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6 BEFORE THE WASHINGTON
7 UTILITIES AND TRANSPORTATION COMMISSION

8 CHELAN COUNTY,)

9 Petitioner,)

10 vs.)

11 BNSF RAILWAY COMPANY,)

12 Respondent.)

DOCKET NO. TR-061442

REPLY OF RESPONDENT BNSF TO
PETITIONER'S BRIEF ON
JURISDICTIONAL ISSUES

13 WUTC CROSSING NO: 2A1673.50U
14 USDOT CROSSING NO. 084493W
15)
16)

17 **I. INTRODUCTION**

18 1. Respondent BNSF Railway Company ("BNSF") submits the following Reply Brief on
19 Jurisdictional Issues in response to the briefs filed by Chelan County (Chelan) and the WUTC
20 Commission Staff. BNSF respectfully renews its request that the Commission dismiss the
21 Petition for Alteration and Relocation of a Highway Under-Crossing (Petition) because the
22 Commission lacks jurisdiction to grant Chelan's request to compel BNSF to pay the cost of
23 relocating the train trestle which structure constitutes an existing grade separated crossing.

24 **II. ARGUMENT**

25 **A. Chelan's Petition Constitutes Economic Regulation Of A Railroad.**

26 2. BNSF has previously recognized and continues to recognize the Commission's
27 jurisdiction in certain circumstances involving safety issues that arise at points where railroads

1 and highways cross. BNSF does not claim the expertise to determine safety standards for vehicle
2 traffic on Chumstick Highway, however, BNSF does have an ongoing interest in rail safety and
3 can attest to the fact that there is no component of *rail safety* in the Chelan proposal.

4 3. Instead, Chelan's Petition fundamentally seeks to compel BNSF to pay the costs of
5 relocating and reconstructing its highway under-crossing, costs that could easily reach ten million
6 dollars, or more. The request therefore constitutes ***economic regulation*** which exceeds the
7 jurisdiction of the Commission. Such ***economic regulation*** of a railroad is expressly reserved
8 for the Surface Transportation Board (STB) by the Interstate Commerce Commission Termination
9 Act (ICCTA), and codified at 49 U.S.C. § 10501(b)(2).

10 4. The Petition itself makes it clear that Chelan greatly underestimates the cost of the project,
11 given that BNSF estimates the cost of the temporary structure alone to be put in place while a new
12 overpass is constructed could be double the total amount cited in Chelan's Petition, or more. The
13 Commission is therefore faced with a Petition for an unfunded or under-funded project of
14 unspecified scope and duration. And while there may in fact be *highway safety* issues at this
15 location, there are *no rail safety* issues. As such, the only disputed issue in Chelan's Petition, as
16 it exists now, is an economic one: getting BNSF to fund their proposal.

17 5. In light of that sole funding issue, and because economic regulation of railroads by
18 agencies other than the STB is expressly prohibited under the ICCTA, Chelan's Petition should
19 be dismissed for lack of jurisdiction.

20 **B. *Iowa, Chicago & Eastern* Is Not Dispositive Or Persuasive To Chelan Petition.**

21 6. Chelan and the Commission Staff, in their respective Briefs on Jurisdictional Issues, rely
22 almost exclusively on an Eighth Circuit case arising out of factual circumstances similar to those
23 faced here. *Iowa, Chicago & Eastern Railroad Corp. v. Washington Co., Iowa*, 384 F.3d 557 (8th
24 Cir. 2004). At first glance that case seems on point insofar as it involves an attempt by a state
25 agency to force a railroad to pay for replacement of railroad bridges. *Id.* at 558. Yet a closer
26 analysis reveals a key difference between that case and here: the implication of *rail safety* issues.
27 Secondly, courts in this jurisdiction have not adopted the reasoning or conclusion reached by the

1 court in *Iowa, Chicago & Eastern* in determining the applicability of the ICCTA to issues
2 involving railroad safety. For those two reasons, *Iowa, Chicago & Eastern* is readily
3 distinguishable in this instance and should be treated accordingly.

4 7. The focus in *Iowa, Chicago & Eastern* was on Iowa Code § 327F.2 (attached as Exhibit
5 1) and the state's ability to regulate safety at railroad crossings. The specific section of the Iowa
6 statute directs that responsibility for maintaining safe bridged crossings in Iowa lies with the
7 railroad. The Eighth Circuit held that because the statute clearly implicated *safety*, it fell into the
8 realm of the Federal Railway Safety Act (FRSA). The court further concluded that the FRSA's
9 preemption provisions trumped the preemption clause in the ICCTA. *Iowa, Chicago & Eastern*,
10 384 F.3d at 559–60.

11 8. The statute at issue in Chelan's Petition here, RCW 81.53.110, differs significantly from
12 the statute interpreted in *Iowa, Chicago & Eastern* in that the RCW is primarily economic in
13 purview. This particular section of the RCW is entitled "*Cost* When Highway Crosses Railroad"
14 (emphasis added), and its purpose is economic regulation and allocation of the costs of
15 construction undertaken for any reason. Because it is not a regulation of *rail safety* issues or at-
16 grade crossings, RCW 81.53.110 does not fall into the realm of the FRSA.

17 9. The precedent relied on by the Eighth Circuit in deciding *Iowa, Chicago & Eastern* comes
18 from cases involving the FRSA preemption of common law tort claims. *See e.g. CSX Transp.*
19 *Inc. v. Easterwood*, 507 U.S. 658, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993)(grade crossing
20 accident); *Tyrell v. Norfolk Southern Railway Company*, 248 F.3d 517 (2001)(FELA injury case).
21 To the extent that such cases clearly involve issues of *rail safety* and regulation at railroad grade
22 crossings and rail yards and not merely the economic allocation of construction costs, the
23 relevance of those cases to the situation here is minimal.

24 10. Put simply, *Iowa, Chicago & Eastern* interpreted a statute that dealt directly with safety
25 issues, and did so by relying on precedent that involved injury claims, as opposed to the RCW
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1 here which implicates only economic cost allocations. Therefore, *Iowa, Chicago & Eastern* is
2 not analogous to this situation or particularly useful to the analysis of economic regulation.¹

3 11. Even if the Commission does find that RCW 81.53.110 somehow implicates safety issues
4 within the realm of the FRSA, which BNSF strongly disputes, *Iowa, Chicago & Eastern*'s reading
5 of the interaction between the FRSA and the ICCTA differs from the analysis adopted by courts
6 in this and other jurisdictions. The Washington Supreme Court in *City of Seattle v. Burlington*
7 *Northern Railroad*, 145 Wn.2d 661 (2002), recognized that the ICCTA and the FRSA can act in
8 tandem in preempting local regulation of railroads. *Id.* at 674. In that case, a local ordinance
9 regulating the amount of time a grade crossing can be blocked by a train was invalidated by the
10 court as preempted by federal law. *Id.* Because the regulation necessarily involved safety in that
11 it would require trains to move through intersections at a higher rate of speed, the court ruled that
12 the FRSA was applicable. *Id.* at 669–70. However, applying the reasoning in *Iowa, Chicago &*
13 *Eastern*, anytime a safety regulation is involved, the FRSA trumps the ICCTA. 384 F.3d at 561.
14 Whereas, in *City of Seattle* the court went on to find that the regulation was preempted by **both**
15 the FRSA and the ICCTA. 145 Wn.2d at 674.

16 12. The Sixth Circuit also ruled under a similar set of circumstances that the FRSA and the
17 ICCTA must both be considered in preemption analysis involving safety. *CSX Transport, Inc.*
18 *v. City of Plymouth*, 92 F. Supp. 2d 643 (E. Dist. MI 2000), *aff'd* 283 F.3d 812 (6th Cir. 2002).
19 The results establish that in this and other jurisdictions, a local regulation must survive
20 preemption analysis both under the FRSA and under the ICCTA.

23 ¹ BNSF respectfully submits that the *Iowa, Chicago & Eastern* case is incorrectly decided as reflected in
24 part by the fact that neither party in that case or the U.S. District Court raised the issue of the FRSA's application to
25 those facts. 384 F.3d at 561 The Eighth Circuit then bootstrapped the FRSA involvement even though the safety
26 issue involved in that case was *highway safety* and there was no implication of *rail safety*. *Id.*, at 561. The flaw in
27 the court's reasoning can be traced to its admittedly broad application of the FRSA (with its limited preemption
clause) to "highway safety risks" at grade separated crossings. The federal statute referenced in the opinion, 49
U.S.C. § 20134, only addresses the hazards posed by *at-grade crossings*. See Exhibit 3, attached. However, there is
nothing in the *Iowa* opinion to indicate that at-grade crossings were involved (at issue was the replacement of four
bridges constituting two over-crossings and two under-crossings) and it is undisputed that no at-grade crossing is
implicated by the Chelan Petition. 49 U.S.C. § 20134 and the analysis of the Eight Circuit based on that statute
simply has no application here. RCW 81.53.010 defines "grade crossing" as a place where a highway crosses a
railroad "at a common grade." See Exhibit 4, attached.

1 13. In sum, *Iowa, Chicago & Eastern* interprets a statute directed to safety issues which is not
2 applicable to this proceeding while Chelan’s Petition and RCW 81.53.110 focus on economic
3 regulation of BNSF. *See* Exhibit 2, attached. But even if the Commission finds that the Petition
4 does involve a viable issue of *rail safety*, which it does not, the Washington Supreme Court and
5 other jurisdictions have adopted a different reading of the interaction between the FRSA and the
6 ICCTA than the court in *Iowa, Chicago & Eastern*. For either or both of these reasons, *Iowa,*
7 *Chicago & Eastern* should not be relied upon here.

8 **C. Economic Regulation Of Railroads Is Expressly Reserved For The STB.**

9 14. An order requiring BNSF to fund a replacement of the highway under-crossing would
10 impose a significant economic cost on BNSF. The track at issue here is a portion of a major
11 railway connecting Chicago and the northern great plains states with the west coast. It is under
12 heavy use, both as a freight and a passenger line. Any disruption along such a key thoroughfare
13 of interstate commerce would cause a substantial economic burden on BNSF’s operation of this
14 railway. In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit
15 found that local ordinances and permitting requirements can amount to economic regulation under
16 the scope of the ICCTA if those requirements affect the railroad’s ability to operate a rail line.
17 *Id.* at 1031. Similarly, regulation by the WUTC here would impose a significant cost and
18 hindrance to BNSF’s ability to operate its railway.² The *City of Auburn* court went on to state
19 that Congress’ preemptive intent in crafting the ICCTA should be given a broad reading. *Id.* at
20 1030–31. The Chelan Petition therefore seeks relief that falls under the exclusive purview of the
21 STB.

22 15. Courts have also found that state and local regulatory authority over railroad construction
23 projects is both expressly and impliedly preempted by the ICCTA. In *Soo Line RR v. City of*
24 *Minneapolis*, 38 F. Supp. 2d 1096 (Mn. 1998), the court held that not only does the ICCTA’s
25 express mention of the term “construction” indicate the STB’s control over any construction

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27 ² The Eighth Circuit case cited in the opposition briefs, *Iowa, Chicago & Eastern*, does not even address the
issue of interference with railroad operations. *see City of Lincoln v. STB*, 414 F.3d 858, 860, 862-63 (8th Cir.
2005)(distinguishing *Iowa, Chicago & Eastern*).

1 projects involving railroads, but also the promulgation of STB regulations regarding construction
2 projects indicate an implied preemption as well. *Id.* at 1099–1100. As one court stated, “it is
3 difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority
4 over railroad operations.” *CSX Trans. Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573,
5 1581 (N.D. Ga 1996).

6 16. To allow each state individually to subject a railroad to varying degrees of responsibility
7 for construction projects at rail crossings would create an expensive and confusing system of
8 regulation of railroad activities. With that in mind, the Code of Federal Regulations (CFR)
9 includes an express finding that *projects to reconstruct existing grade separations* are “deemed
10 to generally be of no ascertainable net benefit to the railroad... .” 23 CFR 646.210(b)(2)
11 (emphasis added). Granting individual counties and states the ability to petition for orders
12 requiring railroads to fund portions of projects that are generally not of any net benefit to the
13 railroad would cause railroads to incur a significant and unsustainable increase to their costs of
14 operation. The ICCTA was specifically intended to prevent such piecemeal economic regulation
15 of railroads, as recognized by the legislative reports regarding its enactment. One House Report
16 emphasized the need to maintain federal exclusivity in economic regulation of the railroads,
17 stating that any other construction would risk “the balkanization and subversion” of railroad
18 regulation. H.R. Rep. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08. A
19 similar Senate Report states that “subjecting rail carriers to regulatory requirements that vary
20 among the States would greatly undermine the industry's ability to provide the ‘seamless’ service
21 that is essential to its shippers and would weaken the industry's efficiency and competitive
22 viability.” S. Rep. 104-176, at 6 (1995).

23 17. As stated in BNSF’s Brief on Jurisdictional Issues, the ICCTA was intended to
24 standardize “all economic regulation” of rail transportation under federal law. H.R. Rep. No.
25 104-311, at 95-96 (1995). Allowing counties and states to act independently to increase the costs
26 of doing business for the railroads is in direct conflict with that congressional intent. Therefore,
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1 because economic regulation of railroads by local and state authorities is both expressly
2 preempted and against the intentions of the ICCTA, this Petition should be dismissed.

3 **C. Chelan’s Petition Is At Best Premature.**

4 18. The Eighth Circuit case, *Iowa, Chicago & Eastern*, relied upon by Chelan and the
5 Commission Staff, references 23 C.F.R. 646.210 which expressly preempts state cost-sharing
6 laws when projects are federally funded. The regulation applies to reconstruction of existing
7 grade separations - such as at issue here - and states that such projects are “deemed to generally
8 be of no ascertainable net benefit to the railroad.” Given that express preemption there is no
9 railroad share of the costs absent a contractual relation. *Id.*

10 19. In *Iowa, Chicago & Eastern*, the Eighth Circuit stated that it wouldn’t presume to construe
11 the complex array of statutes and regulations “in the abstract.” 384 F.3d at 561. But that is
12 precisely what the court did by issuing its opinion prematurely, before the state proceedings were
13 completed, and with knowledge that federal law (23 C.F.R. 646.210) may well apportion costs
14 because “the States do not operate in this arena free of federal involvement.” 384 F.3d at 562.

15 20. Similarly, Chelan seeks an order from the WUTC *in the abstract* that would require BNSF
16 to pay an unspecified portion of the costs of relocating the railroad overpass. Petition, ¶ 11.
17 Chelan has not provided a specific design proposal; it has not solicited construction estimates,
18 or disclosed the source of funding for its “share of the cost” that it promises to pay.³ *Id.* Neither
19 is it apparent that Chelan can provide such an estimate, given that there is no identifiable basis
20 at this point by which to estimate the costs of construction or the share of those costs it hopes the
21 WUTC will allocate to BNSF.

22 **III. CONCLUSION**

23 21. Chelan’s Petition should be dismissed for lack of jurisdiction. There are no rail safety
24 issues here. The Petition’s chief function is to obtain an order requiring BNSF to contribute a
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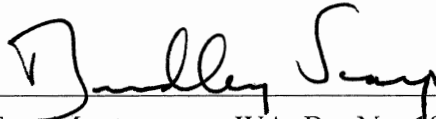
³ If federal funds are involved, 23 C.F.R. 646.210 makes it clear that the railroad’s share would be zero.

1 fixed percentage of the cost of relocating and reconstructing the train trestle. That constitutes
2 impermissible economic regulation of a railroad. But even if the Commission finds that the
3 Petition does implicate *rail safety* concerns, Washington and Ninth Circuit decisions in *City of*
4 *Seattle* and *City of Auburn*, respectively, indicate that local police powers do not simply trump
5 the preemption clause in the ICCTA. Therefore, the imposition of costs on BNSF is an exercise
6 of economic regulatory power expressly and impliedly reserved to the STB. At the very least,
7 Chelan's Petition is premature. Given that it lacks any basic specificity regarding cost, funding
8 and construction, it effectively asks the WUTC to decide these issues in the abstract. The
9 Commission should reject the request especially since any federal funding would negate the
10 economic relief sought by Chelan.⁴

11 22. Accordingly, and for the reason's set forth herein, Chelan's Petition should be dismissed.

12 DATED this 15th day of June, 2007.

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⁴ The precise relief sought by Chelan is not entirely clear due to the reference in their brief (at p. 9) to RCW 81.53.100 which contemplates the railroad bearing the entire expense of a new railroad constructed above or below an existing highway. It is unlikely that Chelan intends that section to apply and the *Supplement Correcting Errata* attached to Chelan's brief contains a correction of that reference and change to RCW 81.53.060. However, the referenced location of the correction itself does not appear to fully correspond with the reference in the brief. Therefore, BNSF assumes that the correction is intended for the statutory reference on p. 9 (lines 11 and 14) of Chelan's brief and that the *Supplement Correcting Errata* simply contains a typographical error.

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3 **CERTIFICATE OF SERVICE**
4

5 I am over the age of 18; and not a party to this action. I am the assistant to an attorney
6 with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite
7 2700, Seattle, Washington, 98101.

8 I hereby certify that true and complete copies of *Reply of Respondent BNSF To*
9 *Petitioner's Brief on Jurisdictional Issues* has been sent via U.S. Mail and Electronic Mail to
10 the following interested parties:

11 Carole J. Washburn, Executive Secretary (Original and 5 copies)
12 Washington Utilities and Transportation Commission
13 1300 S. Evergreen Park Drive S.W.
14 P.O. Box 47250
15 Olympia, WA 98504-7250
16 Fax: (360) 586-1150

17 Gary A. Riesen (one copy)
18 Chelan County Prosecuting Attorney
19 Louis N. Chernak
20 Chelan County Prosecuting Attorney's Office
21 401 Washington Street, 5th Floor
22 P.O. Box 2596
23 Wenatchee, WA 98807
24 Fax: (509) 667-6490

25 I declare under penalty under the laws of the State of Washington that the foregoing
26 information is true and correct.

27 DATED this 15th day of June, 2007 at Seattle, Washington.



Lisa Miller, Legal Assistant

EXHIBIT 1



327F.2 MAINTENANCE OF BRIDGES -- DAMAGES.

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 canal, watercourse, other railway, public highway, or other way, except as otherwise provided by law, and shall be liable for all damages sustained by any person by reason of any neglect or violation of the provisions of this section.

[R60, § 1326, 1327; C73, § 1266, 1267; C97, § 2021; C24, 27, 31, 35, 39, § 7947; C46, 50, 54, 58, 62, 66, 71, 73, 75, § 477.2; C77, 79, 81, § 327F.2]

EXHIBIT 2

RCW 81.53.110**Cost when highway crosses railroad.**

Whenever, under the provisions of this chapter, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed (or the style or nature of construction of an existing crossing is changed), the entire expense of constructing a new grade crossing, an overcrossing, under-crossing, or safer grade crossing, or changing the nature and style of construction of an existing crossing, including the expense of constructing approaches to such crossing and the expense of securing rights of way for such approaches, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road or parkway, between the railroad and the state, in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement. If the highway involved is a state road or parkway, the amount not apportioned to the railroad company shall be paid as provided by law for constructing such state road or parkway.

[1961 c 14 § 81.53.110. Prior: 1937 c 22 § 4B; 1925 ex.s. c 73 § 1B; 1921 c 138 § 2B; 1913 c 30 § 6B; RRS § 10516B. Formerly RCW 81.52.180.]

EXHIBIT 3

TITLE 49 > SUBTITLE V > PART A > CHAPTER 201 > SUBCHAPTER II > § 20134
§ 20134. Grade crossings and railroad rights of way

(a) General.— To the extent practicable, the Secretary of Transportation shall maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem and measures to protect pedestrians in densely populated areas along railroad rights of way. To carry out this subsection, the Secretary may use the authority of the Secretary under this chapter and over highway, traffic, and motor vehicle safety and over highway construction.

(b) Signal Systems and Other Devices.— Not later than June 22, 1989, the Secretary shall prescribe regulations and issue orders to ensure the safe maintenance, inspection, and testing of signal systems and devices at railroad highway grade crossings.

(c) Demonstration Projects.—

(1) The Secretary shall establish demonstration projects to evaluate whether accidents and incidents involving trains would be reduced by—

(A) reflective markers installed on the road surface or on a signal post at railroad grade crossings;

(B) stop signs or yield signs installed at grade crossings; and

(C) speed bumps or rumble strips installed on the road surfaces at the approaches to grade crossings.

(2) Not later than June 22, 1990, the Secretary shall submit a report on the results of the demonstration projects to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.



EXHIBIT 4

RCW 81.53.010
Definitions.

The term "commission," when used in this chapter, means the utilities and transportation commission of Washington.

The term "highway," when used in this chapter, includes all state and county roads, streets, alleys, avenues, boulevards, parkways and other public places actually open and in use, or to be opened and used, for travel by the public.

The term "railroad," when used in this chapter, means every railroad, including interurban and suburban electric railroads, by whatsoever power operated, for the public use in the conveyance of persons or property for hire, with all bridges, ferries, tunnels, equipment, switches, spurs, sidings, tracks, stations and terminal facilities of every kind, used, operated, controlled, managed, or owned by or in connection therewith. The said term shall also include every logging and other industrial railway owned or operated primarily for the purpose of carrying the property of its owners or operators or of a limited class of persons, with all tracks, spurs and sidings used in connection therewith. The said term shall not include street railways operating within the limits of any incorporated city or town.

The term "railroad company," when used in this chapter, includes every corporation, company, association, joint stock association, partnership or person, its, their or his lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any railroad, as that term is defined in this section.

The term "over-crossing," when used in this chapter, means any point or place where a highway crosses a railroad by passing above the same.

The term "under-crossing," when used in this chapter, means any point or place where a highway crosses a railroad by passing under the same.

The term "over-crossing" or "under-crossing," shall also mean any point or place where one railroad crosses another railroad not at grade.

The term "grade crossing," when used in this chapter, means any point or place where a railroad crosses a highway or a highway crosses a railroad or one railroad crosses another, at a common grade.

[1961 c 14 § 81.53.010. Prior: 1959 c 283 § 2; prior: (i) 1913 c 30 § 1; RRS § 10511. (ii) 1941 c 161 § 1; Rem. Supp. 1941 § 10511-1. Formerly RCW 81.52.080, part.]