

1 Hearing Date: Fri., May 21, 2021
2 Hearing Time: 9:00 a.m.
3 Judge/Calendar: Hon. Carol Murphy
4 Without Oral Argument

5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF THURSTON

8 WASTE MANAGEMENT OF
9 WASHINGTON, INC., WASTE
10 MANAGEMENT DISPOSAL SERVICES OF
11 OREGON, INC., MJ TRUCKING &
12 CONTRACTING, and DANIEL ANDERSON
13 TRUCKING AND EXCAVATION, LLC,

14 Petitioners,

15 v.

16 WASHINGTON UTILITIES AND
17 TRANSPORTATION COMMISSION, an
18 agency of the State of Washington,

19 Respondent.

CASE NO. 21-2-00870-34

PETITIONERS' MOTION FOR STAY

I. INTRODUCTION AND RELIEF REQUESTED

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2 On May 3, 2021, the Washington Utilities and Transportation Commission (“UTC”)
3 ordered Petitioners Waste Management of Washington, Inc. (“WMW”), Waste Management
4 Disposal Services of Oregon, Inc. (“WMDSO,” and, collectively with WMW, “WM”), MJ
5 Trucking & Contracting (“MJ Trucking”), and Daniel Anderson Trucking and Excavation, LLC
6 (“DAT”) to “immediately cease and desist solid waste collection services” to two paper mills in
7 the Olympic Peninsula. Decl. of Jessica Goldman (“Goldman Decl.”), Ex. 1. Petitioners filed a
8 petition for review of that order with this Court on the basis that the UTC lacks jurisdiction to
9 regulate Petitioners’ container-on-flat-car (“COFC”) transportation of solid waste, which falls
10 within the exclusive jurisdiction of the federal Surface Transportation Board (“STB”).
11 Petitioners also have filed with the STB a petition for a declaratory order to confirm, pursuant to
12 its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, that the STB has exclusive
13 jurisdiction over Petitioners’ COFC services. *Id.*, Ex. 2.

14 Pursuant to RCW 34.05.550(2), Petitioners respectfully ask this Court to: (1) stay,
15 retroactively to May 3, 2021, the UTC’s order pending resolution of this administrative appeal,
16 and (2) stay this administrative appeal pending the STB’s resolution of the pending petition for a
17 declaratory order.

II. FACTUAL BACKGROUND

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19 McKinley Paper Company (“McKinley Paper”) is a paper mill in Port Angeles that took
20 over the business of Nippon Paper Industries USA (“Nippon”). McKinley Paper, like Nippon,
21 generates solid waste in the form of old corrugated cardboard rejects (“OCC Rejects”) which are
22 disposed in a landfill. Decl. of Michael Penson (“Penson Decl.”) ¶ 3. For many years, until
23 Nippon closed in 2015, WM arranged for the transportation of Nippon’s OCC Rejects to
24 WMW’s rail transfer facility and for transfer there to a railroad for delivery to the landfill. Decl.
25 of Jim Beck (“Beck Decl.”) ¶ 3. WM supplied Nippon a chassis, a truck trailer on which an
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1 intermodal container is mounted for highway transport,¹ along with 48-foot intermodal
2 containers to carry the OCC Rejects mounted on the chassis for transport and transfer to a
3 railroad. The railroad then transported the intermodal containers of OCC Rejects to the landfill.
4 Beck Decl. ¶ 3. This is COFC service. 49 C.F.R. § 1090.1(b) (“Highway TOFC/COFC service”
5 means “the highway transportation, in interstate or foreign commerce,” of a “freight-laden
6 intermodal container” “as part of a continuous intermodal movement that includes rail
7 TOFC/COFC service, and during which the trailer or container is not unloaded.”).

8 In late 2010, the staff of the UTC questioned whether WM’s COFC service to Nippon
9 was subject to the UTC’s jurisdiction over the transportation of solid waste. In February 2011,
10 the UTC staff concluded its investigation and confirmed to WM that it was providing COFC
11 service to Nippon “under 49 C.F.R. §§ 1090.1 and 1090.2” and that WM’s service “is preempted
12 from regulation by the [UTC].” Goldman Decl., Ex. 3.

13 When McKinley Paper took over Nippon’s business in 2020, McKinley Paper asked WM
14 to resume providing the COFC service. In light of the UTC staff’s 2011 determination that the
15 UTC was preempted and could not regulate WM’s COFC service, WM submitted a proposal to
16 McKinley Paper to provide the same type of service to the new owner. Pursuant to this
17 arrangement, WM contracts with MJ Trucking to transport intermodal cargo containers of OCC
18 Rejects on over-the-road chassis from McKinley Paper to the Olympic View Transfer Station
19 (“OVTS”) operated by WMW outside of Bremerton or to the North Mason Fiber Co. (“NMF”)
20 transload facility near Belfair, Washington. WM cycles six intermodal containers per day at
21 McKinley Paper to provide continuous, uninterrupted service. McKinley Paper loads the
22 intermodal cargo containers with the OCC Rejects and the containers are closed at the time they
23 are picked up by MJ Trucking for intermodal transport. Recently, WM has revised its
24 arrangements with McKinley Paper whereby its OCC Rejects also are transported in intermodal
25 containers to the Union Pacific Railroad (“UPRR”) transload facility located in Seattle, known as

26 ¹ See <https://www.up.com/customers/premium/intgloss/index.htm> (last visited May 7, 2021).

1 the Argo Yard. All the intermodal containers remain closed for the entire duration of their
2 transport, including during the transloading process. Beck Decl. ¶ 4.

3 Under contract with Kitsap County, WMW operates OVTS. The Puget Sound and
4 Pacific Railroad (“PSAP”) owns and operates a rail line near OVTS. PSAP provides rail car
5 switching services at OVTS and moves rail cars to and from the Kitsap rail siding to the nearby
6 PSAP rail line for onward transportation. WMW transloads the intermodal containers of OCC
7 Rejects from the truck chassis to rail cars owned by UPRR and staged on rail siding owned by
8 Kitsap County at OVTS. *Id.* ¶ 5.

9 Below is a photograph of a closed intermodal container of OCC Rejects being
10 transloaded in COFC service from the truck chassis to the rail line at OVTS. *Id.* ¶ 6.



21 Likewise, NMF transloads intermodal containers of solid waste from the chassis to
22 UPRR rail cars staged on rail siding owned by NMF and located at the NMF facility. PSAP
23 provides rail car switching services at the NMF facility whereby PSAP moves rail cars to and
24 from the NMF facility rail siding to the nearby PSAP rail lines. The photographs below show a
25 closed intermodal container of OCC Rejects being offloaded from the truck chassis to the UPRR
26 train at NMF’s rail spur, bound for WMDSO’s Columbia Ridge Landfill in Oregon. *Id.* ¶ 7.



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13 After loaded rail cars are switched to the PSAP rail line from either OVTS or NMF, the
14 UPRR transports the intermodal containers to the Columbia Ridge Landfill in Oregon. WMDSO
15 owns and operates the Columbia Ridge Landfill. Below is a photograph of a closed intermodal
16 container of OCC Rejects being offloaded at the end of the COFC service from NMF's rail spur
17 at the Columbia Ridge Landfill. *Id.* ¶ 8.



1 Prior to June 2020, Murrey's Disposal Company, Inc. ("Murrey's") collected the OCC
2 Rejects generated by Port Townsend Paper Company ("PTP"). Penson Decl. ¶ 4; Beck Decl. ¶
3 9. Murrey's did not have sufficient equipment to handle PTP's waste volume. Consequently,
4 PTP was forced to dump the OCC Rejects on the ground and then later to load the OCC Rejects
5 when Murrey's could provide a container. Murrey's insufficient capacity cost PTP twice as
6 much to handle the OCC Rejects and PTP did not want this solid waste left waiting on the
7 ground. Penson Decl. ¶ 4. PTP experienced other problems with Murrey's OCC Rejects service
8 which added to PTP's cost. *Id.* ¶ 5.

9 As a consequence of Murrey's deficient service, PTP contacted WM requesting a bid for
10 transportation and disposal of its OCC Rejects like WM was providing to McKinley Paper. *Id.* ¶
11 5; Beck Decl. ¶ 10. In light of the UTC staff's 2011 determination that federal law preempted
12 state regulation of COFC solid waste service, WM submitted a proposal to provide solid waste
13 transportation and disposal services for PTP's OCC Rejects. PTP accepted WM's proposal and
14 entered into a contract with WM. Starting in June 2020, under agreement with WM, DAT began
15 transporting intermodal cargo containers of OCC Rejects from PTP's Port Townsend facility to
16 OVTS or NMF where, as with McKinley Paper's OCC Rejects, the closed intermodal containers
17 of solid waste are switched to rail cars for continuous transportation to the Columbia Ridge
18 Landfill. Beck Decl. ¶ 10.

19 It took considerable effort and time for WM to phase in its service for PTP while
20 Murrey's was phasing out its service. WM had multiple meetings onsite with PTP and DAT to
21 initiate service and to make sure adequate assets were available to handle the volume of OCC
22 Rejects from the paper mill. WM and DAT had to mobilize equipment to several locations so
23 that once started, daily services could be sustained. It took approximately two weeks to get all of
24 the components in place and several days to phase in the service for PTP. Today, WM cycles 11
25 48-foot intermodal containers daily at PTP to provide continuous, uninterrupted service. *Id.* ¶
26 11.

1 For PTP and McKinley Paper, WM transports 400-500 tons of OCC Rejects every day of
2 the week. This is roughly 30,000,000 pounds per month or the equivalent of 1,500 garbage truck
3 loads monthly. To ensure the necessary service for PTP and McKinley Paper, WM positions 12
4 chassis and 60 intermodal containers at OVTS and NMF. Immediate cessation of WM's OCC
5 Reject service for PTP and McKinley Paper would impact their daily production as they would
6 quickly run out of available intermodal containers to load the OCC Rejects, would put these
7 companies in a precarious compliance position with storage of this solid waste on the ground,
8 and could require the paper mills to cease production until alternate services could be positioned
9 and ramped up. Even if Murrey's had the necessary equipment – which it lacked a year ago for
10 only PTP – it would take several weeks to transition all of WM's and Murrey's equipment at
11 PTP and McKinley Paper. *Id.* ¶ 12; Penson Decl. ¶ 7. Today, it takes approximately a year to
12 purchase new intermodal containers. Beck Decl. ¶ 12.

13 III. PROCEDURAL HISTORY

14 Murrey's is a solid waste collection company holding Certificate G-009, issued by the
15 UTC. That certificate authorizes Murrey's to provide solid waste collection services in portions
16 of Clallam and Jefferson Counties where McKinley Paper and PTP are located. Pointing to its
17 certificate, on July 14, 2020, Murrey's petitioned the UTC to order Petitioners to stop providing
18 COFC service to McKinley Paper and PTP. Petitioners argued that the continuous transportation
19 of closed intermodal containers of OCC Rejects from PTP and McKinley Paper that always
20 includes both a rail and a trucking segment is subject to the exclusive jurisdiction of the STB, as
21 the UTC staff concluded, and based on longstanding federal law.

22 On May 3, 2021, the UTC issued a final ruling granting Murrey's request for declaratory
23 relief and ruling that the STB does not have exclusive jurisdiction over Petitioners' COFC
24 service. Goldman Decl., Ex. 1. On May 5, 2021, Petitioners asked the STB for a declaratory
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1 order to confirm the STB’s exclusive jurisdiction over Petitioners’ COFC transportation. *Id.*, Ex.
2 2. Petitioners then timely filed with this Court a petition for review of the UTC’s decision.

3 Petitioners now move this Court to: (1) stay the UTC’s order pending this administrative
4 appeal, and (2) stay this administrative appeal until the STB rules on the pending petition.

5 **IV. ARGUMENT**

6 **1. The UTC’s Order Should Be Stayed Pending Resolution of this Appeal.**

7 Petitioners respectfully request that this Court stay the UTC’s order pending the Court’s
8 resolution of this administrative appeal. Pursuant to the Administrative Procedure Act, “after a
9 petition for judicial review has been filed, a party may file a motion in the reviewing court
10 seeking a stay or other temporary remedy.” RCW 34.05.550(2). While the statute does not
11 articulate a standard, Washington courts in comparable circumstances have considered: (1)
12 whether a debatable issue is presented on appeal, and (2) whether a stay is “necessary to preserve
13 for the movant the fruits of a successful appeal, considering the equities of the situation.” *Purser*
14 *v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985); RAP 8.1(b)(3). Petitioners readily meet
15 these criteria.

16 **a. The UTC lacks authority to regulate Petitioners’ COFC transportation.**

17 First, Petitioners raise a “debatable” issue on appeal – namely, whether the UTC’s
18 attempted regulation of COFC transportation of solid waste is preempted by federal law.
19 Congress has expressly, unambiguously, and broadly preempted state regulation of the
20 continuous intermodal movement of containerized solid waste involving rail transportation,
21 **including the trucking portion of such transportation.** The federal STB has exclusive
22 jurisdiction to regulate the COFC transportation of containerized solid waste from PTP and
23 McKinley Paper to the landfill by rail carrier and motor carrier. The UTC, like all other state
24 agencies, is preempted from regulating here and erred in holding otherwise.

1 The STB and its predecessor, the Interstate Commerce Commission (“ICC”), have
2 regulated “[r]ail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service” for many decades
3 and have jurisdiction to do so. *Improvement of TOFC/COFC Regulation*, EP No. 230 (Sub-No.
4 5), 364 I.C.C. 731 (ICC 1981) (“Sub-No. 5”), *aff’d sub nom. Am. Trucking Assn’s v. ICC*, 656
5 F.2d 1115 (5th Cir. 1981). The STB defines “[h]ighway TOFC/COFC service” to “mean[] the
6 highway transportation, in interstate or foreign commerce,” of a “freight-laden intermodal
7 container” “as part of a continuous intermodal movement that includes rail TOFC/COFC service,
8 and during which the trailer or container is not unloaded.” 49 C.F.R. § 1090.1(b).

9 TOFC/COFC service, alternatively known as “piggyback” service, is “a form of mixed
10 train **and** truck transportation” that “enables a carrier to transport a trailer [or a container] and its
11 contents over rail on a flatcar and then to haul the trailer [or container] on the highway. The
12 goods need not be unloaded and reloaded when they move from the rail mode to the truck
13 mode,” or vice versa; “the shipment remains within the trailer or container during the entire
14 journey.” *ICC v. Texas*, 479 U.S. 450, 451–52 (1987) (emphasis added). TOFC/COFC service
15 “by definition involves a prior or subsequent movement by rail carrier” *Improvement of*
16 *TOFC/COFC Regulations (Pickup and Delivery)*, EP No. 230 (Sub-No. 7), 6 I.C.C.2d 208
17 (1989) (“Sub-No. 7”) (emphasis added), *aff’d sub nom. Central States Motor Freight Bureau,*
18 *Inc. v. ICC*, 924 F.2d 1099 (D.C. Cir. 1991). In contrast, the mere transportation of an
19 intermodal container on the highway, without the continuous rail leg, is **not** TOFC/COFC
20 service and is not at issue here.

21 In 1980, Congress addressed the economic and competitive condition of the rail industry
22 by enacting the Staggers Rail Act and explicitly stating: “In regulating the railroad industry, it is
23 the policy of the United States government [] to allow, to the maximum extent possible,
24 competition and the demand for services to establish reasonable rates for transportation by rail
25” 49 U.S.C. § 10101(1). In the Staggers Rail Act, Congress directed the ICC to exempt from
26 regulation any service “whenever the Board finds that the application in whole or in part of a

1 provision of this part [] is not necessary to carry out the transportation policy” of the federal
2 government. *Id.* § 10502(a)(1). Congress also provided that the ICC “may revoke an
3 exemption” when necessary to carry out federal transportation policy. *Id.* § 10502(d). “Exercise
4 of the ICC’s section [10502] exemption authority neither lodges nor dislodges agency
5 jurisdiction; instead, it *presupposes* ICC jurisdiction over the persons or services exempted.”
6 *Central States*, 924 F.2d at 1102; *see also Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451-52
7 (D.C. Cir. 2010) (In the Staggers Act, Congress “reaffirm[ed] that where the [ICC] has
8 withdrawn its jurisdiction to regulate, the State could not assume such jurisdiction.”) (quoting
9 the Congressional Record).

10 In 1981, the ICC exercised its authority to exempt from regulation – *i.e.*, to deregulate –
11 the highway portion of the “continuous intermodal movement” if the rail carrier itself was
12 performing the highway transportation in rail-owned trucks. Sub-No. 5, 364 I.C.C. 731. The
13 exemption was limited to “service provided by railroads,” including both the rail and the truck
14 legs. *Id.* at 733.

15 The ICC’s exemption was challenged, and the United States Supreme Court held that the
16 exemption prohibited Texas from regulating the motor portion of TOFC/COFC service:

17 The ICC's statutory authority includes jurisdiction to grant
18 exemptions from regulation as well as to regulate. In 1980,
19 Congress enacted the Staggers Rail Act, 94 Stat. 1895, 49 U. S. C.
20 § 10101 et seq., which authorizes the ICC to exempt from state
regulation “transportation that is provided by a rail carrier as a part
of a continuous intermodal movement.”

21 *ICC v. Tex.*, 479 U.S. at 452.

22 Several years later in 1987, the ICC expanded the TOFC/COFC exemption to include
23 highway transportation by a motor carrier either as the agent or the joint rate partner of a rail
24 carrier. *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and
25 Other Motor Carriers)*, EP No. 230 (Sub-No. 6), 3 I.C.C.2d 869 (1987) (“Sub-No. 6”). The ICC
26 noted that “[i]t has long been recognized that the rail and highway ... portions of TOFC/COFC

1 service are integrally related, because no single mode of transportation standing alone normally
2 satisfies the needs of a TOFC/COFC shipper.” *Id.* at 872. “[A]ll piggyback service is, by its
3 essential nature, bimodal’ because ‘its basic characteristic is the combination of the inherent
4 advantages of rail and motor transportation.” *Id.* (quoting *Am. Trucking v. A.T.& S.F.R. Co.*,
5 387 U.S. 397, 420 (1967)) (brackets omitted). Moreover,

6 motor TOFC/COFC service that is part of a continuous rail/motor
7 movement is obviously “relat[ed] to a rail carrier providing
8 transportation subject to” the Commission’s jurisdiction. A
9 railroad cannot provide such intermodal service without first
10 receiving a trailer or container, which is generally moved over-the-
11 road by truck. The highway movement of containers and trailers is
12 an integral and necessary element of TOFC/COFC service.

13 *Id.* at 873-74 (quoting 49 U.S.C. § 10505(a), now codified as 49 U.S.C. § 10502(a)). “[W]hether
14 they are owned by the railroad partners, affiliated with them, **or independent companies**, the
15 motor carriers involved in the over-the-road segment of TOFC/COFC services are business
16 partners of the railroads that are plainly participating in matters ‘related to a rail carrier’ and are
17 thus within the literal and philosophical scope of § 10505(a) [now codified as 49 U.S.C. §
18 10502(a)].” *Id.* at 874 (emphasis added). The ICC rejected the argument of the motor carriers
19 that “the exemption may be applied *only* to rail transportation” *Id.* at 875.

20 Pursuant to Sub-No. 6, the ICC next adopted 49 C.F.R. § 1090.2:

21 Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and
22 §10530, rail TOFC/COFC service and highway TOFC/COFC
23 service provided by a rail carrier either itself or jointly with a
24 motor carrier as part of a continuous intermodal freight movement,
25 is exempt from the requirements of 49 U.S.C. Subtitle IV,
26 **regardless of the type, affiliation, or ownership of the carrier
performing the highway portion of the service.** Tariffs
heretofore applicable to any transportation service exempted by
this section shall no longer apply to such service.

Id. at 886 (emphasis added).

1 In 1989, the ICC took the final step to exempt TOFC/COFC service where, as in the
2 present case, such service was “arranged **independently** with the shipper or receiver (or its
3 representative/agent) and performed immediately before or after a TOFC/COFC movement
4 provided by a rail carrier” Sub-No. 7, 6 I.C.C.2d at 227 (emphasis added). The ICC again
5 rejected the motor carriers’ argument that the expansion of the TOFC/COFC service exemption
6 did not involve ““a matter related to a rail carrier providing transportation subject to the
7 jurisdiction of the ... Commission” *Id.* at 211 (quoting 49 U.S.C. § 10505(a), now codified
8 as 49 U.S.C. § 10502(a)). “Their view seems to be that the ‘related-to-rail’ language really
9 means ‘provided by rail.’ We reject the motor carriers’ arguments, as we did earlier, and find
10 that the motor carrier services at issue here are related to rail carriers providing transportation
11 subject to Commission jurisdiction” *Id.* The ICC found under its authority at 49 U.S.C. §
12 10505 (now codified as 49 U.S.C. § 10502(a)), that “TOFC/COFC pickup and delivery services
13 performed by motor carriers as part of continuous intermodal movement are related to rail carrier
14 transportation” and should be exempted from economic regulation. *Id.* at 222, 226.

15 In Sub-No. 7, the ICC revised 49 C.F.R. § 1090.2 as follows (additions emphasized):

16 Except as provided in 49 U.S.C. §10505(e) and (g), §10922(1), and
17 §10530, rail TOFC/COFC service and highway TOFC/COFC
18 service provided by a rail carrier either itself or jointly with a
19 motor carrier as part of a continuous intermodal freight movement,
20 is exempt from the requirements of 49 U.S.C. Subtitle IV,
21 regardless of the type, affiliation, or ownership of the carrier
22 performing the highway portion of the service. **Motor carrier**
23 **TOFC/COFC pickup and delivery services arranged**
24 **independently with the shipper or receiver (or its**
25 **representative/agent) and performed immediately before or**
26 **after a TOFC/COFC movement provided by a rail carrier are**
similarly exempt. Tariffs heretofore applicable to any
transportation service exempted by this section shall no longer
apply to such service. The exemption does not apply to a motor
carrier service in which a rail carrier participates only as the motor
carrier’s agent (Plan I TOFC/COFC), nor does the exemption
operate to relieve any carrier of any obligation it would otherwise

1 have, absent the exemption, with respect to providing contractual
2 terms for liability and claims.

3 *Id.* at 227.² Thus, not only did the ICC confirm that it had jurisdiction to regulate the highway
4 portion of the “continuous intermodal transportation,” its jurisdiction included trucking
5 companies performing the highway portion of TOFC/COFC and operating “independently” of
6 the rail carrier.³ *Id.*

7 In 1995, Congress enacted the Interstate Commerce Commission Termination Act
8 (“ICCTA”), abolishing the ICC and creating the STB. *See Friends of the Atglen-Susquehanna*
9 *Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 250 n.1 (3d Cir. 2001). In the ICCTA, Congress
10 acted to the full extent of its preemption authority in a field traditionally occupied by the federal
11 government – rail transportation. Under the ICCTA, STB jurisdiction over transportation by rail
12 carriers “is exclusive”:

13 The jurisdiction of the Board over –

14 (1) **transportation by rail carriers**, and the remedies provided in this
15 part with respect to rates, classifications, rules (including car
16 service, interchange, and other operating rules), practices, routes,
17 services, and facilities of such carriers; and

18 (2) the construction, acquisition, operation, abandonment, or
19 discontinuance of spur, industrial, team, switching, or side tracks,
20 or facilities, even if the tracks are located, or intended to be located,
21 entirely in one State,

22 **is exclusive**. Except as otherwise provided in this part, the
23 remedies provided under this part with respect to regulation of rail
24 transportation are exclusive and preempt the remedies provided
25 under Federal or State law.

26 49 U.S.C. § 10501(b) (emphasis added).

The ICCTA was passed “with the purpose of expanding federal jurisdiction and
preemption of railroad regulation.” *Or. Coast Scenic RR, LLC v. Or. Dep’t of State Lands*, 841

² The STB’s decision to **exclude** Plan I TOFC/COFC service from the exemption confirms its jurisdiction over such service. The STB can change – and has changed – what services within its authority it exempts from federal regulation (*i.e.*, deregulates).

³ “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

1 F.3d 1069, 1072 (9th Cir. 2016). The statutory changes were “made to reflect the direct and
2 complete preemption of State economic regulation of railroads.” *Id.* (quoting H.R. Rep. No.
3 104-311 at 95 (1995)). The ICCTA “preempts all state laws that may reasonably be said to have
4 the effect of managing or governing rail transportation...” *Ass’n of Am. R.R.s v. S. Coast Air*
5 *Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (quotation marks & citation omitted).
6 Indeed, there may not be any clearer statement of federal preemption anywhere in federal law.
7 *See City of Auburn*, 154 F.3d at 1030 (“It is difficult to imagine a broader statement of
8 Congress’s intent to preempt state regulatory authority over railroad operations.”); *accord*
9 *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1152 (9th Cir. 2020).

10 As rail transportation, including TOFC/COFC service, has a history of significant federal
11 presence, “there is no beginning assumption that concurrent regulation by the State is a valid
12 exercise of its police powers.” *U.S. v. Locke*, 529 U.S. 89, 108 (2000). Rather, where Congress
13 expressly preempts state law, the plain text of the statute “begins and ends our analysis.” *Puerto*
14 *Rico v. Franklin Cal. Tax-Free Trust*, ___ U.S. ___, 136 S. Ct. 1938, 1946 (2016). A statute with
15 an express preemption “necessarily contains the best evidence of the Congress’ pre-emptive
16 intent.” *Id.* (quotation marks & citation omitted). In *AGG Enterprises v. Washington County*,
17 the Ninth Circuit emphasized that Congress is the arbiter of preemption: when Congress
18 expressly says it is preempting state regulation, state regulation is preempted. 281 F.3d 1324,
19 1328 (9th Cir. 2002).

20 Congress defined rail “transportation” to make plain the breadth of its preemption. *Del*
21 *Grosso v. S.T.B.*, 898 F.3d 139, 149 (1st Cir. 2018) (“transportation” in “ICCTA-speak” is
22 “expansive”). Congress directs that, for the ICCTA’s purposes,

23 ‘[T]ransportation’ includes –

24 (A) A locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock,
25 yard, property, facility, instrumentality, or equipment of any kind
26 **related to the movement of** passengers or **property**, or both, **by**
rail, regardless of ownership or an agreement concerning use; and

1 (B) services related to that movement, including receipt, delivery,
2 elevation, transfer in transit, refrigeration, icing, ventilation,
3 storage, handling, and interchange of passengers and property.

4 49 U.S.C. § 10102(9) (emphasis added).

5 “Congress enacted the ICCTA as a means of reducing the regulation of the railroad
6 industry.” *Canadian Nat. Ry. Co. v. City of Rockwood*, No. COV-04-40323, 2005 WL 1349077,
7 *3 (E.D. Mich. June 1, 2005). To this end, Congress expressly preempted state regulation by
8 granting exclusive jurisdiction over railroad operations to the STB. The Ninth Circuit has
9 confirmed the breadth of the statute’s preemption: “there is no evidence that Congress intended
10 any such state role under the ICCTA to regulate the railroads.” *City of Auburn*, 154 F.3d at 1031
11 (affirming the STB’s finding of federal preemption regarding local environmental laws). The
12 Ninth Circuit has further recognized the need to defer to the STB for guidance on the scope of
13 ICCTA preemption. *Ass’n of Am. R.R.*, 622 F.3d at 1097.

14 The entire COFC service provided here, which by definition must – and does – include
15 both a truck segment and a rail segment, is regulated exclusively by the STB.

16 **b. A stay is necessary to preserve the fruits of a successful appeal.**

17 Without a stay, Petitioners’ appeal will be rendered moot – PTP and McKinley Paper
18 would be forced to replace Petitioners with inadequate service by Murrey’s. Penson Decl. ¶ 7.
19 That process itself would take weeks to accomplish and would substantially interrupt and
20 damage the paper mills’ operations. *Id.* In fact, if Petitioners stopped all services immediately,
21 both paper mills would quickly run out of available space for byproducts, risk falling out of
22 compliance with waste storage regulations, and might be forced to stop production until alternate
23 services ramped up. Beck Decl. ¶ 12. In addition, Petitioners would risk losing PTP and
24 McKinley Paper’s business permanently even if this Court eventually rejected the UTC’s effort
25 to regulate here. *Id.* Accordingly, a stay is necessary here, and the balance of equities weighs
26 heavily in favor of a stay to preserve the status quo and permit Petitioners to provide services

1 that WM has been providing for many years without challenge and based on the UTC staff's
2 determination that such service is not subject to regulation by the UTC.

3 **2. This Administrative Appeal Should Be Stayed Pending the STB Ruling.**

4 In addition, this Court should stay this administrative appeal pending a ruling from the
5 STB. *See King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350, 16 P.3d 45, 51 (2000) (“The
6 court has inherent power to stay its proceedings where the interest of justice so requires”).

7 Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the STB has authority to issue a declaratory
8 order to rule on the scope of its own jurisdiction. *See also Ass'n of Am. R.R.*, 622 F.3d at 1097
9 (recognizing the need to defer to the STB for guidance on the scope of ICCTA preemption).

10 Pending before the STB is a petition for a declaratory order confirming that the STB alone has
11 jurisdiction over COFC service. The STB's confirmation of the scope of its exclusive
12 jurisdiction likely will determine the proper outcome of the appeal now pending before this
13 Court.

14 In the interest of comity and judicial economy, Petitioners request that this Court stay this
15 appeal so that it will have the benefit of the STB's determinative ruling as to its own jurisdiction.

16 **V. CONCLUSION**

17 For the foregoing reasons, Petitioners respectfully ask this Court to: (1) stay, retroactively
18 effective May 3, 2021, the UTC's order pending a resolution of this administrative appeal, and
19 (2) stay this administrative appeal pending a ruling by the STB.

20 DATED this 10th day of May, 2021.

21 Respectfully submitted,

22 SUMMIT LAW GROUP PLLC

23
24 By: s/ Jessica L. Goldman

Jessica L. Goldman, WSBA #21856

Jesse L. Taylor, WSBA #51603

25
26 Attorneys for Petitioners

1 **CERTIFICATE OF SERVICE**

2 I do hereby certify that on this day I caused to be served a true and correct copy of the
3 foregoing *Petitioners' Motion for Stay* by method indicated below and addressed to the
4 following:

5 Mark Johnson
6 Executive Director and Secretary Via Legal Messenger
7 Washington Utilities and Transportation Commission Via Email
8 621 Woodland Square Loop S.E.
9 Lacey, WA 98503
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records@utc.wa.gov

10 Office of the Attorney General Via U.S. Mail
11 1125 Washington St. SE Via Email
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23 DATED this 11th day of May, 2021.

24 s/ Karen Lang
25 Karen Lang, Legal Assistant
26