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**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION
COMMISSION HEARINGS BOARD**

CITY OF SPOKANE VALLEY, a municipal
corporation,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY
(aka UPRR)

Respondent.

DKT. NO. TR-210814
TR-210809

CITY OF SPOKANE VALLEY'S POST-
HEARING BRIEF

**COMPLAINANT CITY OF SPOKANE VALLEY
POST-HEARING BRIEF**

CITY OF SPOKANE VALLEY'S
POST-HEARING BRIEF

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**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION
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DKT. NO. TR-210814
TR-210809

CITY OF SPOKANE VALLEY'S POST-
HEARING BRIEF

I. INTRODUCTION

1. This pleading is submitted by petitioner/complainant the City of Spokane Valley, 10210 East Sprague Avenue, Spokane Valley, Washington, 99206.

2. The petition (TR-210809) puts at issue RCW 81.53.161, which authorizes the Washington Utilities and Transportation Commission (the "Commission") to allow a city to modify an at-grade crossing when warranted by public safety. The complaint (TR-210809) puts at issue RCW 81.53.295, which directs the Commission to impose maintenance costs for the active warning devices at an at-grade crossing upon the railroad when federal-aid highway funds are used to pay the cost of installing a grade crossing protective device.

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3. The City has shown that the public safety requires modification to the at-grade crossing at Barker Road (the “crossing”) and the associated warning devices. For this reason, the Commission should grant the City’s petition to modify the at-grade crossing. The City has also shown that federal-aid highway funds will be used to pay part of the cost of installing the grade crossing protective device and associated work at the crossing. Therefore, the Commission should apportion the entire cost of maintenance for the warning devices to the Union Pacific Railroad (“UPRR”) pursuant to RCW 81.53.295.

II. STATEMENT OF FACTS

A. The City’s identification of safety concerns along Barker Road

4. The City first identified safety concerns along Barker Road in 2016 as part of its comprehensive plan update. In preparation for this update, the City conducted an Environmental Impact Statement (“EIS”), through which it was determined that significant adverse impacts were expected along Barker Road between Euclid Avenue and I-90.¹ The City further identified safety concerns along Barker Road, and specifically at the crossing, in 2017 as part of the Supplemental EIS (“SEIS”) the City conducted for its Northeast Industrial Area-Planned Action Ordinance (“NIA”). The SEIS noted that queues at the crossing “are forecast to be about 50-100% longer than they are today.”² The City also determined that, at the crossing, “the long northbound queue is determined to be a significant transportation impact.”³

In response to both the EIS and the SEIS, the City began coordinating the construction of the Barker Corridor Improvement Project (the “Project”) to address the

¹ Exh. GM-6 at 27, 29.

² Exh. GM-7 at 38.

³ Exh. GM-7 at 39.

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3 concerns raised in both documents.⁴ The Barker Corridor was specifically selected for
4 improvements because, in addition to the concerns listed in the EIS and SEIS, the City had
5 previously identified Barker Road as needing safety improvements.⁵

6 **B. Barker Road Corridor Improvement Project**

7 5. In response to the concerns noted in the EIS for the City’s comprehensive
8 plan update and the SEIS for the NIA, the City designed the Project in an effort to facilitate
9 increased growth and traffic volumes. The Project was designed to provide an important
10 and needed upgrade to Barker Road, which is a connecting route between I-90 and SR-290,
11 two of the regions’ most important T-1 and T-2⁶ freight routes.⁷ As a part of the Project,
12 Barker Road, a two-lane road, “was replaced with two 12-foot wide lanes of travel, a 12 to
13 14 foot wide center turn lane, and a curb and gutter, all with new arterial pavement
14 sections.”⁸

15
16 6. The City is currently constructing a grade separation at the Barker Road and
17 Burlington Northern and Santa Fe Railway (“BNSF”) crossing immediately to the north of
18 the Project (“Barker GSP”). The Barker GSP was approved based upon the widening of
19 Barker Road, “especially at the Euclid Avenue offset intersection.”⁹ As development to the
20 north of the crossing occurs, an additional third lane will be needed to handle the increased
21 traffic flow.¹⁰ The additional third lane will help to reduce rear-end and turning related
22
23

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25 ⁴ Exh. GM-1T at 6: 15-22.

⁵ Exh. GM-1T at 6: 8-13.

⁶ Washington State Freight and Goods Transportation Systems are classified into five tiers based upon the annual gross truck tonnage that passes through the freight corridor. A T-1 designation means that a corridor sees more than 10 million tons per year. A T-2 designation means that a corridor sees four to 10 million tons per year.

⁷ Exh. GM-1T at 1: 27-30.

⁸ Exh. GM-1T at 2: 5-8.

⁹ Exh. GM-1T at 2: 17-18.

¹⁰ Exh. GM-1T at 2: 18-19.

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3 crashes, as well as to minimize queuing lengths at the crossing.¹¹ Lastly, the corner radii at
4 the intersections of Euclid Avenue and Barker Road will be increased so as to accommodate
5 large truck movements.¹²

6 **C. Specific improvements to the Barker Road UPRR at-grade crossing**

7 7. In addition to the general widening and reconstruction of Barker Road from
8 Trent Avenue to the Spokane River, the City will also be constructing specific
9 improvements to the crossing. There will be two sets of improvements at the crossing.
10 First, there will be improvements to the active warning devices themselves. As an initial
11 improvement, the City is replacing the existing devices with new devices to accommodate
12 the additional lane of travel. The new devices include the installation of one cantilever and
13 one quadrant gate having flashers for each direction of travel.¹³ The northbound cantilever
14 will provide flashers for both lanes of travel while the southbound cantilever will provide
15 two sidelights for eastbound Euclid Avenue and the westbound access road.¹⁴ The City will
16 also install signage in accordance with the Manual on Uniform Traffic Control Devices
17 (“MUTCD”), which includes two stop bars, two W10-1 and W10-4 approach signs and two
18 RR Xing pavement markings.¹⁵

19
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21 8. Second, there will be improvements to the physical crossing surface and
22 adjacent roadway. Specifically, “the City will add eight-inch high concrete medians on
23 Barker Road to both the southbound and northbound approaches to block traffic from trying
24 to go around the railroad crossing arms while they are down.”¹⁶ The median will extend
25

26
27 ¹¹ Exh. GM-1T at 2: 19-20.

¹² Exh. GM-1T at 2: 21-23.

¹³ Exh. RL-1T at 2: 9-11.

¹⁴ Exh. RL-1T at 2: 11-12.

¹⁵ Exh. RL-1T at 2: 13-17.

¹⁶ Exh. RL-1T at 2: 18-20.

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south to block left turns out from Hattamer Lane.¹⁷ The City will also increase the southbound lane width and the radius “for eastbound Euclid Avenue traffic turning southbound on Barker Road.”¹⁸ For the northbound lane, there will be a left turn pocket on Barker Road to allow turns onto Euclid Avenue.¹⁹ The City will also construct a paved pedestrian multi-use path off the roadway, which will be separated from the traffic lanes by a curb and gutter.²⁰ In order to accommodate the additional traffic lanes and multi-use path, the City will pay UPRR to replace the current concrete crossing surface with a new, wider, 81-foot concrete panel crossing surface.²¹

III. LEGAL STANDARD

9. The Commission is authorized to hear petitions from municipalities to modify the warning devices at at-grade crossings.²² The Commission is to grant the petition if the municipality shows that public safety requires the modifications.²³ If federal-aid highway funds are used to pay all or a portion of the cost of installing the warning devices, the Commission is required to apportion the cost of maintenance of the warning devices to the railroad whose road is crossed by the street.²⁴

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¹⁷ Exh. RL-1T at 2: 21.
¹⁸ Exh. RL-1T at 2: 27-28 to 3: 3.
¹⁹ Exh. RL-1T at 3: 7-8.
²⁰ Exh. RL-1T at 3: 9-11.
²¹ Exh. RL-1T at 3: 13-15.
²² RCW 81.53.261
²³ *Id.*
²⁴ RCW 81.53.295

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3 **IV. ARGUMENT**

4 **A. Public safety requires modification of the crossing**

5 *i. UPRR does not have to be the party to request modifications*

6 10. As a threshold matter, UPRR argued many times that modification is not
7 warranted because it was the City, not UPRR, who is requesting to modify the at-grade
8 crossing. According to UPRR, the “crux of the argument” is that UPRR was not the impetus
9 for the modification.²⁵ That is a fundamental misunderstanding of RCW 81.53.261. The
10 “crux of the argument” is not *who* requested the modification of the warning devices, but
11 rather whether the public safety *requires* the modification.
12

13 11. There is no requirement that a modification is only to be granted by the
14 Commission when the railroad is the party requesting the modification to an active warning
15 device. In fact, RCW 81.53.261 states the opposite:
16

17 Whenever [...] *the governing body of any city, town, or county* [...] shall
18 deem that the public safety requires signals or other warning devices [...] [the
19 city shall file] a petition in writing, alleging that the public safety requires the
20 installation of specified signals or other warning devices at such crossing or
21 specified changes in the method and manner of existing crossing warning
22 devices.²⁶

23 As such, the City is the proper party to bring the petition.

24 *ii. The City has provided sufficient evidence of the public safety need for*
25 *modifications to the crossing and associated warning devices*

26 12. In its petition, the City noted that, within ten years, “traffic volumes will
27 increase as the vacant land to the north [of the crossing] is developed.”²⁷ It is a reasonable

28 ²⁵ Rachel Reynolds, TR 142: 13-15.

29 ²⁶ RCW 81.53.261(emphasis added).

30 ²⁷ Exh. RL-4X.

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3 conclusion that accidents increase as traffic volumes increase.²⁸ Robert Lochmiller, the
4 Senior Engineer for the City, testified that increased traffic volumes have impacts to the
5 public safety.²⁹ UPRR did not provide any testimony or evidence to rebut the City on this
6 issue.

7
8 13. The City also conducted two comprehensive traffic analyses along the entire
9 Barker Road Corridor, with each analysis encompassing the effects of increased traffic upon
10 the crossing. The ability to safely facilitate increased traffic volumes over the coming years
11 requires that the City construct improvements along the entire Barker Road Corridor, which
12 includes modifications to the crossing and the active warning devices at the crossing. The
13 NIA SEIS specifically found that queue lengths at the crossing will impact traffic.³⁰ The
14 City constructed the Project, at least partially, in response to the concerns identified in the
15 SEIS.

16
17 14. The improvements themselves will undeniably enhance public safety. The
18 eight-inch high concrete median added to both the northbound and southbound approaches
19 will “block traffic from trying to go around the railroad crossing arms while they are
20 down.”³¹ The concern regarding cars jumping the curb and attempting to get around the
21 track and railroad crossing arms was noted by UPRR itself.³² Extension of the median in the
22 southbound lane will block left turns out from Hattamer Lane by those who may not see the
23 flashing warning devices when a train is approaching.³³ The City increased the turning
24 radius for eastbound Euclid Avenue traffic turning southbound on Barker Road. Increasing
25

26 ²⁸ *Toward Responsible Dev. v. City of Black Diamond*, 2014 WL 295838 *10 (Jan. 27, 2014) (cited as
27 persuasive, nonbinding authority pursuant to GR 14.1(a)).

28 ²⁹ Robert Lochmiller, TR 69: 6-8.

29 ³⁰ Exh. GM-7 at 39.

30 ³¹ Exh. RL-1T at 2: 18-20.

³² Robert Lochmiller, TR 70: 9-11.

³³ Exh. RL-1T at 2: 21-24.

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3 the lane width “allows for larger trucks to make the right turn from Euclid Avenue onto
4 Barker Road without encroaching into opposite lanes of travel and/or jumping over the
5 shoulder/guardrail and hitting the railroad crossing structures on the inside of the turn.”³⁴

6 15. UPRR focused on the fact that the Project will not “eliminate” queuing at the
7 project.³⁵ Queuing happens due to gate arms being down at railroad crossings.³⁶ The at-
8 grade crossing is not being eliminated, so it would be impossible to completely eliminate
9 queuing at the crossing.³⁷ However, the Project will absolutely *reduce* the queuing at the
10 crossing.³⁸ This reduction in queuing will have a positive impact on the public safety at the
11 crossing.
12

13 16. The northbound left turn pocket on Barker Road, allowing turns onto Euclid
14 Avenue, will provide storage for traffic and will help to reduce rear-end collisions for traffic
15 on northbound Barker Road.³⁹ Lastly, the multi-use pedestrian path, which is separated
16 from the traffic lanes by a curb and gutter, will actually facilitate safe pedestrian and bicycle
17 movement along Barker Road and the crossing, as there are currently no pedestrian or
18 bicycle facilities along Barker Road, only a narrow shoulder.⁴⁰
19

20 17. The reasoning and requested modifications of the City are in line with
21 requests by other jurisdictions that the Commission has granted. The Commission has
22 previously granted requests to simply upgrade the lights and batteries of active warning
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26 ³⁴ Exh. RL-1T at 2: 27-28 to 3: 3-6.

27 ³⁵ Gloria Mantz, TR 80: 25 to 81: 1-2.

28 ³⁶ Gloria Mantz, TR 81: 3-4.

29 ³⁷ Gloria Mantz, TR 81: 4-5.

30 ³⁸ *Id.*; Exh. GM-1T at 5: 14-18.

³⁹ Exh. RL-1T at 3: 7-9.

⁴⁰ Exh. RL-1T at 3: 9-13.

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3 devices.⁴¹ The Commission has also previously decided, and UPRR consented to the entry
4 of an order without a hearing, that widening a roadway from two to four lanes and adding a
5 shared use path for the purpose of accommodating increased traffic flow and reducing
6 queuing over a crossing was sufficient for modification under RCW 81.53.261.⁴²

7
8 18. UPRR has not provided any evidence to rebut the City’s determination that
9 the public safety both requires, and will be improved by, the modifications to the crossing.
10 UPRR simply states its belief that “the modifications requested by the City of Spokane
11 Valley (the “City”) are progressed for increased traffic volume, not safety.”⁴³ However,
12 UPRR itself admitted that it does not have any knowledge or background in municipal
13 infrastructure projects that are not related to the railroad facilities themselves.⁴⁴ UPRR's
14 witnesses acknowledged that they lack information to form an opinion about whether the
15 third lane is needed.⁴⁵ Testimony by UPRR's witnesses on this point was not based upon
16 personal knowledge and therefore inadmissible. Furthermore, providing more capacity to
17 facilitate increased traffic volume is a response intended to facilitate the public safety.
18

19 19. UPRR also takes umbrage with the fact that the City, in addition to the actual
20 roadway improvements, will also be including a multi-use path to allow pedestrian and bike
21 use along Barker Road. However, not only will this multi-use path improve public safety as
22 there are currently no pedestrian or bicycle facilities along Barker Road,⁴⁶ but the
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26 ⁴¹ *In re Petition of Cent. Wash. R.R. Co.*, Docket No. TR-190722 (Nov. 19, 2019); *In re Petition of Cent. Wash.*
R.R. Co., Docket No. TR-190660 (Nov. 19, 2019); *In re Petition to Yakima Cnty.*, Docket No. TR-171061
(Nov. 2, 2017).

27 ⁴² *City of Pacific v. Union Pac. R.R. Co.*, Docket No. TR-220088 (April 5, 2022).

28 ⁴³ Exh. EM-1T at 2: 20-21.

29 ⁴⁴ Ellis Mays, TR 98: 18-23; Peggy Ygbuhay; TR 121: 22-25 to 122:1.

30 ⁴⁵ Ellis Mays, TR 116: 18-21.

⁴⁶ Exh. GM-1T at 2: 28-29.

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3 Commission has previously found that installing sidewalks and ADA-compliant surfaces at
4 a railroad crossing, standing alone, was sufficient for modification under RCW 81.53.261.⁴⁷

5 20. The City has shown that the public safety requires modification to the
6 crossing and UPRR has presented no evidence to rebut the City. Therefore, the Commission
7 should grant the City’s petition to modify the at-grade crossing at Barker Road.
8

9 **B. The Commission is required to impose maintenance costs on UPRR pursuant to
RCW 81.53.295**

10 21. RCW 81.53.295 does not give the Commission discretion when apportioning
11 maintenance costs on a federal-aid highway fund project. The Commission is directed,
12 through the use of a mandatory “shall,”⁴⁸ to impose the entire cost of maintenance of an
13 active warning device on the railroad when federal-aid funds are both available and used to
14 pay at least part of the installation of an active warning device.⁴⁹ The City is using federal-
15 aid highway funds for the project and therefore the Commission *must* impose all
16 maintenance costs on UPRR.
17

18 22. The City received a Surface Transportation Block Grant (“STBG”) in the
19 amount of \$2,050,000.⁵⁰ The City expects to utilize \$841,464 in federal funds, \$307,800 in
20 state funds, and \$294,736 of its own local funds for construction of the crossing.⁵¹ UPRR
21 seems to suggest that the City will be utilizing federal funds for other stages of the Barker
22 Corridor Improvement Project, but not for the crossing or the warning devices. This
23 contention is unsupported and erroneous. Even if the City utilized all of its state and local
24 funds for the crossing, the City would still need to utilize its STBG funds for the crossing.
25

26 _____
27 ⁴⁷ *In re Petition of City of Newport*, Docket No. TR-200157 (Mar. 20, 2020).

28 ⁴⁸ *See State v. Blazina*, 182 Wn.2d 827, 838 (use of “shall” is treated as presumptively imperative—“we
presume it creates a duty rather than confers discretion.”).

29 ⁴⁹ RCW 81.53.295.

30 ⁵⁰ Exh. GM-4 at 2.

⁵¹ Exh. GM-5 at 2.

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3 UPRR estimates that the crossing will cost \$615,758 solely for the UPRR work.⁵² In total,
4 the City only has \$602,526 in state and local funding for the crossing. If the City utilized all
5 of its state and local funding, it would still need, at the minimum, to utilize \$13,232 of its
6 STBG grant funds to reimburse UPRR for its crossing work.⁵³ UPRR focused on the fact
7 that this project is “not a Section 130 crossing safety project.”⁵⁴ However, as UPRR's
8 witnesses noted, RCW 81.53.295 does not require the expenditure of Section 130 funds.
9

10 Ms. Foster: Is there any requirement in RCW 81.53.295 for the expenditure
of Section 130 funds?

11 Mr. Mays: No, I do not see any indication of Section 130 in that section.⁵⁵

12 As the City will use federal-aid highway funds to construct the crossing, the Commission
13 imposing the cost of maintenance is proper pursuant to RCW 81.53.295.

14 *i. RCW 81.53.295 does not require “new” installation*

15 23. Contrary to UPRR’s suggestion, there is no requirement for “new”
16 installation of grade crossing protective devices.⁵⁶ When interpreting a statute, the
17 “fundamental objective is to ascertain and carry out the Legislature’s intent and if the
18 statute’s meaning is plain on its face, then the court must give effect to that plain meaning as
19 an expression of legislative intent.”⁵⁷ A court may not add words to an unambiguous statute
20 when the legislature itself has not done so.⁵⁸ This is true even when the “results may seem
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23 ⁵² Exh. PY-2 at 5.

24 ⁵³ Ms. Reynolds: And are you able to tell us today what funds are specifically being used relative to the grade
crossing as opposed to the project as a whole?

25 Mr. Johnson: Well, the – the cost of these – the crossing arms and – and signals exceed the state funds that are
available, so there will be federal and state funds used for this crossing.

26 Brett Johnson, TR 45: 18-24.

27 ⁵⁴ Exh. EM-1T at 2: 14.

28 ⁵⁵ Ellis Mays, TR 101: 14-17.

29 ⁵⁶ Rachel Reynolds, TR 141: 12-15 (“Finally, as to the complaint, the complaint relies upon section 295, which
contemplates installation of new grade crossing protective devices, not redoing what is already there as is the
case in this case.”)

30 ⁵⁷ *State, Dept. of Ecology v. Cambell & Gwinn, LLC*, 146 Wn.2d 1, 9-10 (2002).

⁵⁸ *State v. J.P.*, 149 Wn.2d 444, 450 (2003).

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3 unduly harsh.”⁵⁹ RCW 81.53.295 is clear that it applies to “installing a grade crossing
4 protective device, and related work”. To install is “to set up for use or service”.⁶⁰ Nowhere
5 is there a requirement for either new installation or new service.

6 24. Apportioning maintenance costs to the railroad for any installation of
7 warning devices, not just new installation, is further supported by the statutory and
8 regulatory scheme. WAC 480-62-150(2)(a) states that any city wishing to *modify or*
9 *upgrade* warning signals or devices must file a petition pursuant to RCW 81.53.261.⁶¹ RCW
10 81.53.261 directs that maintenance is to be apportioned in accordance with RCW
11 81.53.271.⁶² RCW 81.53.271 directs that “[i]f the commission directs the installation of a
12 grade crossing protective device, and a federal-aid funding program is available to
13 participate in the costs of such installation, installation and maintenance costs of the device
14 shall be apportioned in accordance with the provisions of RCW 81.53.295.”⁶³ The statutory
15 scheme clearly envisions UPRR paying maintenance on any warning devices installed using
16 federal funds, not just “newly installed” warning devices.
17
18

19 25. Even if there was a requirement for “new” devices, the City has testified that
20 it will in fact be installing new devices.

21 Ms. Reynolds: Do you agree that there are no fundamental changes between
22 the current warning devices and the proposed modifications?

23 Mr. Lochmiller: In regards to the actual signal crossing?

24 Ms. Reynolds: That is correct, sir.

25 Mr. Lochmiller: Well, all of it’s being replaced with a new system so
26 that’s...⁶⁴

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⁵⁹ *Chelan Cnty. v. Nykriem*, 146 Wn.2d 904, 926 (2002).

⁶⁰ https://www.merriam-webster.com/dictionary/install?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

⁶¹ WAC 480-62-150(2)(a).

⁶² RCW 81.53.261.

⁶³ RCW 81.53.271.

⁶⁴ Robert Lochmiller, TR 62: 17-23.

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Ms. Reynolds: Can you – well, the petition does not request installation of a new grade crossing protective device, does it?

Ms. Mantz: Well, Section 7 talk[s] about the gates, the new gates and the cantilevers.⁶⁵

26. While the overall design of the warning devices may be the same, the actual, physical devices themselves are new. UPRR did not rebut the City’s contention that the devices are new, instead focusing only on the fact that “no additional devices [are] being installed at this location.”⁶⁶ Just because there are not going to be additional devices does not mean that there will not be new devices. Further, even if “new” installation is required, there is absolutely no requirement in RCW 81.53.295 for a “new design.” To the extent that RCW 81.53.295 requires “new” installation, the City is installing new warning devices and the imposition of maintenance fees upon UPRR is proper.

ii. The City did not approve the imposition of maintenance costs

27. UPRR further argues that they are not liable for maintenance costs because the City agreed to the imposition of maintenance costs.⁶⁷ While it is generally correct that the City and UPRR could enter into an agreement regarding maintenance costs,⁶⁸ the City did not enter into such an agreement in this case.

28. UPRR’s claims are based upon an email in which Mr. Lochmiller stated the “City is OK with this and would like to proceed with the agreement” in response to an email from UPRR that mentioned “AREMA Annual Maintenance Costs” along with the actual project construction costs.⁶⁹ It is important to note that Mr. Lochmiller had no intent to

⁶⁵ Gloria Mantz, TR 74: 13-17.

⁶⁶ Ellis Mays, TR 118: 1-2.

⁶⁷ Exh. EM-1T at 4: 20-21.

⁶⁸ RCW 81.53.261.

⁶⁹ Exh. RL-8X at 2-3.

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3 make any statements regarding the maintenance costs.⁷⁰ Mr. Lochmiller simply thought he
4 was agreeing to construction costs in order to get the project moving forward.⁷¹

5 29. Regardless of the fact that Mr. Lochmiller did not believe he was agreeing to
6 maintenance costs, Mr. Lochmiller did not have the authority to bind the City to any
7 agreement. UPRR claims it is irrelevant whether or not Mr. Lochmiller had either inherent
8 or apparent authority to bind the City.⁷² However, that is absolutely the relevant inquiry as
9 Mr. Lochmiller is not the principal in this case.
10

11 30. The city manager is the officer for the City who has the authority to enter into
12 contracts on behalf of the City.⁷³ Therefore, for purposes of contractual relationships, the
13 city manager is the principal for the City. In order to bind a principal, an agent must have
14 either actual or apparent authority.⁷⁴ Both actual and apparent authority is about the
15 *principal's* objective manifestations, not an agent's.⁷⁵ Actual authority requires the
16 principal's objective manifestations be made to the agent.⁷⁶ At the time of the December 8,
17 2020, email neither Mr. Lochmiller, nor Gloria Mantz, then Engineering Manager for the
18 City, had been delegated the authority to enter into contracts on behalf of the City.⁷⁷ As
19 such, Mr. Lochmiller did not have actual authority to enter into an agreement regarding
20 maintenance fees on behalf of the City.
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25 ⁷⁰ Robert Lochmiller, TR 16-21.

26 ⁷¹ *Id.*

27 ⁷² Rachel Reynolds, TR 146: 24-25.

28 ⁷³ SVMC 3.35.010.

29 ⁷⁴ *King v. Riveland*, 125 Wn.2d 500, 507 (1994).

30 ⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Exh. GM-8T at 3: 19-21.

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3 31. Apparent authority, on the other hand, requires the principal's objective
4 manifestations be made to the third party.⁷⁸ The City Manager at the time of the December
5 8, 2020 email was Mark Calhoun. UPRR has not claimed that Mr. Calhoun made any
6 statements to UPRR regarding Mr. Lochmiller's authority to enter into agreements on behalf
7 of the City. That is because Mr. Calhoun did not make any such statements. Because no
8 manifestations regarding Mr. Lochmiller's authority were made to UPRR, Mr. Lochmiller
9 did not have apparent authority to enter into any agreements on behalf of the City.
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11 32. As Mr. Lochmiller did not have actual or apparent authority to bind the City
12 to any agreements, the City did not "approve" the imposition of maintenance costs. UPRR's
13 claims regarding this email constituting acceptance of maintenance costs are curious when
14 UPRR itself agrees that this email exchange was not approval of the project.⁷⁹ At most,
15 assuming Mr. Lochmiller possessed any sort of contractual authority, the City entered into
16 an "agreement to agree," which is unenforceable in Washington.⁸⁰ The December 8, 2020,
17 email did not constitute the City agreeing to pay maintenance costs and therefore the City
18 and UPRR did not enter into an agreement pursuant to RCW 81.53.261.
19

20 iii. Imposing maintenance costs upon UPRR is consistent with the custom
21 and practice between UPRR and the City

22 33. Not only is the imposition of maintenance costs for the warning devices
23 authorized pursuant to RCW 81.53.295, but it is also in accord with the customs and
24 practices between UPRR and the City. The City is not asking UPRR to bare any cost of the
25 construction of the crossing. The City absolutely agrees that it will reimburse UPRR for
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27 ⁷⁸ King, 125 Wn.2d at 507.

28 ⁷⁹ Ellis Mays, TR 112: 10-11.

29 ⁸⁰ P.E. Sys., LLC v. CPI Corp, 176 Wn.2d 198 (2012) ("An agreement to agree is an agreement to do
something which requires a further meeting of the minds of the parties and without which it would not be
complete.") (internal citations and quotations omitted).

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3 UPRR's work on the crossing. Instead, all the City is requesting is that UPRR pay the
4 annual maintenance for its facilities. This is completely consistent with the current practice
5 between the parties.

6 Ms. Foster: Do you [UPRR] currently charge the City of Spokane Valley for
7 signal maintenance at this crossing location?

8 Ms. Ygbuhay: No.⁸¹

9 34. UPRR paying maintenance costs for its own facilities is also consistent with
10 previous agreements between UPRR and the City, such as the 2017 Crossing Agreement for
11 surface maintenance entered into by the parties.⁸²

12 Ms. Foster: So Spokane Valley doesn't pay all maintenance costs at this location?

13 Ms. Ygbuhay: No, not outside of the track tie-ends, that's correct.

14 Ms. Foster: Okay, so UP does pay maintenance costs for its facilities?

15 Ms. Ygbuhay: Yes, Union Pacific is bearing the maintenance burden here, yes.⁸³

16 35. As such, to the extent UPRR claims this is somehow an additional burden
17 upon it—it is not. UPRR currently pays maintenance costs at this location and all the City is
18 requesting is that the Commission maintains the status quo.

19 **C. Federal funds do not need to be utilized for UPRR to have maintenance obligations**

20 36. While the City has consistently shown that it will utilize federal funds to
21 reimburse UPRR for modifications to the crossing, the use of federal funds is actually
22 irrelevant to the apportionment of maintenance costs and UPRR is still required to bear the
23 entire cost of maintenance under RCW 81.53.275. RCW 81.53.275 states, in full:

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25 In the event funds are not available from the grade crossing protective fund,
26 the commission shall apportion to the parties on the basis of the benefit to be
27 derived by the public and the railroad, respectively, that part of the cost
which would otherwise be assigned to the fund: PROVIDED, That in such

28 ⁸¹ Peggy Ygbuhay, TR 123: 21-23.

29 ⁸² Exh. PY-5.

30 ⁸³ Peggy Ygbuhay, TR 125: 23-25 to 126: 1-5.

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instances the city, town, county or state shall not be assessed more than sixty percent of the total cost of installation on other than federal aid designated highway projects: AND PROVIDED FURTHER, *That in such instances the entire cost of maintenance shall be apportioned to the railroad.*⁸⁴

37. The City is not requesting or receiving funds from the grade crossing protective funds—these funds are not available for the project. The City is not requesting that UPRR be assessed any costs associated with the installation of the warning devices because it is a federal aid designated highway project. However, it is clear from the plain language of the statute that, regardless of whether federal funds are being used for the project, if no funds from the grade crossing protective fund are being used, then UPRR is to pay the entire costs of maintenance. As such, even if the Commission accepts UPRR’s conclusory allegations that the City is not utilizing federal funds for the crossing, the Commission should still apportion all maintenance costs to UPRR because no funds from the grade crossing protective fund are available to the City and the City is not requiring UPRR to pay any portion or cost of installing and upgrading the crossing.

V. CONCLUSION

38. For the foregoing reasons, the Commission should grant the City of Spokane Valley’s petition to modify the at-grade crossing at Barker Road and grant the City’s request that maintenance costs be born solely by Union Pacific Railroad and that the City is not responsible for maintenance costs.

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⁸⁴ RCW 81.53.275 (emphasis added).
CITY OF SPOKANE VALLEY’S
POST-HEARING BRIEF-17

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DATED this 31st day of May, 2022.

MENKE JACKSON BEYER, LLP

s/ Aziza L. Foster

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury, under the laws of the State of Washington, that on this day, I caused to be served a true and correct copy of the foregoing document by the method indicated before, and addressed to the following:

<p>Washington Utilities & Transportation Commission</p>	<p><input checked="" type="checkbox"/> efiling.utc.wa.gov/form</p>
<p>Jeff Roberson Assistant Attorney General Office of the Attorney General Utilities and Transportation Division P.O. Box 40128 Olympia, WA 98504-0128 (360) 664-1188</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: jeff.roberson@utc.wa.gov <input type="checkbox"/> Via Hand Delivery</p>
<p>Ellis Mays 3017 Douglas Boulevard Suite 300 Roseville, CA 95661 (916) 774-7165 <i>(Contact for Union Pacific Railroad)</i></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: emays@benesch.com <input type="checkbox"/> Via Hand Delivery</p>
<p>Josephine S. Jordan Union Pacific Railroad 1400 Douglas Street, MS 1580 Omaha, NB 68179 (402) 544-4554 <i>(Counsel for Union Pacific Railroad)</i></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: jjordan1@up.com <input type="checkbox"/> Via Hand Delivery</p>
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Dated in Yakima, Washington, this 31st day of May, 2022.

s/Janet L. Rose
JANET L. ROSE

CITY OF SPOKANE VALLEY'S
POST-HEARING BRIEF-19

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