BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of CITY OF SPOKANE VALLEY, WA To Modify Warning Devices at a Highway-Railroad Grade Crossing of Union Pacific Railroad Company	DOCKETS TR-210809 and TR-210814 COMMISSION STAFF'S RESPONSE TO UNION PACIFIC RAILROAD COMPANY'S RESPONSE AND MOTION TO DISMISS CITY OF SPOKANE VALLEY'S PETITION AND COMPLAINT
CITY OF SPOKANE VALLEY, Petitioner, v. UNION PACIFIC RAILROAD COMPANY Respondent.	USDOT: 662526C

I. INTRODUCTION

1 The City of Spokane Valley (Spokane Valley) petitioned the Commission for permission to modify the warning devices at a highway-railroad grade crossing located where Barker Road intersects the main line of the Union Pacific Railroad Company (UPRR). At the same time, Spokane Valley also filed a complaint seeking a declaration that RCW 81.53.295 required UPRR to pay to maintain the warning devices installed pursuant to its petition.[1]

2 UPRR moved to dismiss the complaint, claiming that RCW 81.53.295 violates the Commerce and Due Process Clauses of the United States Constitution,[2] and that the

[1] Staff seeks to consolidate the petition and complaint dockets by motion filed under separate cover letter concurrently with this response.
[2] U.S. CONST. amend. I, amend. XIV § 1.

Interstate Commerce Commission Termination Act of 1995 (ICCTA)[3] preempts chapter 81.53 RCW. UPRR also asked the Commission to deny Spokane Valley's petition, claiming that Spokane Valley failed to make in it the allegations necessary to trigger an adjudication under RCW 81.53.261.

3 The Commission should deny UPRR's motion to dismiss the complaint and reject its request that the Commission deny the petition. Each of the claims UPRR makes in its motion to dismiss runs counter to on-point, relevant precedent. And UPRR is incorrect in claiming that the petition lacked the necessary allegations.

II. RELIEF REQUESTED

4 Commission staff (Staff) respectfully requests that the Commission deny both UPRR's motion to dismiss the complaint filed in Docket TR-210814 and its request that the Commission deny the petition filed in Docket TR-210809.

III. BACKGROUND

5 In October 2021, Spokane Valley petitioned the Commission for approval to modify the protective and warning devices at a highway-rail grade crossing located where Barker Road and UPRR's road intersect.[4] In its petition, Spokane Valley explained that it expected traffic volumes at the intersection to increase due to development north of the grade crossing.[5] The Barker Road project involves reconstructing the crossing to increase the number of northbound lanes to accommodate that increased traffic;[6] Spokane Valley's

[3] Pub. L. 104-88, 109 Stat. 803.
[4] *See generally City of Spokane Valley v. Union Pac. R.R. Co.*, Docket TR-210809, Petition to Modify Warning Devices at Highway-Railroad Grade Crossing (Oct. 25, 2021) (hereinafter "Petition").
[5] Petition at 3.
[6] *E.g.*, Petition at Appx. C.

petition sought permission to install protective and warning devices to address the crossing's new configuration.[7]

6 With its petition, Spokane Valley filed a formal complaint against UPRR.[8] That complaint sought a declaratory order providing that RCW 81.53.295 obligated UPRR to assume the costs of maintaining the protective and warning devices installed pursuant to Spokane Valley's petition.[9]

7 UPRR seeks dismissal of the complaint and denial of the petition.[10]

IV. ISSUES PRESENTED

8 Should the Commission deny UPRR's motion to dismiss because (1) Supreme Court precedent recognizes that the Commerce Clause does not prevent the Commission from ordering UPRR to pay the maintenance costs that arise from a grade-crossing created by the UPRR's road, (2) Spokane Valley's complaint seeks reasonable relief authorized by law and Supreme Court precedent, (3) several federal appellate courts have held that the ICCTA does not preempt laws like RCW 81.53.295, and (4) Spokane Valley explicitly alleged that public safety required the modifications in its complaint and implicitly alleged that public safety necessitated the modifications in the petition?

V. ARGUMENT

9 The Commission should deny UPRR's motion. The Commission lacks the power to grant the relief UPRR seeks through its constitutional claims, and, regardless, RCW 81.53.295 is fully consistent with Supreme Court precedent holding that there is no

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[7] Petition at 3, *see id.* at Appx. C.
[8] *See generally City of Spokane Valley v. Union Pac. R.R. Co.*, Docket TR-210814, Complaint (Oct. 25, 2021) (hereinafter Complaint).
[9] Complaint at 3.
[10] *See generally City of Spokane Valley v. Union Pac. R.R. Co.*, Dockets TR-210809 & TR-210814, Union Pacific Railroad Company's Response and Motion to Dismiss City of Spokane Valley's Petition and Complaint (Nov. 22, 2021) (hereinafter "Motion to Dismiss").

constitutional infirmity in allocating to the rail carrier, whose road makes the modifications necessary, the reasonable costs of modifying a grade crossing to make it safer. UPRR's expansive reading of the ICCTA ignores various other federal statutes that address grade crossing safety; when read in *pari materia* with those statutes, the ICCTA does not preempt RCW 81.53.295. Further, UPRR's ICCTA claim falters on the Surface Transportation Board's own test for ICCTA-preemption, as recognized by the Sixth Circuit in a closely analogous case. And, contrary to UPRR"s claim, Spokane Valley's petition makes the public safety allegations required by RCW 81.53.295.

A. Applicable Legal Standards

10 WAC 480-07-380(1) authorizes motions to dismiss pleadings filed with the Commission. The Commission "consider[s] the standards applicable to a motion made under Washington superior court civil rule[s] 12(b)(6) and 12(c)" when ruling on a motion to dismiss.[11] Under those standards, "[d]ismissal is warranted only if the" Commission "concludes, beyond a reasonable doubt," that Spokane Valley "cannot prove any set of facts which would justify" granting it the relief sought in its petition.[12] The Commission must consider all the allegations in Spokane Valley's petition true and "may consider any hypothetical fact supporting [its] claims."[13] The Commission may grant motions to dismiss "sparingly and with care and, as a practical matter, only" if Spokane Valley "include[d] allegations that show on the face of" its petition "that there is some insuperable bar to relief."[14] No such insuperable bar exists here.

[11] WAC 480-07-380(1).
[12] *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (internal quotations omitted).
[13] *Kinney*, 159 Wn.2d at 842
[14] *Kinney*, 159 Wn.2d at 842.

B. The Commission Should Deny UPRR Relief On Its Commerce Clause Claim

11 UPRR first argues that requiring it to pay to maintain the warning devices installed at Barker Road would violate the Commerce Clause.[15] The Commission should deny UPRR relief on this claim for two reasons. First, it lacks the power to grant that relief. Second, UPRR's claim, and the underlying arguments, run contrary to a significant body of Supreme Court precedent.

1. The Commission lacks the power to grant UPRR relief on its Commerce Clause claim.

12 UPRR asks the Commission to determine that allocating maintenance costs to it violates the Commerce Clause. But that allocation is compelled by RCW 81.53.295. Accordingly, UPRR effectively asks the Commission to determine that RCW 81.53.295 is unconstitutional. The Commission cannot do so because agencies lack the authority to "determine the constitutionality of the law [they] administer[]."[16] The relief that UPRR seeks is thus beyond the Commission's ability to grant.

2. Regardless, RCW 81.53.295's allocation of costs to UPRR is constitutionally permissible.

13 Article I, section 8, clause 3 of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce . . . among the several states." Courts have long interpreted this grant of legislative power as impliedly limiting the states' power to regulate interstate commerce, something referred to as the dormant Commerce Clause.[17]

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[15] Motion to Dismiss at 3.
[16] *Bare v. Gorton*, 84 Wn.2d 380, 384, 526 P.2d 79 (1974); *Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005).
[17] *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007).

14 Tribunals consider a dormant Commerce Clause challenge using a "two-tiered approach."[18] If the statute at issue "directly regulates or discriminates against interstate commerce," the tribunal "generally" invalidates it[19] unless the statute "serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means."[20] Where a statute has "only indirect effects on interstate commerce" and "regulates evenhandedly," courts will uphold the statute against a dormant Commerce Clause challenge if the State has a legitimate interest in the subject matter and the burdens imposed on interstate commerce do not "clearly exceed[] the local benefits."[21]

15 RCW 81.53.295 concerns the allocation of maintenance costs at property located in Washington.[22] That allocation does not "directly affect[] transactions that take place across state lines or entirely outside of the state's borders," and therefore does not directly regulate interstate commerce.[23] RCW 81.53.295 is indifferent to the domicile of the railroad affected by the allocation it requires, and therefore does not discriminate against interstate commerce.[24] Accordingly, if the Commission reaches the merits of UPRR's claim, it should apply the test for non-discriminatory laws that incidentally burden interstate commerce set out in *Pike v. Bruce Church, Inc.*[25] Under that test, RCW 81.53.295 survives UPRR's challenge.

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[18] *Brown-Forman Distillers, Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986).
[19] *Brown-Forman*, 476 U.S. at 578-79.
[20] *Maine v. Taylor*, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (internal quotation omitted).
[21] *Brown-Forman*, 476 U.S. at 579.
[22] RCW 81.53.261, .295; *See* RCW 81.01.010; RCW 80.01.040(1), (2).
[23] *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 445 (9th Cir. 2019).
[24] *Rosenblatt*, 940 F.3d at 448-49; *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 20133) ("Conversely, a statute that treats all private companies exactly the same does not discriminate against interstate commerce. This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses.").
[25] 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

16 RCW 81.53.295 concerns Washington's legitimate state interest in the safety of its public highways. As the Supreme Court has recognized "[t]he care of grade crossings is peculiarly within the police power of the states."[26] This remains true even when the state takes steps to protect that interest that subject "interstate commerce . . . to material interference."[27] The state's interest is thus not only legitimate, but, in this context, paramount.[28]

17 RCW 81.53.295 does not impose burdens on interstate commerce that clearly exceed the local benefits. UPRR cannot have shouldered its burden of proving otherwise[29] by providing no evidence to the contrary. Regardless, the Supreme Court has repeatedly held that states can allocate *all* the costs of making grade crossings safe to a railroad without offending the Commerce Clause, save where they unreasonably inflate the costs at issue.[30] Those holdings imply that the burdens imposed on interstate commerce by the complete allocation to the railroad of the reasonable costs of modifying a crossing cannot exceed the local benefits.[31] And if Washington can constitutionally allocate all costs to UPRR, allocating a smaller share of those costs to it raises no constitutional concern where nothing indicates that Spokane Valley has inflated the costs.

18 UPRR nevertheless argues that giving Spokane Valley the declaration it seeks would violate the Commerce Clause, for three reasons. The Supreme Court has rejected all of them.

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[26] *Lehigh Valley R.R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35, 49 S. Ct. 69, 73 L Ed. 161 (1928).
[27] *Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n of Cal.*, 346 U.S. 346, 355, 74 S. Ct. 92, 98 L. Ed. 51 (1953); *Erie R. Co. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394, 410, 41 S. Ct. 169, 65 L. Ed. 322 (1921).
[28] *Erie*, 254 U.S. at 410.
[29] *Frank & Sons, Inc. v. State*, 136 Wn.2d 737, 757, 966 P.2d 1232 (1998).
[30] *Lehigh Valley*, 278 U.S. at 34.
[31] *See Lehigh*, 278 U.S. 34, *Erie*, 254 U.S. at 409-411.

19 First, UPRR contends that the courts have frequently invalidated state restrictions on railroad operations as violating the Commerce Clause,[32] and it analogizes RCW 81.53.295's allocation of maintenance to those invalidated state restrictions.[33] That analogy is misplaced. The Supreme Court has recognized that "[t]he power of the State over grade crossings derives little light from cases on the power to regulate trains."[34] Crossings are *sui generis*, and the Commission should apply the precedent dealing with them, rather than generalized holdings about state regulation of rail operations.

20 Second, UPRR contends that "[m]odification of the . . . crossing is solely for the public benefit and [UPRR] does not derive any ascertainable benefit from the Project."[35] This argument suffers from two defects. First, it is breathtakingly myopic. UPRR's operations will benefit from the enhanced safety provided by the modifications: it should experience fewer accidents than it otherwise would, which means that its employees will be less likely to be injured, its trains will be less likely to be damaged, its operations will be less likely to be disrupted, and it will be less likely incur the costs associated with the lawsuits that inevitably result from such accidents. Second, and more problematically for UPRR, its argument is irrelevant. Washington's ability to impose on a railroad a duty to maintain protective or warning devices at a crossing does not depend on those devices conferring any benefit on it.[36] "The presence of these tracks in the streets creates the burden" of installing the warning devices "in the interest of public safety and convenience."[37] Thus, "[h]aving brought about the problem, the railroads are in no position to complain because

[32] Motion to Dismiss at 3.
[33] Motion to Dismiss at 3-4.
[34] *Erie*, 254 U.S. at 410.
[35] Motion to Dismiss at 4.
[36] *Atchison*, 346 U.S. at 352-53.
[37] *Atchison*, 346 U.S. at 353.

their share in the cost of [alleviating] it is not based solely on the special benefits accruing to them from the improvements."[38]

21 Third, UPRR contends that the allocation of maintenance costs would create a precedent that would impose a substantial burden on interstate commerce. The Supreme Court has rejected the argument that imposing reasonable costs related to multiple grade crossings violates the Commerce Clause, even where those costs are ruinous. The Court, in fact, has reasoned that "[i]t is said that if the same requirement were made for other grade crossings of the road [the railroad] would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."[39] Again, nothing indicates that Spokane Valley has unreasonably inflated the costs involved here; the Commission should thus view them as reasonable and therefore permissible.[40]

C. Requiring UPRR To Maintain The Crossing Devices Would Not Be Arbitrary Or Unreasonable, And Thus Would Not Violate Due Process

22 UPRR also contends that "a carte blanche allocation of 100% of the maintenance costs to Union Pacific is arbitrary and unreasonable,"[41] citing *Nashville, C. & St. L. Ry. v. Walters*.[42] The Commission should reject that argument, for two reasons. Again, UPRR asks the Commission to provide it relief that the Commission cannot grant. And, again, UPRR makes a claim contrary to a substantial body of Supreme Court precedent.

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[38] *Atchison*, 346 U.S. at 353.
[39] *Erie*, 254 U.S. at 410-11.
[40] *Kinney v. Cook*, 159 Wn.2d at 842.
[41] Motion to Dismiss at 6.
[42] 294 U.S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935).

1. The Commission cannot grant UPRR relief on its claim that RCW 81.53.295 is arbitrary and unreasonable.

23 *Nashville* used the phrase "arbitrary and unreasonable" as shorthand for a constitutional taking without due process.[43] By invoking it, UPRR asks the Commission to declare a statute it administers unconstitutional.[44] Again, the Commission cannot do so.[45] It should deny UPRR the relief it requests on that basis.

2. Regardless, RCW 81.53.295 is not arbitrary and unreasonable.

24 Even if the Commission could take up the merits of UPRR's claim, nothing about the maintenance allocation sought by Spokane Valley is unreasonable. RCW 81.53.295 applies only when federal aid finances part of the modification of protective or warning devices at a crossing.[46] Under it, the railroad pays nothing for the modifications,[47] and shoulders only the duty of maintaining the modifications.[48] Numerous Supreme Court cases affirm the power of the states to allocate to the railroad *all* costs reasonably incurred to modify highway-rail grade crossings because the railroad creates the danger addressed by the modifications.[49] RCW 81.53.295 imposes only a subset of those costs. In short, the legislature made a permissible policy choice regarding the allocation of costs given the relevant facts about the entities involved and what each contributes.

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[43] 294 U.S. at 413.
[44] *See Nashville*, 294 U.S. at 413. Perhaps UPRR means "arbitrary and unreasonable" in the statutory sense of "arbitrary and capricious." RCW 34.05.570(3)(i). In that case UPRR's citation to *Nashville* is irrelevant as it has nothing to say about Washington's Administrative Procedure Act. Regardless, the allocation requested by Spokane Valley's complaint is compelled by state law. RCW 81.53.295. Accordingly, the allocation could only be arbitrary and capricious if the statute is, and ultimately the Commission ends up with UPRR requesting the invalidation of RCW 81.53.295 on due process grounds.
[45] *Bare*, 84 Wn.2d at 382-83.
[46] RCW 81.53.295.
[47] RCW 81.53.295.
[48] RCW 81.53.295.
[49] *E.g.*, *Nashville*, 294 U.S. at 430-31 (collecting cases); *Chicago, Milwaukee, & St. Paul. Ry. Co. v. City of Minneapolis*, 232 U.S. 430, 438 34 S. Ct. 400, 58 L. Ed. 671 (1914) (collecting cases); *Erie*, 254 U.S. at 411 (collecting cases). Again, nothing suggests that Spokane Valley has inflated the costs such that requiring UPRR to pay them is unreasonable. *See Lehigh*, 278 U.S. 34-35.

25 *Nashville* held that a state may in some cases act arbitrarily when imposing costs on a railroad. Specifically, *Nashville* held that it is arbitrary to impose the costs of modifying a crossing on a railroad when the costs do not result from the need to address the safety concerns arising from population growth around a crossing, but instead result from modifying the crossing to obtain federal aid and to make operations more convenient for a railroad's competitors.[50] As the courts have recognized, *Nashville* turned on very specific facts,[51] and UPRR has offered no facts that would allow an analogy here. And it can offer none. The petition here implies that population growth necessitates the crossing modification. And the petition, which concerns only warning devices inextricably linked to safety, inherently does not involve the kind of spurious, non-safety justifications at issue in *Nashville.*

D. The ICCTA Does Not Preempt State Authority To Allocate The Cost Of Maintaining Protective Or Warning Devices Installed At A Grade Crossing

26 UPRR next contends that the ICCTA preempts RCW 81.53.295. At least two federal courts have rejected similar claims. The Commission should follow the reasoning of any or all of those opinions and reject UPRR's challenge.

27 The ICCTA vests in the Surface Transportation Board (STB) jurisdiction over "transportation by rail carrier"[52] and makes the STB's jurisdiction "exclusive."[53] That exclusive jurisdiction "preempts all state laws that may reasonably be said to have the effects of managing or governing rail transportation."[54]

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[50] *Atchison*, 346 U.S. at 353-54.
[51] *Atchison*, 346 U.S. at 353 (quoting *Nashville*, 294 U.S. at 413).
[52] 49 U.S.C. § 10501(a).
[53] 49 U.S.C. § 10501(b).
[54] *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007).

28 The federal courts have applied two different analyses for determining whether the ICCTA prevents states from allocating the costs of abating the dangers at a grade crossing to a railroad. One focuses on harmonizing the ICCTA with the constellation of federal statutes governing crossing safety, all of which preserve state authority. The other applies the test crafted by the STB to determine whether the ICCTA preempts state law. Ultimately the analytical method employed does not affect the result: courts applying each analysis have held that the ICCTA does not preempt states' ability to compel railroads to pay for improvements intended to ensure the safety of highway-rail grade crossings.

1. The Eighth Circuit's test reads the ICCTA in *pari materia* with other federal statutes concerning grade-crossing safety.

29 The ICCTA is not the only federal statute to touch on rail operations, and the courts and the STB interpret its provisions in *pari materia* with those other statutes to avoid reading Congress as impliedly repealing them,[55] which is disfavored.[56] This holds true when considering the applicability of the ICCTA to modifications to highway-rail grade crossings,[57] about which the neither the ICCTA itself nor its legislative history have much to say,[58] but which other federal statutes address in some detail.[59]

[55] *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156-57 (9th Cir. 2020) (collecting cases reading the ICCTA in *pari materia* with various federal acts to harmonize the relevant laws and avoid implied repeals).
[56] *Swinomish*, 951 F.3d at 1156.
[57] *Iowa, Chicago & E. R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004) (reading the ICCTA in *pari materia* with the Federal Railroad Safety Act (FRSA) of 1970 and provisions in Title 23 of the federal code applicable to highway-rail crossings and bridges over rail lines);
[58] *See generally* 49 U.S.C. §§ 10101-11908. The only provision in the ICCTA addressing grade crossings requires the disqualification of the license to operate commercial motor vehicles held by any driver who violates the "laws and regulations pertaining to railroad-highway grade crossings." ICCTA § 403(a), *currently codified at* 49 U.S.C. § 31310(j). Nothing in the legislative history suggests that Congress intended the ICCTA to become the vehicle for addressing crossing safety or that it intended the STB to supplant the FRA or the FHWA as the agency responsible for improving the safety of crossings. *See generally* H.R. Conf. Rep. 104-22 (Dec. 18, 1995); S. Rep. 104-176 (Nov. 21, 1995); H.R. Rep. 104-311 (Nov. 6, 1995).
[59] 49 U.S.C. §§ 20134, 20151-53, 20160, 20161.

30 The Eighth Circuit did exactly that in *Iowa, Chicago and Eastern Railroad Corporation v. Washington County* (*IC & E*), reading the ICCTA in *pari materia* with other federal statutes governing crossing safety.[60] The dispute in *IC & E* was quite similar to the one between the parties here. Washington County initiated administrative proceedings authorized under Iowa law to force the railroad to pay to replace four aging overpasses separating highway-rail crossings.[61] The railroad sought to enjoin those proceedings through a declaration that the ICCTA preempted the relevant state laws.[62]

31 The Eighth Circuit found the railroad's claim "simple, but . . . deceptively simple, for it ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC[63] or the STB, and that Congress left intact in enacting ICCTA."[64] The court then surveyed these other acts, including the Federal Railroad Safety Act (FRSA) and 23 U.S.C. §§ 130 and 144, and described the cooperative federalism embedded in each.[65] That survey led the court to observe that

> Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvements in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. The ICCTA did not address these problems. Its silence cannot reflect the requisite 'clear and manifest purpose of Congress' to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.[66]

Given those observations, and determined to avoid reading the ICCTA as impliedly repealing the relevant federal statutes, the Eighth Circuit held that "IC & E has failed to establish that ICCTA's preemption provision preempts the state administrative proceedings

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[60] 384 F.3d at 557.
[61] *IC & E*, 384 F.3d at 558.
[62] *IC & E*, 384 F.3d at 558.
[63] The Interstate Commerce Commission, the STB's forerunner. *See IC & E*, 384 F.3d at 558.
[64] *IC & E*, 384 F.3d at 559.
[65] *IC & E*, 384 F.3d at 559-61.
[66] *IC & E*, 384 F.3d at 559

commenced by [the Iowa Department of Transportation] in response to the County's petition that IC & E be ordered to replace the four bridges at its own expense."[67]

2. The Sixth Circuit's test examines whether the state law unreasonably burdens or discriminates against railroads.

32 The Sixth Circuit considered whether the ICCTA preempted states ability to allocate the costs arising from modifying grade-crossings to railroads using the preemption test developed by the STB. The case at issue, *Adrian & Blissfield Railroad Company v. Village of Blissfield*,[68] concerned a Michigan law that required railroads to build and maintain roads and sidewalks at or proximate to grade crossings.[69] The Village of Blissfield (Village) invoked that law to attempt to force a railroad "to pay for pedestrian crossings installed by the Village across the Railroad's tracks and sidewalks near the Railroad's property."[70]

33 The Sixth Circuit noted that the STB divided state laws into two types: those that the ICCTA categorically preempted and those that the ICCTA preempted under certain facts.[71] Following the Fifth Circuit, and in accordance with Supreme Court precedent underlying the relevant Fifth Circuit opinion, the Sixth Circuit determined that the ICCTA did not categorically preempt state law governing grade crossings.[72] Accordingly, the Sixth Circuit turned to whether the ICCTA preempted the Michigan law at issue under the facts of the case, which involved consideration of whether the statute imposed "unreasonably

[67] *IC & E*, 384 F.3d at 561.
[68] 550 F.3d 533 (6th Cir. 2008).
[69] *Blissfield*, 550 F.3d at 538 (quoting Mich. Comp. Laws § 462.309(1).
[70] *Blissfield*, 550 F.3d at 535.
[71] *Blissfield*, 550 F.3d at 539-40.
[72] *Blissfield*, 550 F.3d at 540-41 (citing and quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008)).

burdensome" costs on the railroad and whether imposing those costs "discriminated against" the railroad.[73]

34 Turning to the first prong, the Sixth Circuit determined that the allocation required by Michigan law did not unreasonably burden railroading.[74] It recognized that the statute imposed some costs on the railroads, but it joined with several of its sister circuits in holding that the imposition of costs alone did not "render the statute unreasonably burdensome."[75] This resulted because "[a]lthough the 'costs of compliance' with a state law could be high, 'they are incidental when they are subordinate outlays that all firms build into the cost of doing business.'"[76]

35 The Sixth Circuit then determined that the statute at issue did not discriminate against railroads. It reasoned that "[t]his is not an instance in which the state has chosen to require something of the Railroad that it does not require of similarly situated entities."[77] Instead, the statute applied "only to the Railroad because the railroad bisects the town and pedestrian walkways are needed for public safety."[78]

36 Given its analysis, the Sixth Circuit determined that the ICCTA did "not preempt" the Michigan statute at issue.[79]

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[73] *Blissfield*, 550 F.3d at 541 ("[w]e doubt whether increased operating costs alone are sufficient to establish unreasonable interference with railroad operations.") (quoting *Barrois*, 533 F.3d at 355); *id.* ("[n]o statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted.") (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1338 n.11(11th Cir. 2001).
[74] *Blissfield*, 550 F.3d at 541.
[75] *Blissfield*, 550 F.3d at 541
[76] *Blissfield*, 550 F.3d at 541 (quoting *Jackson*, 500 F.3d at 254).
[77] *Blissfield*, 550 F.3d at 541-42.
[78] *Blissfield*, 550 F.3d at 542.
[79] *Blissfield*, 550 F.3d at 542.

3. The ICCTA does not preempt RCW 81.53.295 under either test.

37 RCW 81.53.295 comports with federal statutes giving a strong role to states in improving crossing safety. And while it imposes some costs on railroads, it does not unreasonably burden their operations or discriminate against them. Accordingly, regardless of whether the Commission applies the Sixth Circuit's or the Eighth Circuit's tests, or both, the result is the same. The ICCTA does not preempt RCW 81.53.295.

38 The Commission could simply follow *IC & E*, which is closely analogous. Spokane Valley seeks to allocate the costs of addressing the dangers created by a highway-rail crossing according to RCW 81.53.295, much as Washington County in *IC & E* sought allocate the costs of addressing the safety concerns created by aging overpasses crossing rail lines in accordance with the relevant Iowa law. Spokane Valley's petition touches on other federal statutes existing outside of the ICCTA, such as the FRSA and provisions in Title 23 U.S.C, just as Washington County's petition did.[80] A determination that the STB has exclusive jurisdiction over the crossing modifications here would impliedly repeal those other federal statutes,[81] just as a similar holding in *IC & E* would have done had the Eighth Circuit not rejected the railroad's ICCTA claim. And reading the ICCTA as impliedly

[80] The improvements in *IC & E* were funded through grants made under 23 U.S.C. §§ 130 and 144. The Barker Road improvements were not funded under those programs, but rather through grants made under 23 U.S.C. § 133 and § 148. Decl. of Betty Young at 1 ¶ 5. The difference in funding source does not affect the analysis. Much like grants under § 130 and § 144, grants under § 133 and § 148 are administered by the Federal Highway Administration (FHWA). 23 C.F.R. § 1.85. Like grants under § 130, which are specifically targeted at crossing safety improvements, states may use grants made under the Surface Transportation Block Grant Program created by § 133 and funded through 23 U.S.C. § 104(b)(2) for "highway and transit safety infrastructure improvements and programs, including railway-highway grade crossings." 23 U.S.C. § 133(b)(4), (c)(2). The same is true of grants made under the Highway Safety Improvement Program created by § 148 and funded through 23 U.S.C. § 104(b)(3), which states may use to fund "[c]onstruction and improvement of a railway-highway grade crossing safety feature, including installation of protective devices." 23 U.S.C. § 148(a)(4)(B)(vi); (e)(1)(A). Like § 130, § 133 and § 148 implement cooperative federalism in which the federal government provides funding through programs administered by the FHWA and the states shoulder the responsibility for spending the money to improve transportation safety.

[81] *Swinomish*, 951 F.3d at 1152-53.

repealing those statutes would eliminate the state authority at crossings that Congress has carefully codified into those statutes, impermissibly nullifying congressional intent.[82] The Commission should read the ICCTA in *pari materia* with those provisions of federal law, just as the Eighth Circuit did, and hold that the ICCTA does not preempt RCW 81.53.295, just as the Eighth Circuit held that the ICCTA did not preempt the Iowa statutes at issue in *IC & E*.[83]

39 The Commission could also follow *Blissfield*, which, again, is closely analogous. Spokane County wants UPRR to pay to maintain the crossing devices to be installed at Barker Road, just as the Village wanted the railroad to pay for crossing improvements in *Blissfield*. Spokane Valley's complaint, and the maintenance allocation required by RCW 81.53.295, would impose some costs on UPRR. But nothing offered by UPRR indicates that those costs are unduly burdensome. Instead, they are cost UPRR must pay to do business, and have been for more than 100 years since the Supreme Court decided *Erie's* forerunners. And RCW 81.53.295 does not impose costs on the UPRR or other railroads that it excuses other entities from paying; it instead, as the Sixth Circuit noted in *Blissfield*, imposes costs that exist only because UPRR's road bisect Spokane Valley. Because RCW 81.53.295 does not unreasonably burden or discriminate against railroads, the ICCTA does not preempt it. The Commission should hold as much, following the Sixth Circuit's holding in *Blissfield*.

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[82] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ("[t]he purpose of Congress is the ultimate touchstone in every preemption case) (alteration in original; internal quotation omitted).

[83] In *IC & E*, the Eighth Circuit noted the narrowness of its holding, recognizing that other provisions of federal law may preempt the state's ability to force the railroad to pay costs. *Id.* Should UPRR argue that those provisions apply here to preempt RCW 81.53.295, the Commission should conclude that they do not. § 130 and its associated rules prevent the states from requiring railroads to pay the costs of *construction*. 23 U.S.C. § 130(b); 23 C.F.R. § 646.200(b). Maintenance costs are not included, save for the maintenance of temporary structures used during project construction. 23 C.F.R. §§ 140.900-.918, *see* 23 C.F.R. § 646.216(f)(4). Accordingly, the relevant rules do not preempt states from allocating maintenance costs to the railroad. *D&H Corp. v. Penn. Pub. Util. Comm'n*, 149 Pa. Cmwlth. 507, 513-14 (Pa. Commw. Ct. 1992).

40 The Commission could also apply both tests. Both indicate that the ICCTA does not preempt RCW 81.53.295, and nothing about applying them together changes the outcome they produce individually. The Commission, should it apply both tests, should conclude that the ICCTA does not preempt RCW 81.53.295.

41 That conclusion would comport with the STB's understanding that railroads bear the cost of maintaining protective and warning devices installed at crossings. The STB has acknowledged that the FHWA "recognizes that the maintenance obligation for safety devices at crossings falls on railroads."[84] And it has cited with some approval the FHWA's statement that "[t]he railroad-highway grade crossing is unique to other highway facilities in that railroads design, install, operate, and maintain the traffic control devices located at the crossing. Even though a large portion of the cost of design and construction of crossings, including traffic control devices, is assumed by the public, current procedures place maintenance responsibility with the railroads."[85] Further, the STB has recently signaled that it does not believe the ICCTA preempts state laws allocating grade-crossing improvement costs on railroads, submitting an amicus brief to that effect in *IC & E*.[86]

42 UPRR nevertheless contends that the ICCTA preempts RCW 81.53.295, for two reasons. The STB or the federal courts have rejected each.

43 First, UPRR contends that the "statewide imposition of all crossing maintenance costs on railroads like [UPRR] constitutes economic regulation of rail transportation that

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[84] *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning & Columbiana Counties, OH, and Beaver County, PA*, AB-556 (Sub.-2X) 2008 WL 18555929, * 7 (STB served Apr. 28, 2008).
[85] *Railroad Ventures, Inc.*, AB-556 (Sub.-2X) 2008 WL 1855929, * 7 n. 37 (emphasis in original) (quoting U.S. Federal Highway Administration, Railroad-Highway Grade Crossing Handbook 185 (Revised 2d ed. August 2007).
[86] 384 F.3d at 562.

intrudes on the exclusive jurisdiction of the STB in this area."[87] IC & E raised a nearly identical argument before the Eighth Circuit.[88] As just noted, the STB filed an amicus brief that agreed with the Eighth Circuit's "conclusion that IC & E's broad ICCTA preemption argument is unsound."[89] Put otherwise, the STB has effectively rejected a nearly identical argument to the one UPRR makes here. The Commission should do the same.

44 UPRR also contends that the allocation required by RCW 81.53.295 "imposes an unreasonable burden on railroad operations."[90] As recounted above, the Sixth Circuit determined that a similar allocation did not impose an unreasonable burden in *Blissfield*. UPRR's bald assertion to the contrary does nothing to undercut that court's analysis. The Commission should reject UPRR's argument.

E. Spokane Valley's Petition And The Associated Complaint Suffice To Trigger An Adjudication Under Chapter 81.53 RCW

45 Finally, UPRR contends that Spokane Valley has not properly invoked the Commission's authority because its "[p]etition fails to show that public safety necessitates a change to the existing warning devices."[91] The Commission should reject that claim because Spokane Valley sufficiently raised the public safety need for the protective and warning devices in its petition.[92]

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[87] Motion to Dismiss at 5.
[88] 384 F.3d at 559 ("IC & E argues that [the ICCTA] preempts Iowa Code § 327F.2 as applied in this case because (i) ordering IC & E to pay the cost of replacing four bridges is expressly preempted economic regulation.").
[89] *IC & E*, 384 F.3d at 559. The STB's position on the issue can come as no surprise to UPRR given that it also filed an amicus brief in *IC & E*.
[90] Motion to Dismiss at 5.
[91] Motion to Dismiss at 6.
[92] Spokane Valley used an outdated version of the crossing petition. The current version, which was Staff circulated in March 2021, requires the petitioner to explain the public safety need for the crossing project. Decl. of Betty Young at 1 ¶ 6.

46 To the extent that UPRR contends that Spokane Valley needed to use the magic words "public safety" to trigger the Commission's jurisdiction, it did. Spokane Valley stated in its complaint that the delay in installing the warning devices, a delay resulting from the parties' dispute over maintenance cost allocation, "is harmful to the interests of public safety."[93] Because the Commission should grant Staff's motion to consolidate the complaint and petition dockets, it should treat the allegations in the complaint as effectively part of the petition, and thus view the petition as alleging that public safety required the modifications sought by Spokane Valley.

47 To the extent that UPRR contends that Spokane Valley needed to allege that public safety necessitates the upgrades within the four corners of the petition, it did so, albeit by implication. Spokane Valley stated in the petition that the number of vehicles using the crossing would increase over the coming decade due to development to the north.[94] It stated that the Barker Road project involved widening the highway at the crossing to allow that growth in traffic.[95] To address the additional lane created by this widening, Spokane County asked for authority to install longer cantilevers with flashers for each lane of traffic.[96] It also sought permission to install additional signs and bells.[97] It stated that it intended the signage to be "in accordance with the MUTCD [Manual on Uniform Traffic Control Devices]."[98]

48 The Commission should hold that those factual allegations suffice to allege that public safety required modifications to the signage and protective and warning devices sought by Spokane Valley. Spokane Valley has addressed or will address the increased use

[93] Complaint at 2 ¶ 6.
[94] Petition at 3.
[95] Petition at 5, 7.
[96] Petition at 5.
[97] Petition at 5.
[98] Petition at 5.

of the crossing by modifying it to allow for greater traffic flow. To minimize the danger created by the reconfigured crossing and the increased flow of traffic, Spokane Valley sought to install additional warning devices and signage. That signage will comply with the MUTCD, which provides some measure of the duty of care Spokane Valley owes to the travelling public.[99] Although not stated explicitly, Spokane Valley stated the considerations driving its petition clearly enough to satisfy RCW 81.53.261.

49 If, however, the Commission accepts UPRR's argument that Spokane Valley's petition is insufficient, it should allow Spokane Valley to amend it. The Commission's rules provide that it "may allow amendments to pleadings, motions, or other documents on such terms as promote fair and just results."[100] Dismissal is a harsh remedy, and one that does little to promote administrative economy. The parties have invested time and resources in this docket. A fresh start to allow Spokane County to file a new petition to state explicitly what it has already substantively alleged would waste both. That would further delay the installation of warning devices necessary for the public safety.[101] The Commission should avoid that outcome through permitting Spokane County to make simple amendments to its petition, if necessary.

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[99] *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).
[100] WAC 480-07-395(5).
[101] Complaint at 2.

VI. CONCLUSION

50 The Commission should deny UPRR's motion to dismiss Spokane Valley's complaint and reject its request that the Commission deny Spokane Valley's petition.

DATED this 2nd day of December 2021.

Respectfully submitted,

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