BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF SPOKANE VALLEY, Petitioner, v. UNION PACIFIC RAILROAD COMPANY Respondent.	DOCKETS TR-210809 and TR-210814 (*consolidated*)
CITY OF SPOKANE VALLEY, Complainant, v. UNION PACIFIC RAILROAD COMPANY Respondent.	

POST-HEARING BRIEF ON BEHALF OF COMMISSION STAFF

May 31, 2022

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I. INTRODUCTION

1 The City of Spokane Valley (City or Spokane Valley) has petitioned the Commission for authority to modify the Barker Road grade crossing to make it safer for the traveling public. The City has also complained against Union Pacific Railroad (UP), asking the Commission to declare that UP must maintain the grade-crossing protective devices (GCPDs) that would be installed if the Commission grants its petition.

2 The Commission should enter an order granting the petition and requiring UP to pay to maintain the GCPDs. Public safety would be improved by an order to that effect, and the City will use federal-aid funds to complete the project, meaning that the City asks the Commission to do nothing more than apply the maintenance allocation prescribed in RCW 81.53.295.

II. STATEMENT OF FACTS

3 Between the 2010 and 2020 decennial censuses, the population of Spokane Valley grew by more than 13,000 people.[1] That growth translates, roughly, to a 14.8 percent increase in the City's population over the last decade.[2]

4 This growth, and its associated development,[3] has produced rapidly increasing "[t]raffic congestion in" the City's Barker Road corridor, which stretches along Spokane Valley's eastern edge.[4] To address these traffic problems, the City has made, or plans to make, a number of upgrades or modifications to Barker Road.[5]

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[1] Office of Financial Management, 2020 Census Data Releases, *available at* https://ofm.wa.gov/washington-data-research/population-demographics/decennial-census/2020-census-everyone-counts/2020-census-what-you-need-know/2020-census-data-releases (last visited May 20, 2022) (the data is contained in the "City" Excel spreadsheet linked to on the page).
[2] Office of Financial Management, 2020 Census Data Releases.
[3] *See* Mantz, Exh. GM-1T at 5:29-6:4.
[4] Mays, Exh. EM-2 at 1.
[5] *E.g.*, Mantz, Exh. GM-1T at 3:5-4:10; Mays, Exh. EM-2 at 1-3.

5 The City's plans, unfortunately, face rail-created complications. Tracks owned or operated by UP and BNSF Railway Company cross, or, until recently, crossed, Barker Road at grade in multiple places.[6] One of these grade crossings, the one at issue here, sits between where Hattamer Lane and Euclid Avenue intersect with Barker Road.[7]

6 Currently, Barker Road has one lane through the crossing for each of north- and southbound traffic.[8] Those lanes have no sidewalks.[9] The City seeks to widen the highway to create a turn lane for traffic moving northbound and turning west onto Euclid Avenue. It also plans on installing eight-inch concrete medians on the crossing approaches. One of those medians would extend past Barker Road's junction with Hattamer Lane. Spokane Valley further plans on constructing a separated multi-use pathway.[10]

7 The changes to Barker Road will necessitate the installation of new GCPDs.[11] This is because, as Spokane Valley witness Robert Lochmiller agreed at hearing, "when you move the roadway, you move the equipment."[12] Accordingly, the project will involve the installation of new, longer cantilevers and gates for each direction of travel on Barker Road in new locations.[13] The northbound cantilever will have flashers for both of the lanes of the new roadway configuration.[14] The southbound cantilever will offer "two sidelights for Euclid Avenue and the westbound access road"[15] In total, the grade-crossing protective devices will include "nine flashers and three warning bells" and various other markings or

[6] Mays, Exh. EM-2 at 1-3.
[7] Lochmiller, Exh. RL-1T at Attachment B.
[8] Lochmiller, Exh. RL-1T at 1:29-2:3.
[9] Lochmiller Exh. RL-1T at 3:12-13.
[10] Lochmiller, Exh. RL-1T at 2:7-3:18.
[11] Johnson, Tr. at 44:8-12; Lochmiller, Tr. at 62:24-64:3; Mantz, Tr. at 74:13-17.
[12] Lochmiller, Tr. at 6325-64:3.
[13] Lochmiller, Exh. RL-1T at 2:9-10; Lochmiller, TR. at 63:7-15; Mantz, Tr. at 74:13-17.
[14] Lochmiller, Exh. RL-1T at 2:10-11.
[15] Lochmiller, Exh. RL-1T at 2:11-12; Lochmiller, Tr. at 63:7-19.

signage "in accordance with the Manual on Uniform Traffic Control Devices (MUTCD)."[16] These GCPDs were designed by the railroad,[17] and thus should meet its safety standards.

8 The reconfiguration of the crossing should provide multiple safety benefits. Three of these arise from the wider roadway. By allowing for the creation of a left-turn lane, the widened road will create storage that will remove cars lining up to turn onto Euclid from the flow of traffic, reducing rear-end collisions at the crossing.[18] The wider roadway will also allow larger vehicles to turn from Barker Road onto Euclid Avenue without swinging into lanes containing oncoming traffic.[19] And the wider roadway will allow the City to build other access points to allow railroad employees to access the crossing and turn out of traffic.[20] The medians should prevent vehicles from entering the crossing when a train passes through, whether drivers deliberately attempt to circumvent the gates after the gates have deployed[21] or accidentally turn into the crossing from Hattamer because they fail to see the flashers.[22] The new GCPDs will control traffic on the roadway, keeping motorists out of the crossing and thus avoiding "catastrophic" vehicle-train collisions.[23] And the multi-use pathway will remove pedestrians and bicyclists from the roadway, separating them from motor vehicles.[24]

[16] Lochmiller, Exh. RL-1T at 2:12-17.
[17] Lochmiller, Tr. at 64:10-15; Mantz, Tr. at 92:22-25; Ygbuhay, Tr. at 122:2-17.
[18] Mantz, Exh. GM-1T at 2:18-20, 5:14-19, 7:9-20; Mantz, Exh. GM-8T at 2:12-19; Lochmiller, Exh. RL-1T at 3:7-8.
[19] Lochmiller, Exh. RL-1T at 2:28-3:6.
[20] Lochmiller, Exh. RL-1T at 3:15-17.
[21] Mantz, Exh. GM-8T at 2:24-28; Lochmiller, Exh. RL-1T at 2:18-20.
[22] Lochmiller, Exh. RL-1T at 2:21-24.
[23] Ygbuhay, Tr. at 131:10-134:13.
[24] Mantz, Exh. GM-8T at 2:12-17, 19-21; Lochmiller, Exh. RL-1T at 3:10-12.

9 The City will use federal highway funds to pay the costs of the improvements at the Barker Road crossing, including the signals work.[25] Specifically, Spokane Valley will use funds from the Surface Transportation Block Grant Program created by Congress under 23 U.S.C. § 133 for the project.[26]

10 Spokane Valley and UP negotiated several agreements concerning the Barker Road project between 2017 and 2019. The first was a Construction and Maintenance Agreement (C&M Agreement) executed in 2017 to allow resurfacing of the roadway. To allow the City to proceed with that project, UP exchanged for consideration certain rights, including the right to "construct, maintain, and repair the Roadway over and across the Crossing Area."[27] In that Agreement, the parties covenanted that:

> [f]uture projects involving substantial maintenance, repair, reconstruction, renewal, and/or demolition of the Roadway shall not commence until [UP] and [Spokane Valley] agree on plans for such future projects, cost allocations, right of entry terms, and conditions and temporary construction rights, terms, and conditions.[28]

11 In 2019, UP and the City entered into an agreement to govern preliminary engineering (PE Agreement). The City there noted that "[p]lans are being prepared to widen Barker Road at the location referenced above. The proposed work includes reconstruct[ion of] Barker Road from the Spokane River to Euclid Road to a" three-lane, 40-foot wide "road with curb and gutter" and that the project also involved "construct[ion] of a" 10-foot "asphalt shared use path on the east side of the roadway."[29] It later provided that:

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[25] Mantz, Exh. GM-1T at 4:16-5:9; Mantz, Tr. at 92:14-21, 94:13-957; Johnson, Exh. BJ-1T at 2:5-8; Johnson, Tr. at 44:21-46:12, 47:19-49:3.
[26] Mantz, Tr. at 95:4-7.
[27] Ygbuhay, Exh. PY-5 at 3.
[28] Ygbuhay, Exh. PY-5
[29] Ygbuhay, Exh. PY-2 at 1

> This agreement is intended to address Preliminary Engineering. It is understood by both parties that [UP] may withhold its approval for any reason directly or indirectly related to safety or its operations, property issues[,] or effects to its facilities. If the Project is approved, Union Pacific will continue to work with the Agency to develop Final Plans, Specifications[,] and prepare Material and Cost Estimates for Railroad Construction Work associated with the Project. It is also understood that if the project is constructed, if at all, [that will be done] at no cost to the railroad.
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> The Agency and the Railroad will enter into separate License, Right of Entry, [and] Construction and Maintenance Agreements associated with the actual construction of the project if the project is accepted and approved by the railroad.[30]

12 In late 2020, UP and Spokane Valley exchanged emails to attempt to negotiate a new C&M Agreement for the modifications at issue here. At some point in or after October 2020, UP witness Ellis Mays explained the process by email to a City employee who had inquired about future steps, stating that:

> The estimate has not been completed yet, however, I can provide the after steps. When the estimate is received I will create a project estimate . . . Pending your approval of that estimate and the new annual signal maintenance free UPRR will draft the construction agreement for the city to review and execut[e].[31]

13 On December 8, 2020, Mr. Mays forwarded to that same City employee several documents, including a signal maintenance cost estimate.[32] He concluded his email by stating "[w]ith your concurrence I will proceed with a draft agreement using the ROW exhibits previously sent by the City."[33] Mr. Lochmiller responded to Mr. Mays's December 8 email by stating that the "City is okay with this and would like to proceed with the agreement."[34]

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[30] Ygbuhay, Exh. PY-2 at 2.
[31] Mays, Exh. EM-4 at 1.
[32] Mays, Exh. EM-5 at 1-2.
[33] Mays, Exh. EM-5 at 2.
[34] Mays, Exh. Em-5 at 1.

14 In testimony filed in this docket, UP witnesses Peggy Ygbuhay and Mr. Mays explained UP's policies and practices with regard to C&M Agreements. Ms. Ygbuhay stated emphatically that UP considered the C&M Agreement the agreement necessary to create rights and obligations because it "is the document that approves the work, allows for entry into UP property grants license/easements for the road or improvements, sets responsibilities, and funding terms".[35] She later reiterated that "[a] C[&]M Agreement must first be in place" before a municipality could begin work on a project.[36] And Mr. Mays testified at hearing that the C&M Agreement would contain matters not included in the types of emails he sent to the City's officials when negotiating terms.[37]

15 UP officially sent the City the maintenance estimate as part of the formal C&M Agreement in June of 2021.[38] The City responded by requesting that UP strike the maintenance provisions from the C&M Agreement.[39] UP refused, and the parties exchanged correspondence on the issue.[40] Ultimately, the parties could not resolve whether the C&M Agreement should include a term allocating maintenance costs to the City.[41] That impasse prompted Spokane Valley to file the instant petition seeking approval to modify the crossing, and a complaint against UP seeking a declaration from the Commission that UP was responsible for the maintenance of those GCPDs under RCW 81.53.295.[42]

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[35] Ygbuhay, Exh. PY-1T at 5:22-6:4.
[36] Ygbuhay, Exh. Exh. PY-1T at 6:1-4.
[37] Mays, Tr. at 110:25-112:12.
[38] Ygbuhay, Exh. PY-1T at 3:35-26
[39] Ygbuhay, Exh PY-1T at 5:4-12.
[40] *City of Spokane Valley v. Union Pac. R.R. Co.*, Docket TR-210814, Complaint, 2-3 ¶ 7 & Appx. B, Appx. C, Appx. D, Appx. D (Oct. 25, 2021) (hereinafter "Complaint"). UP did not answer the complaint and deny the allegations in it, although it was required to do so. WAC 480-07-370(2)(c).
[41] Ygbuhay, Exh. PY-1T at 5:2-3.
[42] *See generally City of Spokane Valley v. Union Pac. R.R. Co.*, Docket TR-210809, Petition to Modify Warning Devices at Highway-Railroad Grade Crossing (Oct. 25, 2021) (hereinafter "Petition"); *see generally* Complaint at 1-3 ¶¶ 1-8.

III. ARGUMENT

16 The City's petition and complaint present four issues for the Commission: (1) does "public safety require"[43] modifications to the crossing here; (2) does state law apportion to UP all GCPD maintenance costs, barring some agreement otherwise by the parties; (3) did the parties agree to some other allocation of those costs; and (4) do the parties' agreements prevent the Commission from ordering improvements to the Barker Road crossing?

17 The Commission should answer the first two questions in the affirmative. The overwhelming weight of evidence indicates that the City's proposed modifications would make the crossing safer, and that Spokane Valley will use federal-aid funds to install the GCPDs. But the Commission should answer the latter two questions in the negative. The text of the parties' agreements concerning the crossing and the emails they exchanged to negotiate the never-executed C&M Agreement for the relevant project phase show no binding agreement to allocation of maintenance costs to the City, and UP's agreements with Spokane Valley cannot strip the Commission of its power to order safety measures at the crossing.

A. Public Safety Requires the Installation of the Warning Devices Proposed by the City

18 The Commission may order changes to a highway-rail grade crossing when "public safety requires" those changes.[44] The evidence shows that public safety requires the modifications proposed by the City for the safety of three different types of users.

19 The first set of users is comprised of those traveling in motor vehicles, who would see safety benefits from the proposed modifications. The widened road would allow the City

[43] RCW 81.53.060, .261.
[44] RCW 81.53.060, .261.

to create a turning lane for northbound traffic turning east onto Barker Road, creating storage for vehicles and thus reducing read-end collisions.[45] The wider roadway would also allow larger trucks to turn from Euclid Avenue onto Barker Road without encroaching into other lanes of traffic, thus reducing the chance of vehicle-on-vehicle collisions.[46] The "eight-inch high concrete medians" that Spokane Valley would install on the northbound and southbound crossing approaches[47] will preclude drivers from entering the crossing when a train passes through by preventing drivers from circumventing the active warning devices[48] or by turning out from Hattamer Lane onto Barker Road if they miss the warning flashes.[49] And the GCPDs installed on the new roadway will control traffic in a safe manner.[50] Each modification will thus play some part in reducing the likelihood of a "catastrophic" train-vehicle collision.[51].[52]

20 The second set of users is made up of pedestrians and bicyclists. The Barker Road crossing currently lacks sidewalks,[53] meaning that those traveling by foot or by bicycle must "share the" road's "existing narrow lanes . . . with freight and vehicular traffic,"[54] with all the dangers attendant thereto. The City's proposal includes a separated pedestrian path that eliminates those dangers.[55]

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[45] Mantz, Exh. GM-1T at 2:18-20, 5:14-19, 7:9-20; Mantz, Exh. GM-8T at 2:12-19; Lochmiller, Exh. RL-1T at 3:7-8.
[46] Lochmiller, Exh. RL-1T at 2:28-3:6.
[47] Mantz, Exh. GM-8T at 2:24-28; Lochmiller. Exh. RL-1T at 2:18.20.
[48] Mantz, Exh. GM-8T at 2:24-28; Lochmiller, Exh. RL-1T at 2:18-20; *see* 49 C.F.R. § 222.9 (defining a supplemental safety measures); 49 C.F.R. 222 Appx. A(3) (explaining that gates and non-traversible curbs reduce the risk of a train-vehicle collision by 80 percent).
[49] Lochmiller, Exh. RL-1T at 2:21-24.
[50] See Ygbuhay, Tr. at 131:10-134:13.
[51] Ygbuhay, Tr. at 134:9-11.
[52] Lochmiller, Exh. RL-1T at 2:7-16, 2:24-26; *see* Ygbuhay, Tr. at 131:10-134:13.
[53] Lochmiller, Exh. RL-1T at 3:12-13.
[54] Mantz, Exh. GM-8T at 2:19-22.
[55] Mantz, Exh. GM-8T at 2:12-17, 19-21; Lochmiller, Exh. RL-1T at 3:10-12.

21 The final user benefitted by the project is the railroad itself. The widened road would allow Spokane Valley to provide railroad personnel with additional "driveway approaches for railroad staff to access the area and pull off the roadway."[56] And the concrete medians and GCPDs will provide safety benefits to the railroad no less than to motorists, reducing the chance that a vehicle will enter the crossing as one of UP's trains passes, thus causing a "catastrophic" collision.[57]

22 The Commission recently determined in another docket that modifications like those at issue here were required by public safety, and that conclusion was deemed so obvious that the Commission's approval was not controversial. In Docket TR-220088, the city of Pacific petitioned for approval to modify a crossing by widening a public highway, installing medians, building a separated shared-use pathway, and installing grade crossing protective devices adapted to the new roadway configuration.[58] No party, including the railroad, UP, opposed the petition on the ground that public safety did not require those modifications. The Commission found that the proposed improvements were "intended to promote public safety by increasing traffic flow, reducing queueing over the crossing, and extending adjacent pedestrian facilities through the crossing,"[59] and approved the project under RCW 81.53.261 on the basis that the improvements actually would do so.[60] Given the similarity of the modifications at issue here to those approved in Docket TR-220088, the Commission should simply follow the reasoning it used in that docket and approve the City's petition as required by public safety.

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[56] Lochmiller, Exh. RL-1T at 3:15-17.
[57] Ygbuhay, Tr. at 134:9-11.
[58] *In re Petition of City of Pacific*, Docket TR-220088, Order 01, 1-2 ¶¶ 5 (Apr. 5, 2022) (order issued pursuant to delegated authority by the Executive Director).
[59] *Id.* at 2 ¶¶ 6, 9.
[60] *Id.* at 3 ¶ 14.

23 UP, however, appears to make two arguments against a finding that public safety requires the modifications at issue here: (1) the modifications will reduce, but not eliminate, public safety dangers at the crossing,[61] and (2) the data indicates that the crossing is not dangerous.[62] Neither has merit.

24 Beginning with that first argument, UP effectively asks the Commission to make "the perfect the enemy of the good."[63] The Commission should recognize that doing so is "rarely wise and always unnecessary."[64] UP asks the Commission to apply a standard for determining what the public safety requires, the elimination of dangers, that no proposal could meet,[65] save perhaps closing the crossing.[66] But the Legislature intended the Commission to have more tools for improving public safety than simply closing every crossing in the state.[67] Given that legislative intent, the Commission should reject UP's arguments, which would foreclose the use of those other tools in future cases given the Commission's need to treat similar situations similarly.[68]

25 Turning next to UP's second argument, the Commission should reject it for three reasons. Initially, the Commission has stated that "[t]he lack of prior disastrous consequences from" past incidents at a crossing "does not predict that accidents will not happen there in the future,"[69] meaning that a history showing an absence of accidents does not preclude a finding that public safety requires modification to the crossing. Regardless,

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[61] *E.g.*, Mantz, Tr. at 86:1-15; Mays, Tr. at 102:14-103:9.
[62] *E.g.*, Mantz, Tr. at 79:7-14.
[63] *People v. Taylor*, 743 N.Y.S. 2d 253, 266 (N.Y. Sup. Court 2002)**Error! Bookmark not defined.**.
[64] *Taylor*, 743 N.Y.S.2d at 266.
[65] Mantz, Tr. at 93:21-23.
[66] *See* 49 C.F.R. 222 Appx. A(A)(1) (recognizing that closing a crossing effectively eliminates safety dangers there, but noting that doing so may create safety risks at nearby crossings by redirecting traffic).
[67] *E.g.*, RCW 81.53.060, .261.
[68] *Stericycle of Wash., Inc. v. Wash. Utils. & Transp. Comm'n*, 190 Wn. App. 74, 93, 359 P.3d 894 (2015).
[69] *Burlington N. Santa Fe Ry. Co. v. City of Sprague*, Docket TR-010684, Fourth Supplement Order, 12 ¶ 41 (Jan. 10, 2003).

the data indicates that the Barker Road crossing is dangerous. UP asked the City to make specified changes at the crossing after noting a number of past incidents, specifically "nine blocked crossings, 18 unsafe motorists, and one vehicle on the tracks."[70] That data is alarming, and the Commission should allow the City to take measures to address the safety issues underlying it. And finally, irrespective of the value of the crossing's history for determining what public safety requires, the Commission also looks forward when making that determination.[71] The City has repeatedly stressed that it seeks to modify the Barker Road crossing to deal with future population growth, which will bring with it increased traffic volumes and increased danger at the crossing.[72] The Commission should, if nothing else, find that public safety requires the modifications sought by the City based on those concerns about the future.

B. RCW 81.53.295 Allocates the Maintenance Costs at Issue Here to UP

26 The next question is whether RCW 81.53.295 allocates the cost of maintaining the GCPDs to UP. The answer is yes. The overwhelming weight of evidence shows that Spokane Valley will use federal-aid funds made available to it under 23 U.S.C. § 133 to install the devices.

27 A statutory scheme governs the appointment of maintenance costs for grade-crossing protective devices installed under chapter 81.53 RCW. RCW 81.53.261 requires the Commission to "apportion the entire cost of installation and maintenance" of any signals installed or modified pursuant to an order entered under the section "as provided in RCW 81.53.271." RCW 81.53.271 provides that "[i]f the commission directs the installation of a

[70] Lochmiller, Exh. RL-1T at 3:28-4:5.
[71] *Whatcom County v. BNSF Ry. Co.*, Docket TR-180466, Order 02, 11 ¶ 46 (May 15, 2019).
[72] E.g., Mantz, Exh. GM-1T at 5:27-7:19; Mantz, Tr. at 75:9-17.

grade crossing protective device, and a federal-aid funding program is available to participate in the costs of such installation, installation and maintenance costs of the device shall be apportioned in accordance with the provisions of RCW 81.53.295." RCW 81.53.295 requires that "[t]he railroad . . . shall thereafter pay the entire cost of maintaining the device" when federal funds pay for part of its installation.

28 The Commission should apportion all maintenance for the GCPDs to UP because the City will use federal funding to pay for their installation.[73] City witnesses Gloria Mantz and Brett Johnson both testified that federal funds would be used for the Barker Road crossing project in general, and to install the GCPDs in particular.[74] Indeed, Mr. Johnson testified that federal funds would *necessarily* be used for both of those purposes because the state funds allocated for each were insufficient.[75] As Ms. Mantz and Mr. Johnson also testified, the federal-aid funds the City will use come from the Surface Transportation Block Grant Program created under 23 U.S.C. § 133.[76] Given that federal funding, RCW 81.53.295 dictates the outcome here: the Commission must require UP to pay to maintain the GCPDs.

29 UP, however, seeks to avoid any obligation to maintain the grade-crossing protective devices through several arguments: (1) federal regulations establish that it receives no benefit and thus that it should not pay maintenance;[77] (2) the City did not use funds from 23 U.S.C. § 130 for this project;[78] (3) the MUTCD allocates maintenance costs to the City;[79]

[73] Johnson, Exh. BJ-1T at 2:5-9; Mantz, Exh. GM-1T at 4:16-5:10.
[74] Mantz, Exh. GM-1T at 4:16-5:9; Mantz, Tr. at 92:14-21, 94:13-957; Johnson, Exh. BJ-1T at 2:5-8; Johnson, Tr. at 44:21-46:12, 47:19-49:3.
[75] Johnson, Tr. at 45:18-46:12.
[76] Johnson, Exh. BJ-1T at 2:5-8; Mantz, Exh. GM-1T at 4 25-5:4; Mantz, Exh. GM-4; Mantz, Exh. GM-18X; Johnson, Tr. at 44:21-48:3; Mantz, Tr. at 92:14-25, 94:23-95:7.
[77] *E.g.*, Ygbuhay, Exh. PY-1T at 6:7-18.
[78] *E.g.*, Mays, Exh. EM-1T at 2:12-14.
[79] *See, e.g.*, Lochmiller, Tr. at 52:14-22.

(4) the project does not involve the installation of new devices at the crossing;[80] and (5) the cumulative impact of its maintenance obligations at all the crossings in Washington make it unfair to impose any maintenance obligation on it for this crossing.[81] Staff addresses each in turn.

30 First, UP witness Ygbuhay contends that UP derives no benefit from the grade crossing protection devices.[82] There are three problems with that contention.

31 Initially, it is irrelevant. RCW 81.53.295 does not require the Commission to find that UP derives benefits from the GCPDs before allocating maintenance to it where the City uses federal funds to install the devices. RCW 81.53.295 instead requires, under those facts, the Commission to allocate maintenance costs for the devices to UP, regardless of any benefits.

32 RCW 81.53.295's indifference to benefits to UP is legally permissible. States do not make crossing improvements for the "purpose and end result" of "enhance[ing] the value of" the railroad's property, purposes which *would* limit a state's ability to allocate costs based on "some relationship to the benefits received."[83] Instead, the states build such improvements "to meet local transportation needs and further safety and convenience, made necessary by the rapid growth of the communities" around the crossing.[84] States may exercise their police powers to allocate crossing costs incurred for those purposes wholly to a railroad,[85] subject to a limit not relevant here,[86] because "[t]he presence of [the railroad's]

[80] See, e.g., Lochmiller, Tr. at 62:17-64:9.
[81] Tr. at 31:14-32:5 (UP's counsel responding to Staff's objection to portions of PY-1T).
[82] Ygbuhay, Exh. PY-1T at 6:15-18.
[83] *Atchison, T. & S. F. Ry. Co. v. Pub. Utils. Comm'n*, 346 U.S. 346, 352, 74 S.Ct. 92, 98 L.Ed. 51 (1953).
[84] *Atchison*, 346 U.S. at 352.
[85] *Atchison*, 346 U.S. at 352.
[86] That limit occurs when the state spends such an arbitrarily large sum of money that it asks the railroad to shoulder the costs, taking the railroad's property without due process of law. *Lehigh Valley R.R. Co. v. Bd. of*

tracks in the streets creates the burden of constructing" the crossing improvements, and "[h]aving brought about the problem 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."[87]

33 Further, while Ms. Ygbuhay appears to testify about the lack of benefits to UP to contend that federal law preempts any allocation of maintenance costs to UP, that contention is misplaced. Based on the overall statutory and regulatory scheme, at least one court has rejected the claim that 23 C.F.R. § 646.210, the regulation Ms. Ygbuhay relies on, preempts states from allocating maintenance costs to railroads.[88] That court's conclusion is consistent with the grade crossing manual[89] issued by the Federal Highway Administration, the agency that administers the regulations on which UP relies. That manual recognizes that railroads shoulder the obligation of maintaining crossings and the protective devices at them.[90] In short, UP's preemption claim finds no basis in federal law or administrative practice.

34 Finally, UP's argument is, as Staff has previously noted,[91] extremely myopic. UP admits that any vehicle-train or pedestrian-train collision would be "catastrophic."[92] Such a catastrophe would impact UP, either in the form of injury to its employees, damage to its property, or disruption to its operations. UP cannot credibly acknowledge the possibility and

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Pub. Util. Comm'rs, 278 U.S. 24, 34-35, 49 S.Ct. 69, 73 L.Ed. 2d 161 (1928). UP has offered no testimony that would allow the Commission to conclude that such is the case here.
[87] *Atchison*, 346 U.S. at 352.
[88] *D&H Corp. v. Penn. Pub. Utils. Comm'n*, 149 Pa. Cmwlth. 507, 513-14 (Pa. Cmwlth. Ct. 1992).
[89] United States Department of Transportation Federal Railroad Administration & United States Department of Transportation Federal Highway Administration, Highway-Rail Crossing Handbook, at foreword (3d ed. July 2019) ("Grade Crossing Manual").
[90] Grade Crossing Manual at 149.
[91] *City of Spokane Valley v. Union Pac. R.R. Co.*, Dockets TR-210809 & TR-210814, Commission Staff's Response to Union Pac.' R.R Co.'s Response & Motion to Dismiss City of Spokane Valley's Petition & Complaint, 8 ¶ 20 (Dec. 2, 2021).
[92] Ygbuhay, Tr. at 134:9-11.

impacts of a collision[93] and then deny that it benefits from a safer crossing, which makes such a collision less likely.

35 Second, UP witness Mays testified that the City will not use funds from the Rail-Highway Crossing Program (Section 130) to install the grade crossing protective devices.[94] That contention is also irrelevant. RCW 81.53.261, .271 and .295 obligate railroads to pay to maintain GCPDs when "*a* federal-aid funding program"[95] is used to pay for the installation of the device, and the universe of federal-aid programs encompasses programs other than Section 130.[96] As discussed above, the City will install the devices at issue here with the participation of one of these other federal-aid funding programs, the one created under 23 U.S.C. § 133. The use of those funds triggers the maintenance allocation specified in RCW 81.53.295.

36 Third, UP appears to contend that the MUTCD Section 1A.07 assigns to Spokane Valley the duty of maintaining GCPDs. The Commission should reject that argument for, two reasons.

37 At the outset, MUTCD § 1A.07 uses maintenance in the sense described above in § 1A.05, much as § 1A.07 uses the terms design, placement, operation, and uniformity in the sense described above in §§ 1A.03, 1A.04, and 1A.06. But, § 1A.05 does not speak to cost allocation when explaining what "maintenance" is, meaning that the Commission should read the provision as silent as to the issue before it.[97]

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[93] Ygbuhay, Tr. at 134:9-11.
[94] May, Exh. EM-1T at 2:12-14.
[95] RCW 81.53.271, .295 (emphasis added).
[96] *E.g.*, 23 U.S.C. §§ 133, 148.
[97] *Maytown Sand & Gravel, LLC v. Thurston County*, 191 Wn2d 392, 427, 423 P.3d 223 (2018) (describing the ejusdem generis canon of statutory interpretation).

38 The FHWA's crossing manual reinforces the view that §§ 1A.05 and 1A.07 do not address maintenance allocations. The FHWA publishes the MUTCD,[98] and the foreword to the crossing manual states that it provides guidance fully consistent with the MUTCD.[99] As alluded to above, the grade crossing manual recognizes that "current procedures place maintenance responsibilities for devices located in the railroad ROW with the railroad" because the railroads "install, operate, and maintain the traffic control devices located at the crossing."[100] To harmonize the MUTCD and the crossing manual, the Commission should reject the notion that §1A.07 allocates maintenance costs to the City.

39 Additionally, even if the Commission assumes that Washington has adopted § 1A.07, and it also assumes that § 1A.07 assigns a maintenance duty to the City, it would simply create a conflict between § 1A.07 and RCW 81.53.295. In such a case, the more specific statute controls.[101] Here, RCW 81.53.295 is more specific because it concerns the allocation of GCPD maintenance costs as between a road authority and a railroad where the road authority installs GCPDs with federal-aid funds. That is, of course, the exact factual situation before the Commission.

40 Fourth, UP appears to contend that this project will not result in the installation of grade crossing protective devices, and therefore RCW 81.53.271 and .295 do not apply. UP's argument fails, for at least two reasons.

41 Initially, UP's interpretation is irreconcilable with the plain meaning of RCW 81.53.261, .271, and .295. Those statutes distinguish between "installation" of GCPDs

[98] *CSX Transp. v. Easterwood*, 507 U.S. 658, 666, 113 S.Ct. 1732, 123 L. Ed 2d 387 (1993).
[99] Grade Crossing Manual, at foreword.
[100] Grade Crossing Handbook, at 149.
[101] *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976).

and "changes in the method and manner of existing crossing warning devices."[102] When interpreting a statute, the Commission gives undefined non-technical terms their ordinary dictionary meaning.[103] The Legislature did not define the terms "installation" or "changes" so the Commission should turn to the dictionary, which defines the term "installation" to mean "the act of installing: the state of being installed."[104] It defines the verb "install," in turn, to mean "to establish in an indicated place, condition, or status."[105] The dictionary also defines the term "change" to mean "to make different in some particular"[106] and "existing," when used as an adjective, to mean "already or previously in place, before being replaced, altered, or added to."[107] Given those definitions, RCW 81.53.261, .271, and .295 distinguish two different acts by road authorities: (1) placing warning devices that were not there before at a crossing, and (2) making changes to the warning devices already present at the crossing. RCW 81.53.271 and .295 govern maintenance allocations for the first type of action,[108] and it applies here as undisputed testimony from Mr. Johnson,[109] Mr. Lochmiller,[110] and Ms. Mantz[111] indicates that the project will involve the installation of new GCPDs, meaning devices that were not already present at the crossing, at places different than the places where the GCPDs currently at the crossing site.[112]

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[102] *E.g.*, RCW 81.53.261.
[103] *Wash. Coal. for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 905, 949 P.2d 1291 (1997).
[104] Merriam-Webster Online, available at https://www.meriam-webster,com/dictionary/installation (last visited May 26, 2022).
[105] Merriam-Webster Online, *available at* https://www.meriam-webster,com/dictionary/install (last visited May 26, 2022).
[106] Merriam-Webster Online, *available at* https://www.meriam-webster,com/dictionary/installation (last visited May 12, 2022).
[107] Dictionary.com, *available at* https://www.dictionary.com/browse/existing (last visited May 26, 2022).
[108] RCW 81.53.261
[109] Johnson, Tr. at 44:7-12.
[110] Lochmiller, Tr. at 62:24-64:3.
[111] Mantz, Tr. at 74:13-17.
[112] Lochmiller, Tr. at 63:25-64:3.

42 UP's argument hinges upon the fact that the project will result in the installation of new GCPDs that are similar in make to the ones currently at the crossing. But UP's argument asks the Commission to insert new language into RCW 81.53.261: that statute does not limit the word "installation" with a requirement that the devices be of a different make or model than devices already present.[113] The Commission cannot interpret or apply RCW 81.53.261 in a manner that adds language the Legislature did not codify into the statute.[114]

43 Further, UP's interpretation produces absurd results that thwart the Legislature's manifest purposes. RCW 81.53.295 evidences the Legislature's intent to provide for a fair division of costs when federal-aid funds help with a crossing project. UP controls the design and installation of most, if not all, of the GCPDs that a road authority would install pursuant to such a project.[115] Accepting UP's interpretation would thus allow UP to nullify the Legislature's fair division of costs by exercising that control to require the reinstallation of similar equipment whenever a road authority wanted to upgrade a crossing,[116] giving railroads free license to avoid costs the Legislature specified that they should pay. That cannot be the law.

44 Fifth, UP appeared at hearing to renew an argument that it lost when it moved to dismiss the City's petition and complaint. Specifically, UP contended that the Commission should consider its duties at other crossings when determining whether to obligate it to pay

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[113] *See* RCW 81.53.261.
[114] *Wash. Coal. for the Homeless*, 133 Wn.2d at 904.
[115] Lochmiller, Tr.at 64:10-24; Mantz, Tr. at 92:19-93:3.
[116] *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991) ("[s]tatutes should be construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an interpretation.").

maintenance costs here.[117] That argument has no basis in the federal constitution, relevant federal statutes, or state law governing crossings. The Commission should reject it.

45 UP's argument runs directly counter to the Supreme Court's interpretation of the federal Constitution. That Court held more than 100 years ago that the states could require railroads to pay for crossing modifications, even where the costs of that and other modifications at other crossings would bankrupt the railroad.[118] Accordingly, Washington is not constitutionally compelled to consider any crossing other than the one at issue when allocating maintenance.

46 UP's argument also finds no basis in either of the two relevant federal statutory schemes. One of these is Title 23, the federal scheme for highway aid. As discussed above, federal law governing highways limits a state's ability to allocate certain costs to a railroad.[119] But none of those provisions limit a state's ability to allocate maintenance costs to a railroad at all, let alone limit a state's ability to allocate maintenance costs at one crossing in light of cost allocations at other crossings.[120] And, as also discussed above, the agency that administers those statutes recognizes that railroads are generally responsible for maintaining GCPDs at crossings, and it has never suggested that the number of crossings that a railroad is responsible for maintaining could alter that general responsibility.[121]

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[117] Tr. at 31:14-32:5.
[118] *Erie R.R. Co. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394, 41 S.Ct. 169, 65 L.Ed. 322 (1921) ("[i]t is said that if the same requirement were made for the other grade crossing of the road [the railroad] would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil.").
[119] 23 C.F.R. § 646.210(a).
[120] *See* 23 C.F.R. § 646.210(a); *D&H Corp. v. Penn. Pub. Utils. Comm'n*, 149 Pa. Cmwlth. 507, 513-14 (Pa. Cmwlth Ct. 1992).
[121] United States Department of Transportation Federal Railroad Administration & United States Department of Transportation Federal Highway Administration, Highway-Rail Crossing Handbook, at 149.

47 The other statutory scheme, the Interstate Commerce Act (ICA), governs rail carriers and other interstate common carriers. The ICA, as amended by the Interstate Commerce Commission Termination Act of 1995 (ICCTA), preempts state regulation of "transportation by rail carriers."[122] The STB, which administers the ICA,[123] interprets the ICCTA as preempting state laws that "prevent or unreasonably interfere with railroad operations."[124] Multiple federal courts have rejected the argument that the ICCTA preempts a state's ability to order a railroad to pay for crossing modifications, employing different rationales to reach those holdings.[125]

48 One of those courts, the Sixth Circuit, employed the STB's preemption test when reviewing whether the ICCTA preempts a state from allocating crossing costs to a railroad.[126] It thus asked whether allocating crossing costs to a railroad would "unreasonably" burden railroad operations.[127] The Sixth Circuit acknowledged that the costs imposed by such allocations "could be high."[128] But the court concluded that requiring railroads to pay them would not "unreasonably" burden railroad operations because those costs are "'incidental' when they are subordinate outlays that all firms build into the cost of doing business."[129]

49 The Commission should follow the reasoning employed by the Sixth Circuit and reject UP's argument. Even if UP owes a duty to pay maintenance costs at other crossings,

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[122] 49 U.S.C. § 10501(b).
[123] *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008).
[124] *Town of Milford, MA–Petition for Declaratory Order*, FD 34444, slip op., at 2 (STB served Aug. 12, 2004). The STB recognizes that some state regulations are per se preempted because they unreasonably interfere with railroading, but that body of law is inapplicable at crossings. *Blissfield*, 550 F.3d at 540.
[125] *Blissfield*, 550 F.3d at 541-42*; Iowa, Chicago & E. R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004).
[126] *Blissfield*, 550 F.3d at 539-40.
[127] *Blissfield*, 550 F.3d at 541.
[128] *Blissfield*, 550 F.3d at 541-42.
[129] *Blissfield*, 550 F.3d at 541 (internal quotation omitted).

and even if those costs are high in the aggregate, and even if they are high relative to UP's revenues or profits (something about which UP introduces no evidence), the Supreme Court has allowed states to allocate those costs to railroads for well over a hundred years, and state law has assigned these costs to railroads for over 45 years.[130] In aggregate then, these costs are the type of subordinate outlays UP built, or should have built, into its costs of doing business for almost 50 years. There is nothing unreasonable about requiring UP to pay maintenance costs here, even when those costs are considered in the context of UP's duty to maintain the devices at other crossings.

50 Finally, UP's argument finds no basis in state law. RCW 81.53.295 does not provide for any alteration of the maintenance allocation it prescribes if the railroad must maintain the GCPDs at other crossings.[131] It is instead simple and direct: the only relevant issue is whether the road authority used federal-aid funds to install the GCPDs.[132] If it did, the Commission must allocate maintenance costs to the railroad.[133] That statutory simplicity means that UP must take its arguments to the Legislature; the Commission would commit legal error if it accepted the relevance of other crossings and assigned maintenance based on them.[134]

C. The Parties Did Not Agree to Allocate Maintenance to Spokane Valley

51 The third question before the Commission is whether the parties agreed to dispense with the maintenance allocations set forth in RCW 81.53.295 through a private agreement.

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[130] LAWS OF 1975, 1ST EX. SESS., ch. 189, § 3.
[131] *See* RCW 81.53.295.
[132] RCW 81.53.295.
[133] RCW 81.53.295.
[134] RCW 34.05.570(3).

Unlike the first two questions, the answer to this one is no, as seen in the relevant documents and the emails containing the parties' exchanges concerning maintenance.

1. The City did not accept GCPD maintenance costs in the 2019 PE Agreement.

52 UP contends that the City agreed to assume the costs of maintenance for the warning devices in the 2019 PE Agreement. UP overreads what the City agreed to there.

53 Washington employs "the context rule" for "interpret[ing] the meaning of a contract's terms."[135] Tribunals determine the intent of the parties to a contract "by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing."[136]

54 As UP notes, the PE Agreement did contain language stating that "if the project is constructed" it would be done "at no cost to the railroad."[137] But the context in which that statement occurred shows that the parties intended the word "cost" to mean the costs of construction, not the costs of maintenance. The PE Agreement describes the project as the reconstruction of Barker Road to widen it, install curbs and gutters, and create a shared-use path. The sentence preceding the one cited by UP states that "[i]f the project is approved, [UP] will continue to work with [the City] to develop Final Plans. . . [and] Specifications and prepare Material and Cost Estimates for Railroad *Construction* Work associated with

[135] *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 351, 103 P.3d 773 (2004).
[136] *Adler*, 153 Wn.2d at 351.
[137] Ygbuhay, Exh. PY-2 at 2.

the project."[138] The sentence following the one cited by UP states that the City and UP "will enter into separate License, Right of Entry, Construction and Maintenance Agreements associated with the *actual construction* of the project."[139] As UP acknowledges, no provision in the PE Agreement discusses maintenance costs.[140] The course of dealings between the parties had always involved UP paying maintenance costs,[141] and nothing in the agreement evidences any specific intent to upend that course of dealing so as to make maintenance a "cost."[142] Given all of that, the Commission should not read the PE Agreement as requiring the City to pay the costs of maintaining the devices at issue here.

2. The parties' December 2020 email exchange did not form a binding agreement allocating maintenance to the City.

55 UP also contends that the City agreed to assume the maintenance duties for the warning devices in Mr. Lochmiller's answer to Mr. Mays's December 8, 2020, email. That argument fails because that email was part of a preliminary negotiation never memorialized in a final agreement, and it thus has no legal force.

56 Washington's Supreme Court applies the test set out in the Restatement (First) of Contracts to determine whether preliminary negotiations form a binding agreement.[143] The Restatement recognizes that:

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[138] Ygbuhay, Exh PY-2 at 2 (emphasis added).
[139] Ygbuhay, Exh. PY-2 at 2 (emphasis added).
[140] Ygbuhay, Exh. PY-1T at 3:9-12.
[141] Spokane Valley alleged this in its complaint, *City of Spokane Valley v. Union Pac. R.R. Co.*, Dockets TR-210809 & TR-210814, Complaint, at 2 ¶ 6 (Oct. 25, 2021), and UP did not answer that allegation as required. WAC 480-07-370(2)(c). The Commission should thus treat the allegation as admitted. CR 8(d).
[142] *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 660-61, 266 P.3d 229 (2011) (explaining that past practices between parties can help with the interpretation of an agreement).
[143] *KVI, Inc. v. Doernbecher*, 24 Wn.2d 943, 966-67, 167 P.2d 1002 (1946) (citing the RESTATEMENT (FIRST) OF CONTRACTS § 26 & cmt. a (1932). Washington's Court of Appeals has applied the analogous provision from the Restatement (Second) of Contracts. *Stottlemyre v. Reed*, 35 Wn. App. 169, 665 P.2d 1383 (1983). The version applied here makes no difference as the Restatement (First) and Restatement (Second) are effectively identical as material here. *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 26 cmt. a *with* RESTATEMENT (SECOND) OF CONTRACTS § 27 cmts. a & b (1979).

> [p]arties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that the legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.[144]

57 All the evidence before the Commission indicates that the City did not form a binding agreement with UP on December 8, 2020. As Mr. Mays himself explained in an earlier email, the parties' exchange was simply intended to help him draft a formal instrument that the City would need to execute.[145] Although not dispositive, that explanation indicates that the parties were deferring the creation of a legally binding agreement until they signed that formal instrument.[146] Further, as Mr. Mays testified at hearing, a C&M Agreement was necessary despite the City's email because it would contain matters not addressed in the email,[147] suggesting that the parties were deferring other "details" to the formal writing. That "defer[ral]" strongly, if not dispositively, indicates that the email served only as a preliminary negotiation.[148] And Ms. Ygbuhay confirmed that reading of the email exchange, testifying emphatically that, from UP's perspective, the formal instrument, a C&M Agreement, needed to be in place before the City could exercise any contractual

[144] *KVI*, 24 Wn.2d at 966-67 (quoting RESTATEMENT (FIRST) OF CONTRACTS at § 26 cmt. a) (emphasis added).
[145] Mays, Exh. EM-4 at 1.
[146] *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 179, 94 P.3d 945 (2004); *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-59, 608 P.2d 266 (1980).
[147] Mays, Tr. at 110:25-111:11, see Mays, Tr. at 112:6-12.
[148] *KVI*, 24 Wn.2d at 966-67 (quoting RESTATEMENT (FIRST) OF CONTRACTS at § 26 cmt. a).

rights.[149] UP cannot square its policy of requiring the road authority to execute a C&M Agreement before availing itself of its contractual rights with its claim here that the email constituted a binding agreement.

58 Given that the email served as a preliminary negotiation, with the final details to be worked out in the C&M Agreement, which the parties never executed,[150] the City was "at liberty to retire from the bargain."[151] It did, and UP cannot enforce the terms to which the City did not agree against it.

D. Neither the 2017 C&M Agreement nor the 2019 PE Agreement Preclude the Commission from Ordering Improvements to the Crossing

59 Finally, UP appears to contend that the Barker Road project cannot go forward without its agreement based on the 2017 C&M and 2019 PE Agreements between it and Spokane Valley. UP is simply wrong.

60 Assuming that the 2017 and 2019 Agreements apply in the way UP claims,[152] and assuming that the Commission could bargain away powers granted to it by the Legislature to preserve and protect the public safety,[153] the Commission was not a party to the agreements between UP and the City.[154] Parties to a contract cannot bargain away the rights of a non-party, and any attempt to enforce the contract against the non-party must fail[155] unless the non-party somehow manifests assent to be bound by the terms of the contract or equity

[149] Ygbuhay, Exh. PY-1T at 5:22-6:4.
[150] Ygbuhay, Exh. PY-1T at 5:2-3.
[151] *Coleman v. St. Paul & Tacoma Lumber Co.*, 110 Wash. 259, 188 P. 532 (1920) (quoting Elliot on Contracts, Volume 1, § 27), *overruled on other grounds by Staples v. Esary*, 130 Wash. 521, 228 P. 514 (1924).
[152] Staff takes no position on whether the agreements do so.
[153] Staff takes no position on whether the Commission can do so.
[154] *See generally* Ygbuhay, Exh. PY-2; Ygbuhay, Exh. PY-5.
[155] *E.g.*, *Bush v. Quaiffe*, 138 Wash. 533, 536, 244 P. 704 (1926); *Loutzenhiser v. Peck*, 89 Wash. 435, 441, 154 P. 814 (1916).

compels treating the non-party as a signatory.[156] Nothing indicates that the Commission has through its conduct made the parties' agreement applicable to it. The 2017 and 2019 agreements thus do not bind it. There is a live petition before the Commission seeking approval to modify a crossing, and the record strongly indicates that granting that petition would improve public safety. The Commission can, and should, grant that petition and order changes to the crossing, whether UP has agreed to them or not.[157]

IV. CONCLUSION

61 The Commission should grant the City's petition in the interest of public safety and order the maintenance allocation it seeks based on a straightforward application of RCW 81.53.295.

Respectfully submitted,

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[156] *Evanston Ins. Co. v. Penhall Co.*, 13 Wn. App. 2d 863, 877, 468 P.3d 651 (2020).
[157] RCW 81.53.060, .261.