent with the statutory language. Section .295 involves “installing a grade
10 crossing protective device, and related work...” *Id.* Section .295 is silent on proposed
11 modifications to already existing grade crossings, and certainly does not speak to the
12 *reinstallation* of an existing grade crossing that the City has deemed safe.

13 City witness Robert Lochmiller confirmed that the Petition contemplates the
14 reinstallation of the currently existing system:

15 Q. But the system itself isn't changing fundamentally, correct?

16 A. Correct. I mean, there's a couple additional things, I believe, that changed.
17 But for the majority, it's the standard signal crossing, at-grade crossing.

18 ...

19 Q. Is the proposed modification that is the subject of your petition marked as
20 RL-4X, is there an improvement in the functionality of that proposed device?

21 A. Like I said, I believe there's some improvements on direction of flashers for
22 certain traffic movements, yes. But for the majority, it's basically the same, I
23 think.²

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26 ² Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated),
27 (Page 63:2 to 63:6); Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Page 65:5
to 65:12)).

1 The proposed “modifications” detailed in the City’s Petition will result in a “standard,”
2 nearly identical grade crossing system, with nearly identical functionality and nearly identical
3 equipment:

4 Q. Great. Do you agree that currently there are two gate mechanisms at the
5 Barker Road UP crossing?

6 A. Yes, one on each side.

7 Q. And at the conclusion of this project, there will be two gate mechanisms?

8 A. Correct.

9 Q. And there are currently two cantilevers at the Barker Road crossing?

10 A. Correct.

11 Q. And at the end of this project, there will be two cantilevers?

12 A. Yes.

13 Q. And at the end of -- or as currently exist at Barker Road, there are nine
14 flashers at the crossing, correct?

15 A. I believe so.

16 Q. And at the end of this project, there will be ten flashers?

17 A. Okay.

18 Q. Do you agree with that?

19 A. I believe that's the case, yeah.

20 Q. All right. So there's no differences in the type of traffic control devices that
21 are being installed?

22 A. Other than the additional flasher, yeah.³
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27 ³ Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated),
(Pages 65:13 to 66:13)).

1 Section .295 contemplates installation of a new grade crossing protective device or
2 system, not reinstallation of the same system as requested by the City. Unlike RCW 81.53.281,
3 which specifically references “installation *or* upgrading of a grade crossing protective device,”
4 Section .295 only refers to “installing a grade crossing protective device.” Similarly, RCW
5 81.53.110 involves allocation of costs when “an existing grade crossing is eliminated or changed
6 (or the style or nature of construction of an existing crossing is changed),” none of which is
7 discussed in Section .295. The record before the Commission does not support the application of
8 Section .295 in this case; it follows that Section .295 does not warrant the imposition of
9 maintenance costs on UPRR for the City’s decision to reinstall an already safe grade crossing
10 system at Barker Road. The City’s Complaint, which is predicated upon a flawed interpretation
11 of Section .295, should be denied in its entirety.

12 *4. The Evidence Does Not Demonstrate that Public Safety Necessitates the Proposed*
13 *Modification*

14 The record is devoid of evidence that the City had concerns about the safety of the Barker
15 Road/UPRR grade crossing which necessitate the proposed modifications. To the contrary, the
16 record shows that the Barker Road Crossing has been safe for more than two decades. In its pre-
17 filed testimony, the City submitted a lengthy document, “Northeast Industrial Area Planned
18 Action Ordinance SEPA Analysis,” including an Appendix entitled “Existing Transportation
19 Conditions Report for Spokane Valley Northeast Industrial Area PAO,” which was admitted into
20 evidence as GM-7. City witness Gloria Mantz testified that the exhibit documented a 25-year
21 history of safe rail operations at the Barker Road/UPRR Crossing:

22 Q. And then can you read what I have now marked in blue into the record,
23 please?

24 A. (As read) Historic crash data indicates that the grade crossings on Barker
25 Road and Flora Road for both rail lines have operated safely over the last 25
26 years.

27 Q. And do you agree that the next sentence reads, Figure 12 shows that despite
high train volumes, it has been over 25 years since a crash occurred at any of the
four at-grade rail crossings in the study area?

1 A. That's what it says.

2 Q. So the City deemed the UP Barker Road crossing to be safe, correct?

3 A. That's what that statement says.⁴

4 The City has conflated the statutory requirement of public safety need with a more
5 generalized “impact on public safety.” But merely *impacting* public safety does not pass
6 statutory muster. RCW 81.53.261 forces the Commission to determine from the evidence
7 whether public safety requires the change in the existing warning devices specified in the City’s
8 Petition. If the Commission determines “from the evidence that public safety does not require”
9 the proposed modification described in the Petition, the Commission “shall make determinations
10 to that effect and enter an order denying said petition in toto.” *Id.* The dearth of evidence
11 establishing that public safety concerns about the Barker Road crossing necessitates the proposed
12 modification compels denial of the City’s Petition in toto.

13 It is uncontroverted that the City undertook the entire Barker Road Project to address
14 increasing traffic volumes – not due to concerns about the safety of the UPRR grade crossing.

15 Recall Ms. Mantz’s testimony on this topic:

16 Q. Do you agree that the Barker Road project is driven by anticipated future
17 growth and economic development in Spokane Valley?

18 A. No, it -- actually, no. It's actually to help with current traffic and also
19 anticipated growth. So it's not just for future growth.

19 Q. It's both current and future?

20 A. Oh, yeah.

21 Q. All right. And the Barker Road project would widen the roadway, correct?

22 A. Yes.

23 Q. In addition to widening the roadway, the project also has components for
24 installation or modification of the sewage system in the city?

25 A. Yes, in Spokane County.

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27 ⁴ Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Page 79:2 to 79:14)).

1 Q. And the project also includes the creation of a multiuse path for bicycles and
2 pedestrians, correct?

3 A. Yes, whenever we improve the road, we're required to provide an extra
4 facility for bikers and pedestrians.⁵

5 The City offered evidence that the Barker Road Project was developed because of
6 increased traffic volumes, which “impact public safety” in a general sense. While the City claimed
7 that the proposed modifications will decrease motor vehicle accidents, the City’s witnesses
8 provided no data relating to historic crashes at or near the Barker Road Crossing. In other words,
9 there is no data upon which the Commission could conclude whether the bald assertions of City
10 witnesses regarding public safety impacts are supported by evidence. Conspicuous for its absence
11 is data purporting to show motor vehicle, bicycle or pedestrian accidents or near-misses at the
12 Barker Road/UPRR Crossing.

13 Instead, the City painted “safety concerns” and “safety impacts” with a broad brush, in
14 general terms, without reference to scientific information, qualitative analysis or historical data.
15 Consider the redirect examination of Ms. Mantz, who was asked about “safety concerns at an at-
16 grade crossing.”⁶ Similarly, Mr. Lochmiller was asked on redirect whether “increased traffic
17 volumes impact the public safety.”⁷ But what is missing is evidence that the proposed
18 modification to this particular crossing was necessitated by the public safety. The City instead
19 offered a supplemental exhibit which demonstrates that the Barker Road/UPRR Crossing was not
20 among the City’s top traffic or public safety concerns. The City’s supplemental exhibit does not
21 move the needle on the question of whether the public safety necessitated the proposed
22 modification outlined in its Petition. Quite simply, the City has failed to make its case that the

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24 ⁵ Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Pages
75:10 to 76:4)).

25 ⁶ Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Page
93:17-20)).

26 ⁷ Reynolds Decl., Exhibit A (Docket Nos. TR-210809 and TR-210814 - Vol. II (Consolidated), (Page
68:19 to 69:8)).
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1 proposed modification described in its Petition was necessitated by the public safety.

2 To the contrary, the record before the Commission supports denial of the Petition in toto.
3 Perhaps the best evidence in favor of denial is the Petition itself, which describes reinstallation of
4 the currently existing system. The traffic control system is not changing, the equipment is not
5 being upgraded, the design remains the same, and the proposed system will continue to operate
6 just as the current system does. Common sense dictates that if the public safety necessitated
7 modifications to the existing grade crossing, there would be some proposed change in design,
8 equipment, or functionality of the new system. Absent such a change, it is clear from this record
9 that the public safety did not necessitate the proposed modifications, and the Petition and
10 Complaint should be denied.

11 **B. UPRR’s Substantive Arguments Are Not Collateral Attacks on the UTC’s Order**
12 **Denying UPRR’S CR 12 Motion to Dismiss**

13 Staff stated that UPRR’s substantive arguments – namely that the City failed to sustain its
14 burden – constitute a collateral attack on the UTC’s order on UPRR’s Rule 12 motion. Not so.

15 UPRR previously filed a motion to dismiss pursuant to Civil Rule 12. The Commission,
16 denying the motion, stated that it considered the standards applicable to CR 12 motions and
17 noted that “dismissal is only warranted if the Commission concludes that the City cannot prove
18 any set of facts that would justify granting the relief sought in its Complaint.”⁸ Further, the
19 Commission was required to “consider all the allegations in the City’s Complaint as true
20 and...consider any hypothetical fact supporting its claims.”⁹

21 Under the liberal pleading standards of Civil Rule, 12, the Commission found that the
22 City’s Petition proposing “to replace the concrete surface at the crossing and install additional
23 active warning devices due to increasing traffic volumes related to land development nearby,”
24 satisfactorily set forth a public safety need, and an “explicit statement” regarding public safety
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27 ⁸ UTC Order 01, at 12.

⁹ *Id.*

1 was unnecessary.¹⁰ The Commission did not make an evidentiary finding on the merits of the
2 City's Petition or Complaint, and nothing in the Commission's order denying a motion to
3 dismiss on the pleadings excepts the City from its burden of proof on its Petition and Complaint.

4 The collateral bar rule does not apply to these circumstances. "The collateral bar rule
5 prohibits a party from challenging the validity of a court order in a proceeding for violation of
6 that order." *City of Seattle v. May*, 171 Wn.2d 847, 852, 256 P.3d 1161, 1163 (citing *State v.*
7 *Noah*, 103 Wn. App. 29, 46, 9 P.3d 858 (2000); *State v. Wright*, 273 Conn. 418, 426-28, 870
8 A.2d 1039 (2005)). Neither does the collateral attack rule apply. Collateral attack is a very
9 narrow and strictly limited exception to the rule that judgments are final. *See State v. Rock*, 65
10 Wash. App. 654, 657, 829 P.2d 232, *rev. denied*, 120 Wash. 2d 1004, 838 P.2d 1143 (1992). A
11 party may only attack final orders in a collateral proceeding if they are "absolutely void, not
12 merely erroneous." *See Bresolin v. Morris*, 86 Wash. 2d 241, 245, 543 P.2d 325 (1975), *opinion*
13 *supplemented*, 88 Wash. 2d 167 (1977). UPRR maintains that the City's Petition is facially
14 deficient, warranting denial of all claims. This argument transcends Civil Rule 12 and implicates
15 the substantive merits of the City's claims. The City claims that it is entitled to modify the
16 existing grade crossing and impose costs pursuant to statutes; UPRR is allowed to argue that the
17 City has failed to comply with the very statutes upon which it relies for the relief requested.
18 Unlike CR 12, which required the Commission to consider the pleadings as true and allowed the
19 Commission to consider hypothetical facts that *could* result in a basis for relief, the City now
20 bears the burden of proving that it is entitled to relief by a preponderance of the evidence. The
21 City has failed to meet its burden and UPRR's defense does not constitute a collateral attack on
22 the Commission's prior Order.

23 **C. The Proposed Modifications Do Not Provide an Ascertainable Benefit to UPRR and**
24 **Governing Law Precludes the Allocation of Maintenance Costs to UPRR**

25 "Projects for grade crossing improvements *are deemed to be* of no ascertainable net benefit
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¹⁰ *Id.*, at 25.

1 to the railroads and there *shall be no required railroad share* of the costs.” 23 C.F.R.
2 § 646.210(b)(1) (emphasis added). *Hamilton v. Illinois Cent. R.R.*, 894 F. Supp. 1014, 1018 (S.D.
3 Miss. 1995) (emphasis added).

4 The language of the statute is clear and unambiguous and leaves no room for Washington
5 to impose costs on UPRR under these circumstances. As set forth above, the City’s proposed
6 modifications do not fit within the plain language of the Revised Code of Washington, as the City’s
7 Petition was not necessitated by the public safety and simply contemplates non-safety related
8 improvements to the existing grade crossing. This is precisely the scenario contemplated by 23
9 C.F.R. Section 646.210 and where Washington law is silent. Accordingly, the costs associated
10 with maintaining the City’s proposed grade crossing improvements should not be borne by UPRR.

11 **D. Apportioning the Full Amount of Maintenance Costs to UPRR is Arbitrary and**
12 **Unreasonable**

13 It is a “long-standing constitutional principle” that when a state allocates costs between a
14 railroad and local authority for crossings, such an “allocation of costs must be fair and
15 reasonable.” *Iowa, Chicago & E. R.R. v. Washington Cnty., Iowa*, 384 F.3d 557, 562 (8th Cir.
16 2004). Stated differently, apportionment of maintenance costs may not be arbitrary or
17 unreasonable. *See Nashville, C. & S. L. Railway v. Walters*, 294 U.S. 405 (1935). Washington
18 courts have tried to provide a just and equitable distribution of contribution based on specific
19 facts of the case. *See State ex rel. Seattle v. N.P.R. Co.*, 166 Wash. 437 (1932) (that the cost of
20 the span should have been apportioned between the railroads upon the basis of the widths of their
21 respective rights of way; and that the cost of the approaches should have been divided equally
22 between the three railroads concerned); *Wash. V. N. Pac. Ry. Co.*, 128 Wash. 73 (1924) (the city
23 endeavored to distribute this cost according to its judgment as to what is fair, just and
24 reasonable). Here, a carte blanche allocation of 100% of the maintenance costs to Union Pacific
25 is arbitrary and unreasonable. The traffic control devices at the crossing, while located on
26 UPRR’s right of way, are owned by the City. In the event that this crossing was to be closed or
27 replaced with a grade separation, UPRR would remove the existing traffic control devices for the

1 crossing and return them to the City, upon request.

2 Such a result comports with the Manual on Uniform Traffic Control Devices
3 (“MUTCD”). Recall that City witness Mr. Lochmiller acknowledged that MUTCD applies to
4 this Project during the May 10, 2022, evidentiary hearing.¹¹ Further, pursuant to WAC 468-95-
5 010 MUTCD was adopted by Washington State.¹² MUTCD Section 1A.07 Responsibility for
6 Traffic Control Devices Standard provides:

7 The responsibility for the design, placement, operation, maintenance, and
8 uniformity of traffic control devices shall rest with the public agency or the
9 official having jurisdiction, or, in the case of private roads open to public travel,
 with the private owner or private official having jurisdiction.

10 In this case, the maintenance costs at issue should be borne by the City, which has
11 jurisdiction over Barker Road and owns the traffic control warning devices at issue.

12 **E. Public Policy Warrants Denial of the City’s Petition and Complaint**

13 Public policy considerations militate in favor of UPRR. The Barker Road Project is a City
14 project, designed with the City’s needs and wishes in mind, for the City’s economic benefit. The
15 Barker Road Project anticipates City industrial development of 2.9-3.9 square feet and resulting
16 increases in traffic. *See* GM-7 at page 14 of 138. Allocation of maintenance costs for the grade
17 improvement – which benefits motor vehicles and pedestrians – would result in UPRR essentially
18 subsidizing its competition – trucks hauling loads that could otherwise be shipped via rail. *See,*
19 *e.g., Nashville, C & St. L. R. Co. v. Waters*, 294 US 405, 432 (1934) (finding that the
20 highway/railway improvement projects were primarily intended to benefit the state’s highway
21 transportation system, including motor carriers and trucking companies who directly compete with
22 the railroad). Indeed, the “promotion of public convenience will not justify requiring of a railroad,

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24 ¹¹ Reynolds Decl., Exhibit A (Transcript at 50:20-51:2).

25 ¹² “The 2009 Edition of the *Manual on Uniform Traffic Control Devices for Streets and Highways*
26 (*MUTCD*), published by the Federal Highway Administration and approved by the Federal Highway
27 Administrator as the national standard for all highways open to public travel, was duly adopted by the
Washington state secretary of transportation.” A complete version of the 2009 MUTCD can be accessed
online via the U.S. Department of Transportation, Federal Highway Administration website at:
https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/pdf_index.htm.

1 any more than of others, the expenditure of money, unless it can be shown that a duty to provide
2 the particular convenience rests upon it.” *Id.*, at 428-29 (internal citations omitted).

3 The City’s evidence acknowledges that there is already “a high percentage of truck
4 traffic” on Barker Road. *See* GM-7. In fact, the City’s evidence shows that existing traffic
5 volumes of traffic in the subject area is relatively low, while truck volumes are relatively high.
6 *See* GM-7, at 67 of 138. The City therefore acknowledges that the Barker Road Project involves
7 an industrial area being developed for the City’s economic development. Common sense
8 dictates that UPRR should not be forced to fund the City’s industrialization project, from which
9 UPRR derives no ascertainable benefit.

10 **F. Conclusion**

11 The City’s Petition and Complaint fail under any analysis. The Petition and Complaint
12 fail to set forth why the proposed modifications were necessitated by public safety concerns, and
13 the City failed to submit any supporting evidence about public safety specific to the Barker
14 Road/UPRR Crossing. Instead, the Petitioner/Complainant offered vague references to impacts
15 on public safety generally without any underlying data.

16 Moreover, the Petition requests the reinstallation of the currently existing traffic control
17 warning device system, not installation of a new device. This is a distinction with a difference,
18 because the reconstructive nature of the system excepts the Barker Road/UPRR Crossing from
19 the Washington law allowing imposition of maintenance costs and places this case squarely
20 within the province of federal law. Under the federal framework, UPRR cannot be required to
21 undertake the subject maintenance costs. Imposing these costs upon UPRR constitutes economic
22 regulation of rail transportation and thus intrudes on the exclusive jurisdiction of the STB in this
23 area.

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing to be served via the methods below on this 31st day of May, 2022 on the following counsel/party of record:

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