

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of
CITY OF SPOKANE VALLEY

To Modify Warning Devices at a
Highway-Railroad Grade Crossing of
Union Pacific Railroad Company

CITY OF SPOKANE VALLEY,

Complainant,

v.

UNION PACIFIC RAILROAD
COMPANY,

Respondent.

DOCKETS TR-210809 and
TR-210814 (*Consolidated*)

ORDER 03

GRANTING PETITION TO MODIFY
GRADE-CROSSING PROTECTIVE
DEVICES; APPORTIONING
MAINTENANCE COSTS

BACKGROUND

- 1 On October 25, 2021, the City of Spokane Valley (City) filed with the Washington Utilities and Transportation Commission (Commission) a Petition to Modify Warning Devices at a Highway-Railroad Grade Crossing (Petition) in Docket TR-210809. The Petition seeks to modify a grade public road crossing over Barker Road. The City simultaneously filed a formal complaint (Complaint) against Union Pacific Railroad (UPRR) in Docket TR-210814. The Complaint seeks a Commission decision assigning ongoing maintenance costs for the grade crossing protective devices to UPRR.
- 2 On January 24, 2022, the Commission issued Order 01, Consolidating Dockets; Denying Motion to Dismiss; Prehearing Conference Order (Order 01). The Commission noticed an evidentiary hearing for May 10, 2022, at 9:30 a.m.
- 3 In Order 01, the Commission also denied UPRR's Motion to Dismiss. The Commission held that the City demonstrated that it may be able to prove facts that would justify

granting the relief sought in the complaint.¹ The Commission declined to reach the merits of UPRR's claims that the City's complaint violated the Commerce Clause of the U.S. Constitution, noting that administrative agencies do not have the authority to determine the constitutionality of the laws they administer.² Finally, the Commission rejected UPRR's argument that RCW 81.53.295 is preempted by the Interstate Commerce Commission Termination Act (ICCTA).³ UPRR did not petition for review of Order 01.

4 On March 22, 2022, the City filed Direct Testimony from its witnesses Brett Johnson, Robert Lochmiller, and Gloria Mantz. Brett Johnson testified that he is the Acting Local Programs Engineer for the Eastern Region for the Washington State Department of Transportation.⁴ He was familiar with the Barker Road project and helped administer all programs in the Eastern Region that utilize federal-aid funds.⁵ Johnson testified that federal-aid funds will be used to upgrade the crossing and associated warning devices at Barker Road.⁶

5 City witness Robert Lochmiller testified that he is the Senior Engineer for the City's Engineer Division.⁷ He was the project manager and oversaw the design of the Barker Road Corridor Improvement Project.⁸ Lochmiller explained that the Barker Road crossing currently has one cantilever and one quadrant gate with a flasher for each direction of travel.⁹ The southbound quadrant gate has side flashers for eastbound Euclid Avenue travel.¹⁰ There are a total of nine flasher sets of lights, two warning bells, two

¹ Order 01 ¶ 14.

² *Id.* ¶ 15 (citing *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974)).

³ *Id.* ¶¶ 18-24 (citing, inter alia, *Adrian & Blissfield Railroad Co. v. Village of Blissfield*, 550 F.3d 533 (6th Cir. 2008)).

⁴ Johnson, Exh. BJ-1T at 1:19-20.

⁵ *Id.* at 1:26-2:4.

⁶ *Id.* at 2:6-9.

⁷ Lochmiller, Exh. RL-1T at 1:18-20.

⁸ *Id.* at 1:21-24.

⁹ *Id.* at 1:26-28.

¹⁰ *Id.* at 1:28-29.

stop bars, two W10-1 approach signs, two RR Xing pavement markings, and a W10-4 approach sign on the parallel roads.¹¹

6 Lochmiller described a number of proposed modifications to the warning devices at Barker Road, which include adding eight-inch concrete medians on Barker Road, additional railroad warning flashers, increasing the roadway's radius for eastbound Euclid Avenue, and a paved multi-use pathway.¹²

7 Lochmiller testified that “[w]ith the exception of the additional turning lane and pedestrian path, the additional road and crossing improvements were included as UPRR was concerned about traffic safety as there had been nine blocked crossings, 18 unsafe motorists, and one vehicle on the tracks reported at this location.”¹³

8 The City also provided testimony from Gloria Mantz, the Engineering Manager who supervised the Barker Road Corridor Improvement Project until February 2022.¹⁴ Mantz testified that the “substandard and aging” Barker Road is being upgraded in light of heavy freight traffic and anticipated industrial growth in the area.¹⁵ Mantz explained that an additional third lane was needed to handle increased traffic flow as development occurs, reduce collisions between vehicles, and to minimize queuing lengths at the crossing.¹⁶

9 Mantz noted that the project included a 10-foot-wide shared use pathway on one side of the road to accommodate increased pedestrian traffic as development progresses to the north of the crossing.¹⁷ Currently, Mantz states that there “is no infrastructure to allow

¹¹ *Id.* at 2:3-7. *Accord* Lochmiller, Exh. RL-2 (Photos of Current Warning Devices).

¹² *Id.* at 2:7-3:17. *Accord* Lochmiller, Exh. RL-3 (Proposed warning device layout).

¹³ *Id.* at 4:3-6.

¹⁴ Mantz, Exh. GM-1T at 1:19-25.

¹⁵ *Id.* at 1:27-2:15.

¹⁶ *Id.* at 2:16-20.

¹⁷ *Id.* at 2:24-27.

pedestrians to utilize the Barker corridor.¹⁸ With the planned improvements, however, pedestrians and bicycles will be separated from vehicular traffic.¹⁹

10 Mantz testifies that the entire Barker Road Corridor Improvement Project is funded, in part, with federal-aid funds.²⁰ These federal funds include a \$267,000 Highway Safety Improvement Program grant for the multi-use path, and a \$2,050,000 Surface Transportation Block Grant (STBG) awarded by the Spokane Regional Transportation Council (SRTC).²¹ Mantz explains that \$841,464 in federal funds will be used specifically for modifying the grade crossing at Barker Road.²²

11 Mantz contends that proposed modifications at the Barker Road crossing will improve public safety; she notes that the left-hand turn lane will reduce vehicle queuing, the curb and gutter will prevent vehicle run-offs, and the multi-use pathway will protect pedestrians and bicyclists.²³ Mantz notes that traffic volumes have grown by 5 percent historically.²⁴ Federal Highway Administration studies show that the addition of a center two-way left-turn lane reduces collisions by 50 percent and that curbs reduce run-off crashes by 11 percent.²⁵ Mantz explains that the City first documented concerns with the Barker Road corridor when conducting its State Environmental Policy Act (SEPA) analysis for its 2016 Comprehensive Plan update.²⁶ In 2018, the City prioritized the Barker Road corridor project, as compared to other road improvement projects, using the Federal Highway Administration Systemic Safety Project Selection Tool.²⁷ When gates are down at the Barker Road crossing during the evening rush-hour, Mantz notes that queues typically build up to about 500 feet southbound and 225 feet northbound.²⁸ Mantz

¹⁸ *Id.* at 2:28-29.

¹⁹ *Id.* at 3:3-4.

²⁰ *Id.* at 4:16-18.

²¹ *Id.* at 4:21-27. *See also* Mantz, Exh. GM-4 (STBG grant award).

²² *Id.* at 5:6-10. *See also* Mantz, Exh. GM-5 (Breakdown of project funding).

²³ *Id.* at 5:11-19.

²⁴ *Id.* at 5:27-29.

²⁵ *Id.* at 6:4-7.

²⁶ *Id.* at 6:14-17.

²⁷ *Id.* at 6:7-13.

²⁸ *Id.* at 7:5-8.

contends that if the City cannot make the modifications to the Barker Road crossing, there would be a “massive bottleneck” on the road that would “affect traffic and public safety.”²⁹

- 12 On April 13, 2022, UPRR filed Response Testimony from its witnesses Ellis Mays and Peggy Ygbuhay (Response Testimony). Ellis Mays is a Public Project Manager at Alfred Benesch, working on all of UPRR’s public projects in Washington.³⁰ Mays testifies that the Barker Road project “is actually a transportation project” and that the City’s proposed grade crossing modifications are “for increased traffic volume, not safety.”³¹
- 13 Mays testifies that UPRR informed the City of signal maintenance fees by email on October 19, 2020, that the City approved the signal maintenance fees, along with other costs, by email on December 8, 2020, and that UPRR shared the Construction and Maintenance Agreement with the City on June 24, 2021.³²
- 14 Peggy Ygbuhay is a Manager of Industry and Public Projects for UPRR,³³ responsible for crossing improvement and modification projects, among other tasks.³⁴ Ygbuhay notes that UPRR sent the Construction and Maintenance Agreement to the City on June 24, 2021.³⁵ This agreement provided for \$8,760 in annual maintenance fees for the proposed signals and other warning devices at the Barker Road crossing.³⁶ Ygbuhay admits that the City and UPRR did not execute the Construction and Maintenance Agreement, because the City would not agree to the maintenance fees provision in the agreement.³⁷

²⁹ *Id.* at 7:9-20.

³⁰ Mays, Exh. EM-1T at 1:20-2:5.

³¹ *Id.* at 2:12-21.

³² *Id.* at 4:9-21. *See also* Mays, Exh. EM-4 (Mays Email dated October 19, 2020); Mays, Exh. EM-5 (Mays Email December 8, 2020, regarding signal maintenance).

³³ Ygbuhay, Exh. PY-1T at 1:24-25.

³⁴ *Id.* at 2:1-4.

³⁵ *Id.* at 3:25-26

³⁶ *Id.* at 4:1-6.

³⁷ *Id.* at 5:2-5.

- 15 Ygbuhay contends that UPRR did not derive any benefit from the proposed modifications to the Barker Road crossing.³⁸ Ygbuhay argues, among other points, that the proposed project “increases traffic volume,” the increased road width “degrades the underlying track structure,” impedes railroad drainage, and decreases commercial opportunities.³⁹
- 16 On April 26, 2022, the City filed Rebuttal Testimony from its witness Mantz. With respect to UPRR’s claim that the Barker Road project would increase traffic volume, Mantz explains that this is “fundamentally incorrect.”⁴⁰ Mantz explains that traffic volumes on Barker Road have increased for years and will continue to increase as the area is further developed.⁴¹ These traffic volumes will increase regardless of whether the City completes the Barker Road project, and, therefore, Mantz contends that these modifications will improve public safety.⁴² Mantz notes, for instance, that widening the roadway’s radius and lane width will allow trucks to make the right turn from Euclid Avenue onto Barker Road without encroaching on other lanes, jumping the guardrail, or colliding with railroad crossing structures.⁴³
- 17 With respect to the Construction and Maintenance Agreement, Mays contends that prior to 2022, the City Manager never delegated authority to any other staff member to enter into agreements regarding maintenance fees.⁴⁴
- 18 Also on April 26, 2022, UPRR filed Rebuttal Testimony from its witnesses Mays and Ygbuhay (Rebuttal Testimony).
- 19 On May 5, 2022, the Commission entered Order 02, Granting Motion to Strike (Order 02). The Commission granted the City’s motion to strike UPRR’s Rebuttal Testimony, finding that UPRR “should not be permitted to file a second round of Response

³⁸ *Id.* at 6:7-8.

³⁹ *Id.* at 6:10-18.

⁴⁰ Mantz, GM-8T at 1:26-30.

⁴¹ *Id.* at 1:30-2:4.

⁴² *Id.* at 2:10-14.

⁴³ *Id.* at 2:29-3:8.

⁴⁴ *Id.* at 3:9-21.

Testimony in the guise of Rebuttal Testimony, depriving the City of an opportunity to respond prior to the evidentiary hearing.”⁴⁵

- 20 On May 10, 2022, the Commission convened an evidentiary hearing before Administrative Law Judge Michael S. Howard. The City, UPRR, and Commission staff (Staff) appeared at the hearing. The City and UPRR proffered witnesses, and all parties conducted cross-examination.
- 21 On May 31, 2022, the parties filed post-hearing briefs. In its brief, the City argues that, pursuant to RCW 81.53.261, “[t]he ‘crux of the argument’ is not who requested the modification of the warning devices, but rather whether the public safety requires the modification.”⁴⁶ The City argues that the statute in fact provides that the governing body of any city, town, or county may petition the Commission when it deems the public safety requires signals or other warning devices, which undermines UPRR’s suggestion that the railroad must propose the modification of any warning devices.⁴⁷
- 22 The City argues, further, that it has provided sufficient evidence of the public safety need for modified warning devices at the Barker Road crossing.⁴⁸ While the proposed modifications may not eliminate vehicle queuing, the City submits that a reduction in queuing will have a positive impact on public safety.⁴⁹ The City notes that the Commission has approved, and UPRR has agreed to, the widening of grade crossings in past cases.⁵⁰
- 23 The City notes that, pursuant to RCW 81.53.295, the Commission shall apportion the entire cost of maintaining signals or other warning devices to the railroad when federal-aid funds are used for the grade crossing project.⁵¹ The City maintains that federal-aid funds are being used for this project.⁵² Even if federal-aid funds were not used, the City

⁴⁵ Order 02 ¶ 13.

⁴⁶ City’s Brief ¶ 10.

⁴⁷ *Id.* ¶ 11.

⁴⁸ *Id.* ¶¶ 12-14, 16.

⁴⁹ *Id.* ¶ 15.

⁵⁰ *Id.* ¶¶ 17, 19 (internal citations omitted).

⁵¹ *Id.* ¶ 21.

⁵² *Id.* ¶ 22.

submits that Washington state law requires the Commission to apportion any maintenance costs to the railroad.⁵³

24 The City disputes UPRR's claim that the statute requires the installation of "new" signals or warning devices, noting this term is not used in the statute.⁵⁴ However, even if this was a requirement, the City states that it will be installing new devices.⁵⁵

25 In its Brief, UPRR again argues that the City's Petition is facially deficient because it does not allege a public safety need.⁵⁶ UPRR claims the Petition is also deficient because it is "devoid of reference to the costs of installation and maintenance."⁵⁷ UPRR contends that these claims do not amount to a collateral attack on Order 01.⁵⁸

26 UPRR argues that the Petition requests the "reinstallation" of an "already safe" grade crossing system.⁵⁹ UPRR maintains that RCW 81.53.295, unlike RCW 81.53.281, contemplates the installation of a "new" grade crossing protective device.⁶⁰ Because RCW 81.53.295 does not apply, UPRR argues that it is not required to pay ongoing maintenance costs.⁶¹

27 UPRR also disagrees that the public safety requires the modification of signals or warning devices at the Barker Road crossing.⁶² UPRR notes, for instance, that City witness Mantz admitted that it had been over 25 years since any crash occurred at any of the grade crossings in the City's study area.⁶³ UPRR contends that the City undertook the

⁵³ *Id.* ¶¶ 36-37 (citing RCW 81.53.275).

⁵⁴ *Id.* ¶¶ 23-24.

⁵⁵ *Id.* ¶¶ 25-26 (citing Lochmiller, TR 62: 17-23).

⁵⁶ UPRR's Brief at 2:4-21.

⁵⁷ *Id.* at 2:22-3:5.

⁵⁸ *Id.* at 8:11-9:3.

⁵⁹ *Id.* at 3:6-12.

⁶⁰ *Id.* at 5:1-11.

⁶¹ *Id.*

⁶² *Id.* at 5:12-20.

⁶³ *Id.* at 5:20-6:3.

Barker Road Corridor Improvement Project to address increasing traffic volumes.⁶⁴ It distinguishes between generalized impacts on public safety and evidence of specific collisions at the Barker Road crossing.⁶⁵

28 Citing 23 C.F.R. § 646.210, UPRR argues that “the language of the statute [sic] is clear and unambiguous and leaves no room for Washington to impose costs” on the railroad.⁶⁶ UPRR also cites to caselaw from the U.S. Court of Appeals for the Eighth Circuit, the U.S. Supreme Court, and the Washington state Supreme Court to argue that the apportionment of maintenance costs for grade crossings must be reasonable.⁶⁷

29 Finally, UPRR argues that public policy supports denying the Petition because apportioning maintenance costs to the railroad would require UPRR to subsidize trucking companies.⁶⁸

30 In its Brief, Staff argues that public safety requires the proposed modifications to the Barker Road crossing for motor vehicles, pedestrians, and bicyclists.⁶⁹ Staff also notes that the railroad benefits from increased access to its crossing facilities and a reduced risk of collisions.⁷⁰

31 Staff next argues that the City will use federal-aid funds to install the devices at the Barker Road crossing and that Washington state law requires the Commission to apportion maintenance costs to the railroad.⁷¹ Although UPRR witness Ygbuhay testified that the railroad did not receive any benefit from grade crossing improvements, Staff contends that this is irrelevant under Washington law and “extremely myopic,” ignoring the implications of a catastrophic collision to the railroad’s operations.⁷²

⁶⁴ *Id.* at 6:13-7:4.

⁶⁵ *Id.* at 7:5-8:1.

⁶⁶ *Id.* at 9:23-10:5.

⁶⁷ *Id.* at 10:11-25.

⁶⁸ *Id.* at 11:12-12:9.

⁶⁹ Staff’s Brief ¶¶ 18-20.

⁷⁰ *Id.* ¶ 21.

⁷¹ *Id.* ¶ 26-27.

⁷² *Id.* ¶¶ 30-34.

- 32 Staff also disagrees with UPRR's suggestion that the RCW 81.53.295 only applies when the railroad installs warning devices of a new make or model. Staff suggests that this position is contrary to the statute's plain language and would produce absurd results.⁷³
- 33 Staff maintains that the City did not agree to pay for ongoing maintenance costs at the crossing and that the December 2020 email exchange did not constitute a binding agreement.⁷⁴

DISCUSSION

- 34 The City has established that the public safety requires the modification of the signals and other warning devices at the Barker Road crossing. We reject UPRR's attempt to relitigate issues addressed in Order 01 and its arguments that the public safety does not require modifications to the crossing. Finally, we find that applicable statutes require the Commission to apportion the entire cost of maintaining the signals and other warning devices to UPRR.

Whether the Commission should reject UPRR's arguments that were already considered and rejected in Order 01

- 35 In its post-hearing Brief, UPRR argues that the City's Petition is facially deficient,⁷⁵ that imposing maintenance costs is contrary to federal law,⁷⁶ and that these maintenance costs are unreasonable and arbitrary.⁷⁷ We reject these arguments as an impermissible collateral attack on Order 01 in this Docket.
- 36 Pursuant to WAC 480-07-810(3)(a), a party seeking review of an interim or interlocutory order must file its petition within 10 days after the Commission serves its order. UPRR did not petition for review of Order 01 within 10 days, and many of the arguments raised in its post-hearing brief represent a collateral attack on Order 01. To the extent that UPRR presents its arguments in a slightly different manner, this should again be understood as an impermissible, second bite at the apple.

⁷³ *Id.* ¶¶ 41-43.

⁷⁴ *Id.* ¶¶ 52-58.

⁷⁵ UPRR's Brief at 2:4-3:5.

⁷⁶ *Id.* at 9:23-10:10.

⁷⁷ *Id.* at 10:10-11:11.

- 37 Bearing this issue in mind, we first discuss UPRR’s arguments that the City’s Petition, or its Complaint, are facially deficient. The Commission already considered and rejected these same arguments in Order 01 when it denied UPRR’s Motion to Dismiss. Applying the standards applicable to a motion made under Washington superior court civil rules 12(b)(6) and 12(c), the Commission found that the City demonstrated that it may be able to prove facts that would justify granting the relief sought.⁷⁸ The Commission found that, “[a]s applied to the facts alleged in the Complaint, RCW 81.53.295 would require UPRR to pay the maintenance costs for grade crossing protective devices.”⁷⁹ The Commission thus rejected UPRR’s arguments that the City’s Petition, or its Complaint, are facially deficient.
- 38 UPRR also argues that the City’s Petition is facially deficient because it does not allege a public safety need.⁸⁰ To the extent this represents a new argument not presented in UPRR’s Motion to Dismiss, it is unpersuasive and should be rejected. The City completed the Commission’s provided form for a petition for the modification of warning devices at a highway-rail grade crossing. The City completed various sections including “Section 4 – Vehicle Traffic” and “Section 7 – Description of Proposed Changes.” The City was not required to use the specific term “safety” to allege a public safety need when completing this document.
- 39 While UPRR claims that its arguments are not a collateral attack on Order 01,⁸¹ we find this entirely unpersuasive. Because UPRR’s arguments are concerned with whether the City has alleged sufficient facts to state a claim upon which relief can be granted,⁸² UPRR’s arguments are equivalent to a motion to dismiss under Civil Rule 12(b)(6). The Commission has already rejected UPRR’s Motion to Dismiss on this same issue. Even if the Commission chose to consider UPRR’s arguments a second time, there is no reason to depart from our earlier findings in Order 01.
- 40 For the same reasons, we reject UPRR’s arguments that the apportionment of maintenance costs is contrary to federal law, or that the maintenance costs are arbitrary and unreasonable. The Commission rejected UPRR’s argument that federal law preempted RCW 81.53.295.⁸³ The Commission also found that it lacked the authority to

⁷⁸ Order 01 ¶¶ 12-14.

⁷⁹ *Id.* ¶ 14.

⁸⁰ *See* UPRR’s Brief at 2:4-21.

⁸¹ *Id.* at 8:11-9:3.

⁸² *See* UPRR’s Brief at 2:4, 3:3.

⁸³ Order 01 ¶¶ 18-20.

determine that maintenance costs were arbitrary or unreasonable.⁸⁴ These arguments are not persuasive and cannot be raised a second time.

Whether the public safety requires the modification of signals or other warning devices at the Barker Road crossing

41 We agree with the City and Staff that the public safety requires the modification of signals or other warning devices at the Barker Road crossing.

42 Pursuant to RCW 81.53.261, when the governing body of a city deems that the public safety requires the installation or modification of any signals or warning devices at any crossing of a railroad at common grade, the city may file a petition with the Commission alleging that the public safety requires installation or modification of these signals or other warning devices. The Commission will set the matter for hearing and determine from the evidence whether the public safety requires the installation or modification of signals or other warning devices at the crossing.⁸⁵ The Commission will then enter an order either granting or denying the petition, and the Commission will apportion the costs of installation and maintenance of the signals or other warning devices.⁸⁶

43 The City's witnesses credibly explain that the Barker Road crossing must be widened and modified to accommodate increasing traffic along the Barker Road corridor. Mantz testified that Barker Road is being upgraded due to heavy freight traffic and anticipated industrial growth in the area.⁸⁷ Mantz explained that an additional third lane was needed to handle increased traffic flow as development occurs, to reduce collisions between vehicles, and to minimize queuing lengths at the crossing.⁸⁸ Currently there "is no infrastructure to allow pedestrians to utilize the Barker corridor."⁸⁹ But with the planned improvements, pedestrians and bicycles will be separated from vehicular traffic.⁹⁰ In rebuttal testimony, Mantz explains that traffic volumes will increase regardless of

⁸⁴ *Id.* ¶ 17.

⁸⁵ *Id.*

⁸⁶ *Id.* (citing RCW 81.53.271).

⁸⁷ Mantz, Exh. GM-1T at 1:27-2:15.

⁸⁸ *Id.* at 2:16-20.

⁸⁹ *Id.* at 2:28-29.

⁹⁰ *Id.* at 3:3-4.

whether the City completes the Barker Road project, and therefore, these modifications will improve public safety.⁹¹

44 The City's witnesses also describe a history of incidents at the crossing. Lochmiller testified that "there had been nine blocked crossings, 18 unsafe motorists, and one vehicle on the tracks reported at this location."⁹² On cross-examination, Lochmiller explained that he obtained this information from the diagnostic team meeting.⁹³

45 Much as the City observes, UPRR did not effectively undermine the City's testimony on the issue of public safety. Both of UPRR's witnesses, Mays and Ygbuhay, admitted to a lack of knowledge or background in municipal projects that are not related to railroad facilities themselves.⁹⁴ Mays equivocated on whether a third lane would reduce rear-end accidents, but he did not contradict the City's testimony on this issue.⁹⁵ Mays testified that he did not have enough information "to say one way or another" whether the third lane was needed.⁹⁶

46 While Mantz admitted on cross-examination that there were no collisions at the Barker Road crossing over the last 25 years,⁹⁷ the Commission has held that "[t]he lack of past accidents at a dangerous location is not a necessary predictor of future safety."⁹⁸ The City is therefore not required to establish that catastrophic collisions have already occurred at this crossing. To hold otherwise would suggest that lives are worth less than the funds spent on warning signs.

47 UPRR also argues that the City's proposed modifications seek to address increasing traffic volumes, rather than public safety concerns.⁹⁹ There is no evidence to support this supposed distinction. Under RCW 81.53.261, the City is not required to establish that

⁹¹ *Id.* at 2:10-14.

⁹² Lochmiller, Exh. RL-1T at 4:3-6.

⁹³ Lochmiller, TR 66:23-67:6.

⁹⁴ City Brief ¶ 18 (citing Ellis Mays, TR 98: 18-23; Peggy Ygbuhay; TR 121: 22-25 to 122:1).

⁹⁵ *See* Mays, TR 104:5-15.

⁹⁶ *Id.* at 116:18-21.

⁹⁷ Mantz, TR 78:20-79:14.

⁹⁸ Staff's Brief ¶ 25 (citing *Burlington N. Santa Fe Ry. Co. v. City of Sprague*, Docket TR-010684, Fourth Supplemental Order ¶ 41 (January 10, 2003)).

⁹⁹ UPRR's Brief at 6:13-7:4.

public safety concerns exist *independently* of increasing traffic. It is sufficient for the City to demonstrate a public safety need given the circumstances. As Mantz testified, if the City cannot make the modifications to the Barker Road crossing, there would be a “massive bottleneck” on the road that would “affect traffic and public safety.”¹⁰⁰ The railroad cannot absolve itself of its duties under Washington law by pointing to increased traffic volumes as an underlying cause of safety concerns.

48 We therefore agree with the City and Staff that public safety requires the modification of warning devices at the Barker Road crossing.

Whether ongoing maintenance costs for signals or other warning devices should be apportioned to UPRR

49 We find that UPRR should be required to pay the entire cost of maintaining the modified signals or other warning devices at the Barker Road crossing.

50 Pursuant to RCW 81.53.271, if the Commission directs the installation of signals or other warning devices at a grade crossing and federal-aid funding is available for the project, the Commission must apportion costs in accordance with RCW 81.53.295. RCW 81.53.295 in turn provides that whenever federal-aid funds are available and are used for such a project, the railroad shall pay “the entire cost of maintaining the device.”

51 Here, the City has established that federal-aid funds will be used for the modifications to the Barker Road crossing. City witness Mantz testified that \$841,464 in federal funds will be used specifically for modifying the grade crossing at Barker Road.¹⁰¹ Johnson similarly explained that federal funds would be used for the project because the cost of the improvements exceeded the available state funds.¹⁰² UPRR did not effectively rebut this testimony through cross-examination or provide any contradictory evidence. Because federal-aid funds are used for this project, RCW 81.53.295 provides that the railroad shall pay “the entire cost of maintaining the device.”

52 UPRR argues that RCW 81.53.295 contemplates the installation of a “new” grade crossing protective device, and, because RCW 81.53.295 does not apply, that it is not required to pay ongoing maintenance costs.¹⁰³ There is no basis for drawing such a

¹⁰⁰ *Id.* at 7:9-20.

¹⁰¹ Mantz, Exh. GM-1T at 5:6-10. *See also* Mantz, Exh. GM-5 (Breakdown of project funding).

¹⁰² Johnson, TR 46:9-12. *Accord id.* at 48:1-3.

¹⁰³ UPRR’s Brief at 5:1-11.

distinction. RCW 81.53.271 and RCW 81.53.295 discuss the apportionment of costs for the installation of grade crossing protective devices. These statutes clearly apply to the facts of this case, because the City proposes the installation of signals and protective devices at the Barker Road crossing, including additional warning flashing signs and a concrete curb.¹⁰⁴ These statutes do not require that these warning devices be “new,” different in kind, or different in design from the existing warning devices. To draw a distinction, as UPRR suggests, between what is merely a modified “reinstalled” arrangement of warning devices, and a “new” arrangement of warning devices is unsupported by any statutory language and questionable as a matter of practice.

53 UPRR witnesses also argued that the City agreed to assume maintenance costs.¹⁰⁵ RCW 81.53.261 permits the parties to enter into agreements for the apportionment of costs for grade crossings. We observe that UPRR did not raise this as an issue in its post-hearing brief. But regardless, we find this argument unpersuasive. UPRR’s witness Ygbuhay admits that the City did not execute the Construction and Maintenance Agreement.¹⁰⁶ UPRR’s argument relies on earlier email exchanges between UPRR and City employees, which were clearly not binding.

54 As the City explains, it did not confer actual or apparent authority on its employees to enter into such an agreement. Actual authority requires the principal to make objective manifestations to the agent.¹⁰⁷ Apparent authority requires the principal to make objective manifestations to a third party.¹⁰⁸ Yet the principal in this instance, the City manager, did not confer actual authority to enter into binding contracts to Lochmiller, Mantz, or any other employee at the time of these discussions.¹⁰⁹ The City manager did not confer apparent authority either. There is no evidence that UPRR relied on statements from the City manager indicating that Lochmiller or another employee had authority to enter into contracts.

¹⁰⁴ Lochmiller, Exh. RL-3 (Proposed warning device layout). *Accord* Lochmiller, TR 62:22-23, 63:7-13, 69:15-24.

¹⁰⁵ Mays, Exh. EM-1T at 4:9-21. *See also* Mays, Exh. EM-4 (Mays Email dated October 19, 2020); Mays, Exh. EM-5 (Mays Email December 8, 2020, regarding signal maintenance).

¹⁰⁶ Ygbuhay, Exh. PY-1T at 5:3.

¹⁰⁷ City’s Brief ¶ 30 (citing *King v. Riveland*, 125 Wn.2d 500, 507 (1994)).

¹⁰⁸ *Id.* ¶ 31 (citing *King*, 125 Wn.2d at 507).

¹⁰⁹ Mantz, Exh. GM-8T at 3:18-20 (“Prior to 2022, the City Manager has never delegated authority to any other staff member to enter into an agreement regarding maintenance fees.”).

55 Furthermore, we agree with the City that “an agreement to agree” contemplates a further meeting of the minds and is unenforceable.¹¹⁰ On December 8, 2020, Mr. Mays forwarded to that same City employee several documents, including a signal maintenance cost estimate.¹¹¹ He concluded his email, “With your concurrence I will proceed with a draft agreement using the ROW exhibits previously sent by the City.”¹¹² 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.”¹¹³ Mays’s and Lochmiller’s emails contemplated a further meeting of the minds, which is not an enforceable agreement.

56 We do not reach UPRR’s argument that “public policy” requires denying the Petition, because apportioning maintenance costs to the railroad would require UPRR to subsidize trucking companies.¹¹⁴ The Commission may not depart from the statute’s clear requirements.

57 We therefore find that, pursuant to RCW 81.53.295, UPRR is required to pay the entire costs of maintaining the signals or other warning devices at the Barker Road crossing.

FINDINGS AND CONCLUSIONS

58 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate railroads and railroad safety to the fullest extent allowed by federal and state law, and the Commission has jurisdiction over the parties and subject matter of this proceeding.

59 (2) UPRR is a railroad subject to Commission regulation.

60 (3) UPRR’s arguments that the City’s Petition, or its Complaint, are facially deficient represent an untimely challenge to Order 01 and should be rejected.

¹¹⁰ City’s Brief ¶ 32 (citing *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 208 (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).

¹¹¹ Mays, Exh. EM-5 at 1-2.

¹¹² *Id.* at 2.

¹¹³ *Id.* at 1.

¹¹⁴ *Id.* at 11:12-12:9.

- 61 (4) The un rebutted record evidence demonstrates that public safety requires the
modification of signals or warning devices at the Barker Road crossing.
- 62 (5) RCW 81.53.295 provides that whenever federal-aid highway funds are used to
pay a portion of the cost of installing a grade crossing protective device, the
railroad whose road is crossed by the highway, street, or road shall thereafter pay
the entire cost of maintaining the device.
- 63 (6) The record evidence conclusively demonstrates that federal-aid highway funds
will be used to pay a portion of installing the modified signals and devices at the
Barker Road crossing.
- 64 (7) UPRR should be required to pay the entire costs of maintaining the signals or
warning devices at the Barker Road crossing.

ORDER

THE COMMISSION ORDERS:

- 65 (1) The City of Spokane Valley's Petition is GRANTED.
- 66 (2) Union Pacific Railroad Company is required to pay the entire costs of maintaining
signals or warning devices at the Barker Road crossing.

DATED at Lacey, Washington, and effective June 7, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Michael Howard
MICHAEL HOWARD
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order and you would like the Order to become final before the time limits expire, you may send a letter to the Commission waiving your right to petition for administrative review.

WAC 480-07-825(2)(a) provides that any party to this proceeding has 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (2)(b) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(2)(c) states that any party may file a response to a Petition within 10 days after service of the Petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence that is essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will give other parties in the proceeding an opportunity to respond to a motion to reopen the record, unless the Commission determines that it can rule on the motion without hearing from the other parties.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion.

Any Petition or response must be electronically filed through the Commission's web portal, as required by WAC 480-07-140(5).