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 RESPONSE TO UNION PACIFIC RAILROAD CO.'S MOTION TO DISMISS

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I. INTRODUCTION

1. Petitioner City of Spokane Valley (the "City") has for several years been working on public works projects in the Barker Road corridor.[1] One of these projects includes the reconstruction and modification of an at-grade crossing over Barker Road, USDOT #662526C, to include the construction of new warning devices within the right-of-way of Union Pacific Railroad Company ("UPRR").[2] UPRR has historically paid maintenance costs for the warning devices that will be replaced. (Complaint, ¶ 8). The work will be paid for, in part, with federal funds. (Complaint ¶ 4). The City's efforts have stalled because UPRR has refused to agree to pay future maintenance costs of the new warning devices in accordance with RCW 81.53.295. (*Id.*, Exhibit D). After months of negotiation and delay, the City filed a petition for approval of crossing modifications pursuant to RCW 81.53.261, and a complaint pursuant to RCW 81.04.110, for a declaratory ruling that maintenance costs of the modified warning devices must be prospectively borne by UPRR.

2. UPRR has responded by filing a motion to dismiss pursuant to WAC 480-07-0380(1). The motion ignores controlling legal authority, relying instead on unsupported assertions about the economic consequences of the relief sought by the City. UPRR's motion is without merit and should be denied.

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[1] A description of these projects can be found at *www.spokanevalley.org/barkercorridor*. The UTC may take judicial notice of these projects pursuant to Wash. R. Evid. 201.

[2] A construction drawing depicting the proposed warning devices within the UPRR right-of-way is attached to the City's petition to modify the warning devices.

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II. LEGAL ARGUMENT

3. While ostensibly directed at the City's complaint, UPRR's motion to dismiss actually seeks to invalidate RCW 81.53.295, at least as applied to this public works project. According to UPRR, the manner in which the Washington legislature has directed the allocation of warning device maintenance costs on federally funded projects since 1975 is preempted by federal legislation and violates the Commerce Clause and substantive due process guaranty of the United States Constitution. UPRR's arguments run counter to controlling legal authority and its motion should be denied.

A. For purposes of the motion, the UTC must accept the City's allegations as true.

4. UPRR argues that it is aware of no supporting evidence concerning the use of federal funds to construct the warning devices at issue. (Motion to Dismiss, at 5). However, UPRR's motion is reviewed using standards applicable to motions to dismiss brought pursuant to Washington Civil Rule ("CR") 12(b)(6). WAC 480-07-380(1)(a). Under this standard, the UTC must presume all facts alleged in the complaint are true and may also consider hypothetical facts supporting the City's claims. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 83 (2007). Here, the City alleged that the construction project at issue is intended to be partially paid with federal funds, and that UPRR has historically paid maintenance costs associated with the existing warning devices. (Complaint, ¶¶ 4, 8). For purposes of the present motion, the UTC must accept these allegations as true.

B. UPRR relies on conclusory and unsupported factual allegations.

5. A more fundamental problem with the motion is that UPRR has constructed its legal arguments not on the City's allegations but rather on its own conclusory assertions

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about *potential* future impacts of a ruling in this case. Argument about the Commerce Clause and due process rely on unsupported allegations about UPRR's current responsibilities relating to other at-grade crossings and the "substantial burden" a decision in this case will allegedly impose on "the flow of interstate commerce[.]" (Motion to Dismiss, at 4). Although the UTC has not yet rendered any decision in this matter, UPRR nevertheless describes a future decision the UTC may render after a full record has been developed as "not fair or reasonable" and "arbitrary and unreasonable." (*Id.*, at 4, 6). There is no evidence whatsoever to support these conclusory assertions, and they cannot properly form the basis for a ruling under CR 12(b)(6) that the complaint filed by the City fails to state a claim upon which relief can be granted.

C. Neither the City's complaint nor RCW 81.53.295 violates the Commerce Clause of the United States Constitution.

6. UPRR argues that allocating future maintenance costs of warning devices to UPRR will establish "precedent for responsibility for future maintenance costs on similar projects," thereby imposing a "substantial burden on the flow of interstate commerce" in a manner incompatible with the Commerce Clause. (Motion to Dismiss, at 4). UPRR's argument that a ruling on the complaint will establish "precedent" is difficult to reconcile with its past practice of paying maintenance costs for the existing warning devices. (*See* Complaint, ¶ 8).

7. As a threshold matter, the UTC lacks authority to invalidate on constitutional grounds the framework established by the Washington State Legislature governing responsibility for maintenance costs of warning devices at at-grade crossings. *Bare v.*

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Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power."). Assuming that the UTC may address whether RCW 81.53.195 *as applied* to UPRR violates the Commerce Clause, it does not for reasons set forth in detail below. However, the cost allocation framework set forth in RCW 81.53.295 has been in place for more than 45 years. *See* Laws of 1975, Ch. 189, § 3.

1. The allocation of maintenance costs pursuant to RCW 81.53.295 does not implicate the Commerce Clause.

8. State and local action is not subject to the Commerce Clause when specifically authorized by Congress, even if it interferes with interstate commerce. *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983). The State of Washington may regulate highway-rail crossings in two circumstances. First, a state regulation is authorized if it addresses a subject not covered by federal regulations. 49 U.S.C § 20106(a)(2); *also Southern Pac. Transp. Co. v. Pub. Util. Com'n of State of Cal.*, 647 F. Supp. 1220, 1227 (N.D. Cal. 1986), *aff'd Southern Pac. Transp. Co. v. Pub. Util. Com'n of State of Cal*, 820 F.2d 1111 (9th Cir. 1987). Second, a state regulation that is more stringent than federal standards is allowed if it addresses an essentially local safety concern and does not unduly burden interstate commerce. 49 U.S.C § 20106(a)(2). What is significant about the statutory scheme is that the "absence of burden on commerce is a specified condition to state authority to regulate only with respect to regulations that are more stringent than federal rules." *Southern Pac. Transp. Co*, 647 F. Supp. at 1227.

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9. Here, the federal government has expressly declined to regulate the allocation of maintenance costs of warning devices. Instead, the federal government has required that when federal funds are used, *construction* costs cannot be allocated to the railroad. 23 C.F.R. 646.210 (1990); *CSX Transp. v. Mayor and City Council of Baltimore City, Md.*, 759 F. Supp. 281, 284 (D. Md. 1991). The federal government has excluded maintenance as a category of cost that may not be allocated to a railroad. *See* 23 C.F.R. 646.210(b)(1) (costs that railroads need not pay are those incurred in "[p]rojects for grade crossing improvements").

10. In *D & H Corp. v. Penn. Pub. Utility Com'n*, 613 A.2d 622 (Pa. Commw. Ct. 1992), an administrative law judge ordered the railroad to pay 50% of future maintenance costs associated with a reconstructed grade crossing. The railroad appealed, arguing that the assessment of future maintenance costs to the railroad was in error because the project was a "federal aid project" and the state statute authorizing cost allocation to the railroad was therefore preempted by 23 C.F.R. 646.210(a). The state court rejected this argument, finding that the project was not a federal aid project. *D & H Corp.*, 613 A.2d at 624. The state court also ruled that even if the project were a federal aid project, the cost allocation "would not have been preempted by 23 U.S.C. 646.210 because this provision does not specifically preempt *maintenance* responsibility in federal aid rail-highway projects." *Id.* (emphasis in original).

11. The opinion of the Pennsylvania court in *D & H Corp.* is shared by the Federal Highway Administration. In the 2019 edition of its Railroad-Highway Grade Crossing Handbook, the FHA explains that "[e]ven though much of the cost of designing

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and constructing crossings, including traffic control devices, is assumed by the public, current procedures place maintenance responsibilities for devices located in the railroad right of way with the railroad." *Federal Highway Administration, Railroad-Highway Grade Crossing Handbook* 149 (3rd edition, July 2019).[3]

12. Since the allocation of maintenance costs of warning devices is a subject not covered by federal regulation, whether it imposes a burden on commerce is irrelevant. *Southern Pacific Transp. Co.*, 647 F. Supp. at 1227 (orders issued by State of California regulating the minimum distance between the center lines of parallel tracks and requiring sidewalks adjacent to tracks addressed subjects not covered by federal regulations and it was therefore irrelevant whether the orders placed a burden on interstate commerce).

2. Neither the relief sought by the City nor RCW 81.53.295 imposes a substantial burden on interstate commerce.

13. The standard applicable to state regulations affecting interstate commerce is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1979): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Demonstrating that state regulations impose substantial costs on interstate operations is not sufficient to establish a burden calling for balancing. To prevail here, UPRR must demonstrate that the relief sought by the City "impedes substantially the free flow of commerce from state to

[3] The handbook is available at: https://safety.fhwa.dot.gov/hsip/xings/com_roaduser/fhwasa18040/fhwasa18040v2.pdf

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state[.]" *Burlington Northern Railroad Co. v. Dept. of Public Service Regulation*, 763 F.2d 1106, 1114 (9th Cir. 1985) (internal brackets omitted).

14. In its motion to dismiss, UPRR makes the conclusory assertion that allocating the maintenance costs of warning devices at a single at-grade crossing to UPRR will cause "a substantial burden on interstate commerce[.]" (Motion to Dismiss, at 4). However, it has been long settled that the expenditure of money alone does not substantially impede interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 767 (1945). In a 1985 case, a plaintiff railroad alleged that a Montana statue requiring railroads to maintain and staff station facilities in all towns of at least 1,000 residents violated the Commerce Clause. *Burlington Northern*, 763 F.2d at 1108-09. The railroad argued that the statute resulted in economic waste affecting railroad operating efficiency and rates paid by the public. *Id.*, at 1114. The Ninth Circuit rejected this argument, ruling that financial loss to the railroad does not, without more, substantially impede interstate commerce. *Id.*

15. Here, there is no evidence, and UPRR does not seriously argue, that the allocation of maintenance costs associated with a single at-grade highway-rail crossing will substantially impede interstate commerce. Indeed, there is no evidence to even conclude that these costs will exceed those historically paid by UPRR to maintain warning devices at this crossing.

D. The allocation of maintenance costs associated with crossing warning devices is not preempted by the ICCTA.

16. UPRR argues that RCW 81.53.295 is preempted by the ICC Termination Act ("ICCTA"), 49 U.S.C. § 10501. (Motion to Dismiss, at 5). According to UPRR, the cost

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allocation mandated by RCW 81.53.295 "constitutes economic regulation of rail transportation and thus intrudes on the exclusive jurisdiction of the STB in this area." (*Id.*). This is erroneous.

17. Pursuant to the framework established by the STB and adopted by a majority of federal courts, two types of state actions may be preempted by the ICCTA, those that are "categorically preempted," and those that are only preempted "as applied." *See Adrian Blissfield Railroad Co. v. Village of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008); *Franks Investment Co. v. Union Pacific Railroad*, 593 F.3d 404, 408-14 (5th Cir. 2010); *Ass'n of American Railroads v. South Coast Air Quality Mgt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010). RCW 81.53.195 is neither categorically preempted nor preempted as applied to UPRR in this case.

1. RCW 81.53.295 is not categorically preempted by the ICCTA.

18. Courts and the STB have recognized two broad categories of state and local actions that are categorically preempted by the ICCTA: (1) any form of state or local permitting or preclearance that can be used to deny a railroad the ability to conduct some part of its operations; and (2) state or local regulation of matters directly regulated by the STB such as the construction, operation, and abandonment of rail lines, railroad mergers, line acquisitions, and railroad rates and services. *Adrian Blissfield Railroad Co.*, 550 F.3d at 540; *Franks Investment Co.*, 593 F.3d at 410-411. Put differently, the ICCTA categorically preempts "state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting continued application of laws having a more remote or incidental effect on transportation." *Florida East Coast Railway Co. v. City of*

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West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001) (Internal brackets, quotations, and citation omitted).

19. It is well settled that the ICCTA does not categorically preempt state laws regulating highway-rail crossings. *See e.g.*, *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 103 (2nd Cir. 2009) ("If we adopted a definition of rail transportation for pre-emption purposes that includes the movement of people and property across railroad tracks, then any entity—an automobile, bicycle or even a pedestrian passing over the crossing—would arguably be beyond the reach of state regulatory action."); *accord Maumee & Western Railroad Corp.,* 2004 WL 395835, at *2 (S.T.B. 2004) (rejecting blanket rule that eminent domain proceedings against railroads are preempted; ruling that "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc.," are not categorically preempted by ICCTA); *Adrian Blissfield Railroad Co.*, 593 F.3d at 540 (state statute requiring railroad to pay for construction of pedestrian crossing not preempted by ICCTA); *Wheeling & Lake Erie Railway Co. v. Pennsylvania Pub. Util. Com'n*, 778 A.2d 785, 792 (Pa. Commw. Ct. 2001) (order issued by state public utility commission directing railroad to remove existing crossing bridge and construct new bridge at its sole cost not preempted by the ICCTA); *Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa*, 384 F.3d 557, 561-62 (8th Cir. 2004) (state statute governing the allocation of costs to replace crossing bridges not preempted by the ICCTA); *Home of Economy v. Burlington Northern Santa Fe Railroad*, 694 N.W.2d 840, 846 (N.D. 2005) ("[T]he ICCTA does not explicitly preempt state law regarding grade crossings, and we discern no actual conflict between the Surface Transportation Board's exclusive jurisdiction

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with respect to regulation of rail transportation under the ICCTA and the states' traditional authority regarding grade crossings."); *Franks Investment Co.*, 593 F.3d at 411 (5th Cir. 2010) (the resolution of "typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB.").

2. The allocation of future maintenance costs pursuant to RCW 81.53.295 is not preempted by the ICCTA as applied to UPRR.

20. The touchstone of the as-applied preemption analysis is "whether the state regulation imposes an unreasonable burden on railroading." *Adrian & Blissfield Railroad Co.*, 550 F.3d at 541 (quoting *New York Susquehanna and Western Railroad Corp. v. Jackson*, 500 F.3d 238, 253 (3rd Cir. 2007)). Under two-prong as-applied preemption analysis used by the STB and adopted by most federal courts, a state regulation is permissible so long as the regulation (1) is not unreasonably burdensome; and (2) does not discriminate against railroads. *See Green Mountain Railroad Corp.*, 2002 WL 1058001 at *4 (S.T.B. 2002); *Association of American Railroads*, 622 F.3d at 1097 (9th Circuit); *Adrian & Blissfield Railroad Co.*, 550 F.3d at 541 (6th Circuit); *New York Susquehanna and Western Railroad Corp.*, 500 F.3d at 253 (Third Circuit); *Franks Investment Co.*, 593 F.3d at 413-14 (5th Circuit); *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212, 220-21 (4th Cir. 2009); *Emerson v. Kansas City Southern Railroad Co.*, 503 F.3d 1126, 1133-34 (10th Cir. 2007).

21. The unreasonable-burden prong requires only that "the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion," and "the regulation must be settled and definite enough to

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avoid open-ended delays." *Adrian & Blissfield Railroad Co.*, 550 F.3d at 541 (citation omitted). To pass the non-discrimination prong, a state statute "must address state concerns generally, without targeting the railroad industry." *Id.* States retain their police powers, allowing them to create health and safety measures, but "those rules must be clear enough that the rail carriers can follow them . . . the state cannot use them as pretext for interfering with or curtailing rail service." *Id.* State actions are not preempted merely because they reduce the profits of a railroad. *Id.*; *Florida East Coast Railroad*, 266 F.3d at 1338 n. 11. The fact that UPRR may have to pay future maintenance costs associated with warning devices is not an unreasonable burden on its operations.

22. Similarly, the fact that RCW 81.53.295 applies specifically to railroads does not make it discriminatory. In *Adrian & Blissfield Railroad Co.*, the plaintiff railroad alleged that the ICCTA preempted a state statute requiring the railroad to pay for pedestrian crossings installed by a town across its tracks and near its property. The federal appellate court explained that the statute was not discriminatory because it did not require something of railroads that was not required of similarly situated entities. 550 F.3d at 541-542. The town constructed the sidewalk across the railroad tracks only because "the railroad bisects the town and pedestrian walkways are needed for public safety." *Id.*, at 542. There was no evidence "that local bodies could target railroads with the statute at issue in order to cause indefinite delays for railroad operations." *Id.* Because the statute addressed "a general concern about the safety of pedestrians," it did not discriminate against railroads. *Id.*

23. In a similar manner, RCW 81.53.295 addresses general concerns about safety at highway-rail crossings. The statute and the City's efforts to implement the statute do not

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discriminate against railroads. Moreover, aside from unsubstantiated assertions about increased costs, UPRR has provided absolutely no evidence that paying maintenance costs associated with these warning devices will interfere with its railroad operations. *See Franks Investment Co.*, 593 F.3d at 415 (reversing district court and dismissing as-applied preemption challenge absent "evidence in the record to permit a finding that the four crossings created any unusual interference with the railroad.").

E. The apportionment of maintenance costs to UPRR in this case is neither arbitrary nor unreasonable.

24. Argument by UPRR that the manner in which the State of Washington apportions maintenance costs is arbitrary and unreasonable is actually a substantive due process challenge. *See Nashville, C & St. Ry. v. Walters*, 294 U.S. 405, 413 (1935). However, the UTC lacks authority to adjudicate the constitutionality of the statutes that it enforces. *Bare*, 84 Wn.2d at 383. In addition, the motion brought by UPRR is devoid of any factual basis to sustain an as-applied challenge to the application of RCW 81.53.295 in the context of this case.

25. As a general principle, it is correct that a local government may not exercise police power authority in an arbitrary or unreasonable manner. *Nashville*, 294 U.S. at 415; *see also Miss. Pub. Serv. Comm'n v. Ala. Great S. R. Co.*, 294 So. 2d 173, 177 (Miss. 1974) (noting that *Nashville* simply stands for the proposition that police powers may not be used in an arbitrary or unreasonable manner). However, UPRR cites no authority suggesting that requiring a railroad to pay the cost of maintaining warning devices located within its right-of-way is arbitrary or unreasonable. To the contrary, this appears to be a standard practice

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throughout the United States. *See Federal Highway Administration, Railroad-Highway Grade Crossing Handbook* 149 (3rd edition, July 2019).

26. Local governments have broad authority to allocate the costs of constructing and maintaining railroad crossings and corresponding warning devices. *See Wash. v. N. Pac. Ry. Co.*, 128 Wash. 73, 76, 221 P. 991 (1924). The Washington State Legislature decided more than 45 years ago that when federal funds are used to pay for the construction of warning devices, "[t]he railroad whose road is crossed by the highway, street, or road shall thereafter pay the entire cost of maintaining the device[.]" Laws of 1975, Ch. 198, § 3. This decision is to be accorded substantial deference. *Jones v. King County*, 74 Wn. App. 467, 479, 874 P.2d 853 (1994) ("In applying the substantive due process test, we give deference to legislative policy decisions."). UPRR does not argue that the statute implicates a fundamental right or liberty interest so as to require heightened scrutiny. RCW 81.53.295 is therefore invalid only if it "fails to serve any legitimate government objective," making it "arbitrary and irrational." *Yim v. City of Seattle*, 194 Wn.2d 682, 698, 451 P.3d 694 (2019) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)). The statute implements federal legislation limiting the allocation of construction costs to railroads when federal-aid highway funds are used on a project. *See* 23 U.S.C. § 130(b); 23 C.F.R. § 646.210. The statute also provides a uniform standard for allocating the cost of warning device maintenance in circumstances where warning devices are constructed using federal-aid highway funds. While UPRR may prefer the legislature had reached a different determination, its decision as codified in 1975 was neither arbitrary nor irrational.

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F. The petition should not be dismissed.

27. Finally, UPRR argues that the City's petition to modify warning devices should be dismissed because the City did not include, in the form petition, a statement that public safety requires the modifications being requested. (Motion to Dismiss, at 6).

28. Granting dismissal of a petition to modify warning devices before a hearing on the merits would be inconsistent with the plain text of the RCW 81.53.261, which provides that upon the filing of a petition the UTC shall set the matter for hearing and an interested party is "*entitled* to be heard and introduce evidence, which shall be reduced to writing and filed by the commission." RCW 81.53.261 (emphasis added). Ultimately, it is up to the UTC to decide based upon the evidence, not solely the language of the petition, whether the public safety necessitates a modification. *See Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 635, 128 P.3d 627 (2006) ("A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits.").

29. Moreover, at this stage of these proceedings, the UTC must take everything in the petition as true, including hypothetical facts that may support the City's claims. *Kinney*, 159 Wn.2d at 842. The petition states that part of the changes are to "accommodate traffic lanes and multi-use path." (Petition, at 5). There are currently 8,600 average annual daily trips that use the crossing at issue, and that number is only expected to increase as the vacant land to the north is developed. (*Id.*, at 3). Solely for purposes of surviving a motion to dismiss this is sufficient to showcase the public safety need for a modified grade crossing. *Gaspar*, 131 Wn. App. at 353 (dismissal under 12(b)(6) usually granted "only in the unusual

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case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.") (citation omitted; internal quotation marks omitted).

30. Finally, the City used a form that was provided by the UTC. The form requested nine categories of information (1-Petitioner's Information; 2-Respondent's Information; 3-Crossing Location; 4-Vehicle Traffic; 5-Current Crossing Information; 6-Current Warning Devices; 7-Description of Proposed Changes; 8-Illustration of Proposed Warning Devices; and 9-Waiver of Hearing by Respondent). None of these categories asks a petitioner to explain why public safety requires the installation or modification of warning devices at an at-grade crossing, presumably because the necessity of warning devices is obvious. Nevertheless, if the UTC determines the City must or should include a statement to this effect with its petition, the City requests leave to file an amended petition. UPRR makes no showing or even claim of prejudice regarding the contents of the existing petition or the effect of an amendment to the petition to address this issue.

III. CONCLUSION

31. For the foregoing reasons, the UTC should deny UPRR's motion to dismiss the City's complaint and petition.

32. Should the UTC find a technical pleading flaw in the petition, the UTC should grant the City leave to file an amended petition.

DATED this 2nd day of December, 2021.

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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:

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