

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of
CITY OF SPOKANE VALLEY

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

CITY OF SPOKANE VALLEY,

Complainant,

v.

UNION PACIFIC RAILROAD
COMPANY,

Respondent.

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

ORDER 01

CONSOLIDATING DOCKETS;
DENYING MOTION TO DISMISS;
PREHEARING CONFERENCE
ORDER; NOTICE OF HEARING
**(Evidentiary hearing set for May 10,
2022, at 9:30 a.m.)**

- 1 **Nature of proceeding.** On October 25, 2021, the City of Spokane Valley (City) filed with the Washington Utilities and Transportation Commission (Commission) a Petition to Modify Warning Devices at a Highway-Railroad Grade Crossing (Petition) in Docket TR-210809. The Petition seeks to modify a grade public road crossing over Barker Road. The City simultaneously filed a formal complaint (Complaint) against Union Pacific Railroad (UPRR) in Docket TR-210814. The Complaint seeks a Commission decision assigning ongoing maintenance costs for the grade crossing protective devices to UPRR.
- 2 On November 2, 2021, the Commission sent a letter to UPRR requesting a response to the Petition within 20 days indicating its support or opposition.
- 3 On November 22, 2021, UPRR filed a Motion to Dismiss the Petition and Complaint.
- 4 On December 2, 2021, the City of Spokane Valley and Commission staff (Staff) filed a response opposing the Motion to Dismiss.

5 Also on December 2, 2021, Staff filed a Motion to Consolidate the Petition and
Complaint.

6 On December 6 and December 8, 2021, respectively, the City and UPRR filed responses
to Staff's Motion.

7 **Conference.** The Commission convened a virtual prehearing conference in this docket on
January 13, 2021, before Administrative Law Judge Rayne Pearson.

8 **Appearances.** Aziza L. Foster, Kenneth W. Harper, and Quinn N. Plant, Menke Jackson
Beyer, LLP, Yakima, Washington, represent the City. Rachel Tallon Reynolds and Jean
Y. Kang, Lewis Brisbois Bisgaard & Smith LLP, Seattle, Washington, represent UPRR.
Jeff Roberson, Assistant Attorney General, Olympia, Washington, represents
Commission Staff.¹ Contact information for the parties' representatives is attached as
Appendix A to this Order.

9 **Petitions to Intervene.** No party sought to intervene in the proceeding.

10 **Motion to Consolidate.** WAC 480-07-320 provides that the Commission may
consolidate proceedings at its discretion when "the facts or principles of law are related."
The Petition and Complaint share related facts and principles of law, and the parties agree
they should be consolidated. Accordingly, Staff's Motion is granted and Dockets TR-
210809 and TR-210814 are consolidated.

11 **Motion to Dismiss.** We deny UPRR's Motion to Dismiss (Motion). UPRR contends in
its Motion that the Commission should dismiss the Complaint because it violates the
Commerce Clause of the U.S. Constitution, because it is preempted by the federal
Interstate Commerce Commission Termination Act (ICCTA), and because it is arbitrary
and unreasonable. UPRR further argues that the Petition fails to allege that the
modifications proposed in the Petition are required for public safety. We address UPRR's
arguments in turn.

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

Legal Standard

- 12 When the Commission evaluates motions to dismiss, it considers the standards applicable to a motion made under Washington superior court civil rules 12(b)(6) and 12(c).² As Staff and the City observe, dismissal is only warranted if the Commission concludes that the City cannot prove any set of facts that would justify granting it the relief sought in its Complaint. The Commission must consider all the allegations in the City’s Complaint true and “may consider any hypothetical fact supporting its claims.”³ The Commission may only grant the Motion if the City included allegations that show there is “some insuperable bar to relief.”⁴
- 13 Here, the Complaint states that the City entered into an agreement with UPRR related to proposed modifications at the Barker Road crossing. The Complaint further states that the modifications will be paid for, in part, by federal funds authorized through the Federal Highway Act, and that UPRR is not expected to provide funds to modify the crossing. The Complaint alleges that UPRR refuses to assume ongoing maintenance costs at the crossing and would not enter into a Public Highway At-Grade Crossing Agreement unless the City agreed to assume these costs. Finally, the Complaint alleges that UPRR’s position is contrary to RCW 81.53.295, which provides as follows:

Whenever federal-aid highway funds are available and are used to pay a portion of the cost of installing a grade crossing protective device, and related work, at a railroad crossing of any state highway, city or town street, or county road at the then prevailing federal-aid matching rate, the grade crossing protective fund shall pay ten percent of the remaining cost of such installation and related work. The state or local authority having jurisdiction of such highway, street, or road shall pay the balance of the remaining cost of such installation and related work. The railroad whose road is crossed by the highway, street, or road shall thereafter pay the entire cost of maintaining the device.

- 14 In its Motion, UPRR alleges that federal funds were not allocated to the proposed modification project but provides no further facts or documentation to support its claim.

² WAC 480-07-380(1).

³ *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

⁴ *Id.*

Even if it had, the Commission must, at this stage of the proceeding, accept the facts as set forth in the Complaint as true. Accordingly, for the purposes of evaluating the Motion, we accept as true the Complaint's allegation that federal funds will be used to install warning devices at the crossing. As applied to the facts alleged in the Complaint, RCW 81.53.295 would require UPRR to pay the maintenance costs for grade crossing protective devices. We therefore find that the City has satisfactorily demonstrated that it may be able prove facts that would justify granting the relief sought in its Complaint.

Commerce Clause and Due Process Claims

- 15 UPRR contends that the Complaint violates the Commerce Clause of the U.S. Constitution because the proposed crossing modifications are “solely for the public benefit,” and UPRR “does not derive any ascertainable benefit from the project.”⁵ UPRR argues that requiring it to pay ongoing maintenance costs thus “imposes a substantial burden on the flow of interstate commerce and is not fair or reasonable.”⁶
- 16 As Staff and the City correctly observe, however, the Commission has no authority to determine that allocating maintenance costs to UPRR, as required by RCW 81.53.295, violates the Commerce Clause. The Washington Supreme Court has long held that “an administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.”⁷ The quasi-judicial authority granted to the Commission by the legislature is exercised as a function of the executive branch of government, not the judicial branch. Because the Commission is not a court, it lacks authority to declare RCW 81.53.295 unconstitutional. Accordingly, our inquiry ends here. We thus need not, and do not, reach the merits of UPRR's claim that the statute violates the Commerce Clause.
- 17 It follows that the Commission similarly lacks authority to determine that assigning maintenance costs to UPRR as required by RCW 81.53.295 would be “arbitrary and unreasonable.” Although not expressly articulated by UPRR, we agree with Staff and the City that UPRR's argument advances a due process claim and once again requests that the Commission declare the statute it administers unconstitutional. As explained above, the Commission lacks the authority to make such a finding. We likewise decline to address the merits of this claim.

⁵ Motion, ¶13.

⁶ *Id.*

⁷ *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974).

Federal Preemption

- 18 UPRR next argues that the Complaint “violates the ICCTA” because requiring railroads to bear the entire cost of maintaining crossing signals and warning devices pursuant to RCW 81.53.295 constitutes economic regulation of rail transportation and “thus intrudes on the exclusive jurisdiction of the [federal Surface Transportation Board] in this area.”⁸ We agree with Staff and the City 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.
- 19 As Staff observes, an Eighth U.S. Circuit Court of Appeals case, *Iowa, Chicago & Eastern Railroad Corporation v. Washington County*, is analogous to the facts presented here.⁹ In that case, Washington County sought to replace two bridges that carried the interstate rail line of the Iowa, Chicago & Eastern Railroad Corporation (IC&E), and two bridges that carried highways over the rail line. Washington County and IC&E were able to negotiate replacing the bridges, but IC&E refused to provide funding as required by state law. Washington County petitioned the Iowa Department of Transportation for a ruling that IC&E must pay for replacement bridges pursuant to an Iowa statute that requires every railroad company to build, maintain, and keep in good repair, *inter alia*, all bridges necessary for it to cross over or under any waterway or public highway.
- 20 The parties ultimately obtained a stay, and IC&E commenced an action to obtain a declaratory judgment that the statute at issue was preempted by the ICCTA. The Eighth Circuit affirmed the district court’s decision that the ICCTA did not preempt the state law, reviewing a “complex array of statutes and regulations”¹⁰ and concluding 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 ICCTA did not address these problems. Its silence cannot reflect the requisite “clear and manifest purpose of Congress” to preempt traditional state

⁸ Motion, ¶17.

⁹ 384 F.3d 557 (8th Cir. 2004).

¹⁰ *Id.* at 561.

regulation of public roads and bridges that Congress has encouraged in numerous other statutes.¹¹

21 As Staff observes in its response, the ICCTA is not the only federal statute governing rail operations. As such, courts and the federal Surface Transportation Board (STB) interpret its provisions in *pari materia* with those other statutes to avoid requiring courts to conclude that Congress “impliedly repealed” them.¹² Here, determining that the STB has exclusive jurisdiction over the crossing modifications proposed by the Petition would require us to determine that Congress has impliedly repealed other federal statutes governing the Petition.¹³ We decline to reach that conclusion. UPRR advanced no arguments in its motion claiming that the ICCTA impliedly repeals other federal statutes conferring state authority at crossings. Moreover, as Staff notes in its Response, the STB rejected IC&E’s preemption argument and agreed with the Eight Circuit’s decision in *IC & E*.¹⁴

22 We also find that RCW 81.53.295 does not impose an “unreasonable burden” on UPRR. In *Adrian & Blissfield Railroad Co. v. Village of Blissfield*, the Sixth U.S. Circuit Court of Appeals found that the ICCTA did not preempt a Michigan statute that required railroads to pay for the installation and upkeep of sidewalks that abut and cross railroad property.¹⁵ In that case, the Village of Blissfield constructed a sidewalk near a Blissfield Railroad crossing and billed the railroad for the costs. The railroad sued the Village, alleging that the statute assigning those costs to railroads was preempted by the ICCTA. The Sixth Circuit found that “the fact that the statute may prevent the railroad from maximizing its profits ... does not render the statute *unreasonably* burdensome A statutory requirement that the Railroad pay for pedestrian sidewalks and walkways is merely a cost of doing business as a railway running through the center of a town.”¹⁶ Similarly, the requirement in RCW 81.53.295 that the railroad assume the costs of maintaining warning devices at the crossing is a cost of doing business as a railway that

¹¹ *Id.*

¹² *Id.*

¹³ In its Response, Staff correctly observes that the Petition implicates both the Federal Railroad Safety Act and Title 23, United States Code, related to highway safety.

¹⁴ Staff Response, ¶41, citing 384 F.3d at 562.

¹⁵ 550 F.3d 533 (6th Cir. 2008).

¹⁶ *Id.* at 541.

runs through Spokane Valley. Those costs do not impose an unreasonable burden on UPRR.

23 Nor does the statute's exclusive application to railroads make it discriminatory. Like the Michigan statute at issue in *Blissfield*, RCW 81.53.295 applies to UPRR because its railroad bisects Spokane Valley, and the public must be able to traverse the crossing safely. Consistent with the Sixth Circuit's decision, we find that the statute addresses a general state concern about the safety of both pedestrians and motorists and does not discriminate against railroads.

24 Under either analysis, we reach the same conclusion: RCW 81.53.295 is not preempted by the ICCTA.

Public Safety

25 Finally, UPRR argues that the Petition should be dismissed because the City did not include a statement that public safety requires the requested modifications. The same standards applicable to a motion made under Washington superior court civil rules 12(b)(6) and 12(c) apply to the Petition, and we accept as true the facts alleged in the Petition for the purpose of our evaluation. The Petition states that the City proposes to replace the concrete surface at the crossing and install additional active warning devices due to increasing traffic volumes related to land development nearby. Accepting these statements as true, we find that the City has satisfactorily set forth a public safety need (increased traffic at the crossing) that justifies the relief requested (modification of the existing warning devices). An explicit statement to that effect is unnecessary.

26 For the reasons discussed above, we deny the Motion.

27 **Discovery.** The parties requested that the Commission's discovery rules be made available. The parties may conduct discovery under the Commission's discovery rules, WAC 480-07-400 – 425. The Commission urges the parties to work cooperatively together to avoid having to bring discovery matters to the Commission for formal resolution.

28 **Procedural schedule.** The parties agreed upon, and the Commission adopts, the preliminary procedural schedule set forth in Appendix B to this Order.

29 **Document filing and service requirements.** Parties must file and serve all pleadings, motions, briefs, and other prefiled materials in compliance with all of the following requirements:

(a) Parties must submit electronic copies of all documents by 5 p.m. on the filing deadline established in the procedural schedule (or other deadline as applicable) unless the Commission orders otherwise. Paper copies are not required. Parties must comply with WAC 480-07-140(6) in formatting, organizing, and identifying electronic files. Parties must submit documents electronically through the Commission's web portal (www.utc.wa.gov/e-filing). If a party is unable to use the web portal to submit documents for filing, the Commission will accept a submission via email to records@utc.wa.gov provided the email: (1) explains the reason the documents are not being submitted via the web portal, and (2) complies with the requirements in WAC 480-07-140(5)(b).

(b) Parties must electronically serve the other parties and provide courtesy electronic copies of filings to the presiding administrative law judge (rayne.pearson@utc.wa.gov) by 5 p.m. on the filing deadline unless the Commission orders otherwise. If parties are unable to email copies, they may furnish electronic copies by delivering them on a flash drive only.

30 **Cross-examination exhibits.** Parties are required to file and serve all proposed cross-examination exhibits by **12 p.m. on May 6, 2022**. The Commission requires electronic copies in searchable Adobe Acrobat (.pdf). The exhibits must be grouped according to the witness the party intends to cross examine with the exhibits.

31 **Exhibit lists.** Each party must file a list of all exhibits the party intends to introduce into the evidentiary record, **including all prefiled testimony and exhibits**, as well as cross-examination exhibits. The parties must file and serve their exhibit lists by **12 p.m. on May 6, 2022**.

32 **Cross-examination time estimates.** Each party must provide a list of witnesses the party intends to cross-examine at the evidentiary hearing and an estimate of the time that party anticipates the cross-examination of that witness will take. Parties should not file witness lists or cross-examination time estimates but must provide them to the administrative law judge and the other parties via email by **12 p.m. on May 6, 2022**.

33 **The Commission gives notice that it will hold a virtual public comment hearing in these matters at 6 p.m. on Tuesday, May 10, 2022, to afford members of the public an opportunity to present oral comments on the issues presented by this case. To participate by phone, call (253) 215-8782 and use the Meeting ID: 920 8684 0216#**

and Passcode: 712357#. To participate via Zoom, please use the following link: [Click here to join meeting.](#)

34 **The Commission gives further notice that it will hold a virtual evidentiary hearing in these matters at 9:30 a.m. on Tuesday, May 10, 2022. To participate by phone, call (253) 215-8782 and use the Meeting ID: 986 8993 4306# and Passcode: 706512#. To participate via Zoom, please use the following link: [Click here to join meeting.](#)**

35 **Notice to the parties: a party who objects to any portion of this Order must file a written objection within ten (10) calendar days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. The service date appears on the first page of the order in the upper right-hand corner. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

Dated at Lacey, Washington, and effective January 24, 2022.

Washington Utilities and Transportation Commission

/s/ Rayne Pearson
RAYNE PEARSON
Administrative Law Judge

Appendix A

**Parties' Representatives
Dockets TR-210809 and TR-210814**

PARTY	REPRESENTATIVE	PHONE	E-MAIL
City of Spokane Valley	Aziza L. Foster Kenneth W. Harper Quinn N. Plant Menke Jackson Beyer, LLP 807 N. 39 th Ave. Yakima, WA 98902	509-575-0313	zfoster@mjbe.com qplant@mjbe.com kharper@mjbe.com
UPRR	Rachel Tallon Reynolds Jean Y. Kang Lewis Brisbois Bisgaard & Smith LLP 1111 Third Avenue, Suite 2700 Seattle, WA 98101	206-436-2020	Rachel.Reynolds@lewisbrisbois.com Jean.Kang@lewisbrisbois.com
Staff	Jeff Roberson Assistant Attorney General Office of the Attorney General Utilities and Transportation Division P.O. Box 40128 Olympia, WA 98504-0128	360-664-1188	Jeff.Roberson@utc.wa.gov

Appendix B
Procedural Schedule
Dockets TR-210809 and TR-210814

Event	Date
City of Spokane Direct Testimony	March 22, 2022
UPRR and Commission Staff Response Testimony	April 12, 2022
Settlement Conference	April 22, 2022
Rebuttal/Cross Answering Testimony (All Parties)	April 26, 2022
Discovery Cutoff	May 4, 2022
Cross-Examination Exhibits, Witness Lists, and Time Estimates	May 6, 2022 (by 12 p.m.)
Evidentiary Hearing	May 10, 2022, at 9:30 a.m.
Public Comment Hearing	May 10, 2022, at 6 p.m.
Simultaneous Post-Hearing Briefs	TBD