BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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| CHELAN COUNTY,<br><br>Complainant,<br><br>v.<br><br>BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,<br><br>Respondent. | DOCKET NO. TR-061442<br><br>COMMISSION STAFF'S RESPONSE BRIEF ON JURISDICTIONAL ISSUES |

1 Commission Staff hereby responds to the BNSF Railway Company's "brief on jurisdictional issues," in which BNSF requests that the Commission dismiss Chelan County's Petition for Alteration and Relocation of a Highway-Rail Undercrossing.

2 BNSF asserts that because the proposed project involves the design, construction, alteration, and relocation of the railroad trestle (under-crossing) and, therefore, affects transportation, operations, and facilities within the meaning of 49 U.S.C. § 10501(b)(2), enforcement of state authority is preempted and jurisdiction rests exclusively with the Surface Transportation Board.

3 BNSF's analysis is incomplete and incorrect.

4 In *Iowa, Chicago & Eastern Railroad Corporation v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004), the U.S. Court of Appeals for the Eighth Circuit rejected an identical preemption argument. Perhaps most significantly, the court's conclusion was

consistent with amicus briefs submitted by both the Surface Transportation Board and the U.S. Department of Transportation (of which the Federal Railroad Safety Administration is a part), which agreed that the railroad's broad ICCTA preemption argument was unsound. *Id.* at 562.

5 In *Iowa, Chicago & Eastern*, a county had petitioned the Iowa Department of Transportation for a ruling that the railroad must pay for replacement of four bridges—two of which carry the rail line over the county highways. The County asserted that the bridges had deficient vertical clearances for highway traffic and that one was too narrow. *Id.* at 558. An Iowa statute provides that "Every railroad company shall build, maintain, and keep in good repair all bridges, abutments, or other construction necessary to enable it to cross over or under . . . any public highway, or other way . . .." *Id.*, n. 1. Before the matter was fully heard by IDOT, the railroad sought a declaratory judgment in federal district court that the state statute was preempted by 49 U.S.C. § 10501(b)(2), the ICCTA's preemption provision. *Id.* at 558. Specifically, the railroad argued that the ICCTA preempted the Iowa statute because (i) ordering the railroad to pay the cost of replacing four bridges is expressly preempted economic regulation; (ii) ordering the replacement of bridges carrying the rail line over highways is expressly preempted regulation of facilities essential to the railroad's rail service; and (iii) Congress in the ICCTA occupied the field of economic and facilities regulation of railroads. *Id.* at 559.

6 The Court of Appeals rejected the railroad's preemption theory, reasoning that the ICCTA and Federal Railroad Safety Act "must be construed *in pari materia*; that the Federal Railroad Administration under the FRSA exercises primary authority over rail safety; and therefore the FRSA, not ICCTA determines whether a state law relating to rail safety is

preempted." *Id.* at 560. The court noted that the FRSA specifically addresses "the railroad grade crossing problem" at 49 U.S.C. § 20134(a), and includes a *limited* preemption provision at 49 U.S.C. § 20106. The court noted that the U.S. Supreme Court held in *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 665-71, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), held that the FRSA preempts state tort law regulation of railroad grade crossing safety only when federal funds participate in the installation of warning devices and the devices are subject to the approval of the Federal Highway Administration. *Id.* at 559.

7 The Court rejected as unpersuasive the railroads' argument that the limited FRSA preemption provision did not apply because the County sought to replace the bridges for reasons of "highway improvement" and not rail safety. "If [the railroad] is arguing that "rail safety" does not include the highway safety risks created at rail crossings, that cramped reading of the FRSA is inconsistent with 49 U.S.C. § 20134(a), with the federal rail crossing regulations discussed in *Easterwood*, and with common sense." *Id.* at 560.

8 In sum, the court found that its review of "a complex array of statutes and regulations" established "that Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. 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." *Id.* at 561.

9 The Court did not rule out that some outcomes of the as yet incomplete administrative proceeding might be preempted, however, and offered the following caution:

> IDOT's application of [the statute requiring railroad to construct and maintain bridges at highway crossings] to a particular bridge project must be consistent with the long-standing constitutional principle that State and local governments may require railroads to pay for the cost of railway-highway bridges 'made necessary by the rapid growth of communities,' but 'such allocation of costs must be fair and reasonable.'

[Citations omitted.] *Id.* at 562.

*10* To be sure, there are some somewhat analogous instances in which ICCTA preemption has been held to apply. In *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005), the Eighth Circuit upheld an order of the STB that preempted a city's eminent domain action to permanently acquire a portion of railroad right-of-way for storm sewer and bike trail purposes when the STB concluded that the plan would interfere with the rail owners' ability to get equipment to the track for maintenance or to handle derailments, or to develop a railroad terminal and to rebuild a sidetrack. The court noted that the STB itself had distinguished an Interstate Commerce Commission decision (STB's predecessor) called *State of Texas, Department of Transportation-Petition for Declaratory Order Regarding Highway Construction in Tarrant County, TX*, Finance Docket No. 32589 (ICC served Feb. 7, 1995), in which the ICC declined to preempt the State's relocation of a railroad right-of-way in order to accommodate a taking of the existing right-of-way. And indeed, in the STB's decision, the STB stated, with reference to *State of Texas*, "[t]his case, on the other hand, involves a narrowing, not a relocation, of rail right-of-way. Instead of being no better or worse off than it was before the taking, as the railroad in *State of Texas* was, [the rail owner] would be left with less than it previously had, and less than it states it requires in connection with its rail operations, if the northernmost 20 feet of its right-of-way were taken from it." *City of Lincoln—Petition for Declaratory Order*, STB Finance Docket 34425 (Aug. 11, 2004).

*11* The decisions cited by the BNSF in its brief are simply factually inapposite as none of them deal with whether a state may order improvements to a railroad-highway crossing in the interest of public safety and apportion part of the cost to the railroad. The railroad's argument simply goes too far. For example, under RCW 81.53, railroads are responsible for paying the cost of establishing a new crossing over an existing highway. RCW 81.53.100. Railroads are in all cases responsible for maintaining the structure of over- and under-crossings. RCW 81.53.090. Railroads are responsible for maintaining the surface of grade crossings within one foot on either side of the crossing. *Id.* Railroads are also responsible for maintaining warning devices at crossings. RCW 81.53.271, 261, 295. Under Commission rules, a standing train may not block a grade crossing for more than 10 minutes. WAC 480-62-220; *and see Eagle Marine Industries, Inc. v. Union Pacific Railroad Company*, 363 Ill.App.3d 1166, 845 N.E.2d 869, 301 Ill.Dec. 4 (2006) (upholding an identical rule against Commerce Clause and ICCTA challenge and distinguishing *City of Seattle v. Burlington Northern R.R. Co.*, 145 Wash.2d 661, 41 P.3d 1169 (2002)). Clearly, any highway-railroad crossing imposes a cost on a railroad and will potentially cause disruptions to railroad operations when repairs or changes become necessary. Under the logic of BNSF's argument, all such state requirements would be preempted because of their impact of railroad operations—even in the absence of any similar federal regulatory scheme to deal with such crossing problems.

*12* The Commission should reject BNSF's invitation to dismiss Chelan County's petition for lack of jurisdiction.

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Respectfully submitted,

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