Decision No. C12-0881

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 10A-842R

IN THE MATTER OF THE COLORADO DEPARTMENT OF TRANSPORTATION, AND THE CITY OF COMMERCE CITY FOR AUTHORITY TO WIDEN THE ROADWAY AND CROSSING, INSTALL PEDESTRIAN SIDEWALKS, REMOVE EXISTING FLASHERS AND GATES AND INSTALL NEW APPROACH GATES, RAISED MEDIANS AND FLASHERS, RELOCATE ONE EXISTING RAILROAD CONTROL POINT TO THE NORTH SIDE AND, RELOCATE TWO SWITCHES TO MOVE THE HAZELTINE SIDING TO THE NORTH AT THE CROSSING OF THE UNION PACIFIC RAILROAD TRACK ON STATE HIGHWAY 44 (104TH AVE.) IN CITY OF COMMERCE CITY, ADAMS COUNTY, COLORADO.

ORDER ADDRESSING EXCEPTIONS AND MOTION TO STRIKE

Mailed Date: August 3, 2012
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TABLE OF CONTENTS

I. BY THE COMMISSION 3
A. Statement 3
B. Background 3
C. Recommended Decision 7
D. The City Exceptions 9
1. The City 9
2. UPRR 9
3. Discussion 10
E. UPRR Exceptions 11
1. The Argument that the Recommended Decision Fails to Properly Find the Just and Reasonable Point of Crossing Pursuant to § 40-4-106(2)(a), C.R.S. 11
a. UPRR 11
b. The City 12
c. Discussion 13

2. The Argument that the Recommended Decision Exceeds the Powers of the Commission as it Grants Property to the Applicant 13
a. UPRR 13
b. The City 14
c. Discussion 14
3. The Argument that the Recommended Decision Errs in Allocating Signal Costs Against UPRR in that no Allocation can be had Because there is no Money in the Highway Rail Crossing Signalization Fund 16
a. UPRR 16
b. The City 17
c. Discussion 17
4. The Argument that the Recommended Decision and the Proceedings Below have Deprived UPRR of Due Process of Law 18
a. UPRR 18
b. The City 18
c. Discussion 19
5. The Argument that Cost Allocation has been Waived in this Proceeding 19
a. UPRR 19
b. The City 20
c. Discussion 20
6. The Arguments Related to Cost Allocation-Roadway and Track Work 21
a. UPRR 21
b. The City 21
c. Discussion 22
7. The Arguments Related to Cost Allocation-Crossing and Queue Cutter Signals 23
a. UPRR 23
b. The City 24
c. Discussion 25
8. The Argument that Federal Law Preempts the Commission's Authority Over Hazeltine Side Track 26
a. UPRR 26
b. The City 29
c. Discussion 30
(1) Types of Federal Preemption 30

(2) Categorical Preemption....31
(a) The ICCTA Does Not Preempt Routine Crossing Matters....32
(b) In Matters Involving Safety at Railroad Crossings, the FRSA Rather than the ICCTA Determines Whether a State or Local Law is Preempted....34
(c) As Applied Preemption....35
(d) Conclusion....36
F. Motion to Strike....37
G. Filings....39
II. ORDER....40
A. The Commission Orders That:....40
B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING July 18, 2012....41

I. BY THE COMMISSION

A. Statement

1. This matter now comes before the Commission for consideration of exceptions to Recommended Decision No. R12-0400 (Recommended Decision), filed on May 29, 2012 by the Union Pacific Railroad Company (UPRR) and the City of Commerce City (City). Both UPRR and the City filed responses to the exceptions on June 12, 2012. In its response to exceptions, the City also moved to strike certain exhibits attached to UPRR's exceptions (Motion to Strike). UPRR filed its response to the Motion to Strike on June 26, 2012. Being fully advised in the matter and consistent with the discussion below, we grant the exceptions filed by UPRR, in part, and deny, in part; deny the exceptions filed by the City; grant the Motion to Strike; and modify the dates by which the parties must make certain filings on our own motion.

B. Background

2. The Administrative Law Judge (ALJ) assigned to this docket, G. Harris Adams, discussed the procedural history of this matter in the Recommended Decision, at ¶¶ 1-15.

We incorporate that statement of procedural history in this Order and will not reiterate it here. We will refer to the procedural history below, as needed to provide context to our rulings. Following the issuance of the Recommended Decision, we extended the deadline for filing exceptions and responses to exceptions. *See,* Decision No. C12-0472-I, mailed May 3, 2012.

3. The City is in the process of constructing various improvements along the 104th Avenue corridor. Planned improvements start east of State Highway 2 and extend west past U.S. Highway 85. This application is a part of the overall project involving improvements to 104th Avenue. Because 104th Avenue is a State Highway, the instant docket is a joint application by the City and the Colorado Department of Transportation (CDOT), requesting to make changes to 104th Avenue at the crossing with UPRR.[1]

4. At the crossing of the UPRR Greeley Subdivision, 104th Avenue is currently a two-lane roadway that runs east and west. The UPRR Hazeltine siding is to the north of this crossing. UPRR uses this siding for a variety of purposes including, but not limited to, storing rail cars, delivery of rail cars to industries, and meets and passes with trains on the mainline. The Hazeltine siding is the first siding north out of Denver and it contains a control point. This is a point on a rail line where trains receive a signal about whether they can continue into the next signaling block or whether they must come to a stop to wait for another train to be moved into a siding or pass before the stopped train may proceed. Currently, when the northbound trains are stopped at the control point, the train stops south of the 104th Avenue crossing.

5. The Rolla Yard Lead is located to the south of the 104th Avenue crossing. UPRR uses the Rolla Yard Lead primarily as an automobile unloading facility. The switch used to

[1] Even though CDOT is one of the joint applicants in this docket, its participation in the case was limited. The City proposed to perform the work associated with the project. Therefore, only the City will be referred to as the applicant in this Order.

move the trains from the mainline track to the Rolla Yard Lead is a hand thrown switch. This requires one of two actions by the UPRR personnel. The first option is that the UPRR personnel can stop the train north of the 104th Avenue crossing. UPRR personnel would then cross 104th Avenue to throw the switch and cross back to the train. The train would then move from the Hazeltine siding south onto the mainline track, move through the 104th Avenue crossing, then move onto the Rolla Yard Lead. In the alternative, the train can move into the 104th Avenue crossing and then stop, blocking the crossing, while UPRR personnel throw the switch to move the train into the Rolla Yard. Hearing Exhibit ZZ is a representation of the existing track, switch, and siding configurations in relation to the existing location of 104th Avenue.

6. During the hearing, the City proposed certain changes to the crossing which have been referred to as Option 4. Option 4 contemplates a widening of 104th Avenue, new active warning equipment, and movement of the Hazeltine siding switch as well as the control point north of the present location. *See,* Hearing Exhibit ZZ. Option 4 contemplates widening 104th Avenue ultimately to six lanes, with the immediate construction of the four outermost lanes and a wide median where the remaining two lanes would be located. Finally, Option 4 contemplates an installation of a sidewalk and multi-use path, as well as installation of new active warning equipment consisting of flashing lights with gates, median flashing lights with gates, and the constant warning time detection circuitry.

7. For its part, UPRR mainly advocated for a grade separation at the 104th Avenue crossing. However, the railroad also presents an alternative at-grade proposal. This proposal has been referred to at the hearings and in the Recommended Decision as Option 5. Option 5 contemplates that the control point would be moved south of its existing location and

south of the crossing; the switches for the Hazeltine siding and the Rolla Yard Lead would be removed; and a second track would be constructed to connect the Hazeltine siding to the Rolla Yard Lead. In addition to these proposed updates, a crossover would be installed south of the crossing. The crossover would allow trains moving northbound on the mainline to crossover to the Hazeltine siding, and would allow trains moving southbound on the Hazeltine siding to move either straight through to the Rolla Yard Lead or to move over to the mainline. Hearing Exhibit CC is a representation and comparison of the existing track configuration and the Option 5 track configuration.

8. UPRR argues that, because the new control point would be located outside of the old control point, most of the construction, installation, and some of the testing involved with the Option 5 track configuration could be done while the Hazeltine siding is in operation. UPRR contends it would take approximately two weeks to cut in the new control point signals, perform the testing, remove the Hazeltine Siding switch, remove the Rolla Yard Lead switch, connect the track together with new track (and a new track through the 104th Avenue crossing), and finish the work to cut the crossover into the new track and the existing mainline track.

9. Further, UPRR recommends the installation of queue cutter signals to mitigate queuing issues that are currently present at the crossing and will worsen after the 104th Avenue roadway improvements are completed. A queue cutter signal works by stopping traffic before it queues on or across the tracks. Loop detectors would be installed downstream from the crossing at some distance from the crossing. The queue cutter signal stays green when traffic drives over the loop detectors at a normal speed. The signal cycles to an amber and then a red indication when traffic starts to slowly move or stop over the loop detectors. Traffic would stop at the stop bar located before entering the crossing instead of entering the crossing only to be stopped near

or on the crossing. Once the queue of cars stopped on the loop detector moves off of the loop detector, the queue cutter signal would cycle to green, and traffic would start to flow once again. The queue cutter signal would be interconnected and preempted by the railroad signal, such that the queue cutter would cycle to red before or at the time that the railroad signal lights start to flash and the gates started to descend. The queue cutter signal would operate separately from the traffic signal at the U.S. 85/104th Avenue intersection.

C. Recommended Decision

10. In the Recommended Decision, the ALJ did not order either Option 4 or Option 5. Instead, he ordered the roadway improvements, including the highway approaches and the initial cost of the necessary crossing service extension. The ALJ ordered the City to pay the expenses associated with these roadway improvements.[2] The ALJ also ordered the removal of the Hazeltine siding switch and the portion of the track within the expanded crossing.[3] The ALJ ordered UPRR to pay for these expenses.[4] The ALJ also noted that, should UPRR choose to reinstall a south switch to the Hazeltine Siding, it can do so outside of the crossing and at its own expense.[5] Our review of the record shows that what the ALJ has ordered in the Recommended Decision does not preclude the railroad from constructing either Option 4, Option 5, or perhaps yet another configuration at the crossing.

11. In addition, the ALJ ordered installation of a queue cutter signal for westbound 104th Avenue;[6] installation of loops and conduit to accommodate a future queue cutter signal for eastbound 104th Avenue;[7] and active warning devices consisting of gates, flashing lights, bells,

[2] *Id.*, at Ordering ¶ 4.
[3] *Id.*, at ¶ 253.
[4] *Id.*, at ¶ 302, Ordering ¶ 5.
[5] *Id.*, at ¶ 255
[6] *Id.*, at ¶ 303, Ordering ¶ 8.
[7] *Id.*, at Ordering ¶ 8.

constant warning time circuitry, medians, and a new cabin.[8] The ALJ allocated 24 percent of the total signalization costs to the railroad and the remaining 76 percent to the City.[9] Because costs for the railroad and queue cutter signals were unknown during the hearing, the ALJ ordered UPRR to file a cost estimate for the crossing surface work, the crossing signal work, and the work necessary to interconnect the queue cutter signal, and the City to file construction plans and a cost estimate for the queue cutter signal.[10] The ALJ ordered the parties to make these filings on or before July 31, 2012.[11] Finally, the ALJ ordered the parties to file a signed Construction and Maintenance Agreement by September 30, 2012; the City to file a crossing work completion letter on or before December 31, 2012; and UPRR to file a copy of the U.S. Department of Transportation National Inventory form showing the updated crossing information on or before December 31, 2012.[12]

12. We will uphold the Recommended Decision with respect to the removal of the southern switch at Hazeltine siding and the portion of the track within the expanded crossing. However, just like the ALJ, we decline to prescribe a particular method for reconnecting the Hazeltine siding to the mainline track outside of the point of crossing. We adopt this approach because we find that the parties, particularly UPRR, are in a better position to make this decision than the Commission. Further, we do not wish to preclude the parties from discussing possible variations to the crossing configurations presented in the record (Option 4 or Option 5) or even exploring yet another crossing configuration. For these reasons, we will not order Option 5 as UPRR urges. We emphasize, however, that neither the Recommended Decision nor this Order

[8] *Id.*, at ¶¶ 1.
[9] *Id.*, at Ordering ¶ 6.
[10] *Id.*, at Ordering ¶¶ 9-10.
[11] *Id.*
[12] *Id.*, at Ordering ¶¶ 13-15.

precludes Option 5 or any other method for reconnecting the Hazeltine siding to the mainline track outside of the point of crossing.

D. The City Exceptions

1. The City

13. The City takes exceptions to ordering paragraphs 8 and 10 of the Recommended Decision, which require the installation of queue cutter signals. The City argues that insufficient evidence was presented at the hearings in this matter to support either the need for, or the impact of, implementing a queue cutter at the crossing. The City states that the record does not support the conclusion that a queue cutter signal will "promote safety." The City contends that the sole evidence to support such a conclusion was conceptual information provided at the hearings by UPRR witness Rick Campbell. The City argues that the record contains no evidence on the following matters: (1) the impact of the queue cutter on westbound 104th Avenue traffic flow; (2) whether adding a queue cutter would create additional or greater safety challenges at the crossing; and (3) potential air quality impacts of adding a queue cutter. The City also argues that the Recommended Decision ignores the evidence that traffic will not queue across the railroad tracks once roadway improvements are completed. The City concludes that practical impacts of a queue cutter on traffic, safety, and air quality at the crossing are unknown. The City urges the Commission to delete any requirement that the City install, maintain, and pay for a queue cutter at the crossing.

2. UPRR

14. In response, UPRR points to the testimony supporting the conclusion that a queue cutter signal was necessary for westbound 104th Avenue traffic. UPRR also contends that even the City's own witness stated that a queue cutter signal could be a good safety measure as long as

it ran independent to the U.S. 85/104th Avenue signal. UPRR also argues that the record contains uncontroverted evidence regarding the safety benefits of a queue cutter signal, therefore showing that such a signal would promote safety at the crossing. UPRR states that the record contains evidence that traffic flows would not be harmed with the addition of a queue signal and that there would be queuing of vehicles to the tracks, even under the City's projected volumes. Regarding air quality impacts, UPRR states that the City has provided no authority for the proposition that the Commission is required to consider air quality impact in determining what is necessary to protect public safety at a railroad crossing. Therefore, UPRR urges the Commission to uphold the Recommended Decision on the issue of the queue cutter signal at the crossing.

3. Discussion

15. We uphold the Recommended Decision on the queue cutter signal issue. Given the documented queuing issues at the crossing,[13] the only alternative to the queue cutter signal is interconnection and preemption of the U.S. 85/104th Avenue traffic signal by the railroad signal. Due to the traffic volumes on U.S. 85 and the distance between U.S. 85 and the crossing, such a proposition will lead to excessive preemption times, which would in turn cause operational and safety issues at the U.S. 85/104th Avenue intersection and possibly on I-76. The installation of the queue cutter signal will accomplish the same goals as preemption and interconnection. Both solutions would keep vehicles from queuing near or on the tracks, but the queue cutter signal will do so without causing operational and safety issues at the U.S. 85/104th Avenue intersection. For this reason, we find that a queue cutter is preferable to preemption.

[13] Recommended Decision, at ¶¶ 243-244; Hearing Exhibit Z; Hearing Transcript, July 27, 2011, p. 156, line 7 to p. 157, line 20; p. 159, lines 1 to 4.

16. Further, contrary to the City's claims, the record does contain evidence that queue cutter signal operations promote safety at highway-rail crossings. Mr. Campbell, testifying on behalf of UPRR, discussed not only queue cutter signals and their operations in the abstract, but also offered an expert opinion on how such a signal would prevent accidents and promote public safety at the 104th Avenue crossing.[14] In addition, although the City is correct in that the evidence indicates that traffic would not queue across the tracks once the improvements are completed, it is also the case that traffic could queue to or across the tracks at that time or in the near future.[15] Finally, regarding the impacts of a queue cutter to traffic flow and air quality, the City failed to raise these issues at the hearing. For the foregoing reasons, we deny the exceptions filed by the City.

E. UPRR Exceptions

1. The Argument that the Recommended Decision Fails to Properly Find the Just and Reasonable Point of Crossing Pursuant to § 40-4-106(2)(a), C.R.S.

a. UPRR

17. UPRR begins its exceptions by objecting to the following language contained in paragraph 19 of the Recommended Decision:

> 19. The Commission has the power to determine the just and reasonable manner, including the particular point of crossing of public utility facilities across the facilities of another utility at grade, above grade, or below grade. This provision clearly applies to utilities *other than railroad crossing facilities at grade*. § 40-4-106(2)(a), C.R.S.

(Emphasis by UPRR.)

[14] Hearing Transcript, July 27, 2011, p. 162, line 11 to p. 177, line 25; p. 205, line 1 to p. 206, line 20.
[15] Recommended Decision, at ¶¶ 243-244; Hearing Exhibit Z.

UPRR contends that, in paragraph 19 of the Recommended Decision, the ALJ has found that the Commission has no power to determine the justness and reasonableness of a highway's proposed crossing with a railroad. UPRR argues that this finding is contrary to the plain language of § 40-4-106(2)(a), C.R.S. The railroad contends that this is why the ALJ only considered whether the City's preferred plan would maximize public safety and did not balance the highway needs versus railroad needs.

18. UPRR contends that the plain language of § 40-4-106(2)(a), C.R.S., gives the Commission the power to determine the just and reasonable manner, including the particular point of crossing, when the railroad tracks cross the facilities of any other public utility or any public highway at grade. UPRR relies on the legislative history of the statute as well as several principles of statutory interpretation to further support its argument.

b. The City

19. In its response to exceptions, the City does not dispute that § 40-4-106(2)(a), C.R.S., gives the Commission the power to determine the just and reasonable manner, including the particular point of crossing, where, as here, the railroad tracks would cross the facilities of a public highway at grade. Instead, the City argues that UPRR misinterpreted the ALJ. The City contends that, in paragraph 19 of the Recommended Decision, the ALJ did not state that the Commission has no duty to consider these issues, but rather that the statute applies not only to railroad crossings but to crossings involving other utilities as well. The City also argues that the statute does not require the Commission to balance the rail needs, on the one hand, and highway and public safety needs, on the other hand, in determining the just and reasonable manner of the crossing. Rather, the express purpose of § 40-4-106(2)(a), C.R.S., is to prevent accidents and promote public safety.

c. Discussion

20. We agree with the City that UPRR has apparently misinterpreted paragraph 19 of the Recommended Decision. The notion that the Commission has the power to determine the just and reasonable manner, including the particular point of crossing at which the railroad tracks would cross the facilities of a public highway at grade (among other types of crossings) is not controversial and appears in the plain language of § 40-4-106(2)(a), C.R.S. We also agree with the City that the statute requires the Commission to do so "…as may to the commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted." Subsection (2)(a) of § 40-4-106, C.R.S., does not require the balancing of the needs or desires of the railroad, unlike other subsections that pertain to cost allocation. We therefore deny the exceptions filed by UPRR on this ground.

2. The Argument that the Recommended Decision Exceeds the Powers of the Commission as it Grants Property to the Applicant

a. UPRR

21. In exceptions, UPRR argues that the ALJ erred by granting its property to the City. UPRR points out that, while the Commission does have the power to determine the just and reasonable point of crossing pursuant to § 40-4-106(2)(a), C.R.S., it has no power to act as a condemnation court. UPRR also states that the Recommended Decision specifies the point of crossing with the new widened roadway, which will affect various railroad facilities. UPRR points out that the ALJ ordered UPRR to take the south switch of the Hazeltine siding out of service, at UPRR's cost, which is within the expanded footprint of the roadway. UPRR states that the Recommended Decision is silent on who should bear the cost associated with the loss of use of the siding. However, the Recommended Decision does state, at paragraph 302, that if the siding is reconstructed later, it would be UPRR's burden to do so.

22. UPRR argues the Commission lacks the authority to make an order concerning the switch and the sidetrack, as it does not have eminent domain authority. UPRR argues that the condemnation of the Hazeltine siding must be resolved in an eminent domain proceeding, not before the Commission.

b. The City

23. In response, the City does not dispute that the Commission has no authority to condemn railroad property. The City agrees that, although the Commission has the authority to rule on the point and the manner of a crossing, any resulting property rights must be determined at another time and in another forum. The City relies on *City of Craig v. Pub. Utils. Comm'n*, 656 P.2d 1313 (Colo. 1983), where the Colorado Supreme Court has held that the Commission proceeding to determine whether a crossing should be closed is not an adjudication of property rights at the crossing, but is a condition precedent to such an adjudication.

24. The City submits that, if UPRR believes its property interests are implicated by the Recommended Decision, the proper forum to determine such property rights is, failing a successful negotiation among the parties, a district court condemnation action. Finally, the City states that UPRR cites no authority for the proposition that a railroad track or switch is a fixture attached to the land. Therefore, the City implicitly argues that there is no authority for the proposition that portions of the Recommended Decision pertaining to the switch, the side track, and the siding amount to condemnation.

c. Discussion

25. It appears that the parties do not dispute the applicable legal framework. The Commission has the authority to rule on the point and manner of a crossing between a railroad and a public highway, and any resulting property rights must be determined either by

agreement of the parties or by a district court in an eminent domain action. The issue is whether the ALJ, in paragraph 302 of the Recommended Decision, attempts to grant any property to the City and/or to take it from the railroad. In paragraph 302 of the Recommended Decision, the ALJ stated as follows:

> 302. Union Pacific is allocated the cost of the track construction or removal. Should Union Pacific choose to reinstall a south switch to the Hazeltine siding, it may do so outside of the crossing at its election and expense.

We find that the Recommended Decision does not attempt to grant any property to the City or to take it from the railroad. First, UPRR has cited no authority for the proposition that the track and switch are fixtures and that, as a result, paragraph 302 of the Recommended Decisions amounts to the condemnation of the underlying land. Further, § 40-4-106(2)(a), C.R.S., authorizes the Commission to determine the just and reasonable manner including the particular point of crossing and to prescribe the terms and conditions of installation and operation, maintenance, and warning at all such crossings. Finally, § 40-4-106(3)(a), C.R.S., authorizes the Commission to prescribe the proportion in which the expense of the alteration or abolition of the crossing should be divided between the railroad corporations affected or between the corporation and the state, county, municipality, or public authority in interest. We find that what the ALJ has ordered in paragraph 302 of the Recommended Decision comes squarely within the purview of §§ 40-4-106(2)(a) and (3)(a), C.R.S. In the *City of Craig*, the Colorado Supreme Court has considered these provisions before finding that a Commission decision is not an adjudication of property rights.[16] To the extent UPRR believes its property rights will be affected by a final Commission decision issued in this docket, it may pursue appropriate remedies in a condemnation suit before a district court. We deny the exceptions filed by UPRR on this ground.

[16] The Commission promulgated Rules 7211(d) and (e), to implement §§ 40-4-106(2)(b) and (3)(a), C.R.S.

3. The Argument that the Recommended Decision Errs in Allocating Signal Costs Against UPRR in that no Allocation can be had Because there is no Money in the Highway Rail Crossing Signalization Fund

a. UPRR

26. On exceptions, UPRR argues that the ALJ erred in allocating signal costs against the railroad, because no allocation can be had if there is no money in the highway rail crossing signalization fund. UPRR points out that the ALJ allocated a portion of the signal costs to UPRR and the rest to the City. The railroad argues that, because there is no funding at this time in the highway rail crossing signalization fund, an allocation pursuant to § 40-4-106(2)(b), C.R.S., is improper.

27. Section 40-4-106(2)(b), C.R.S., states as follows:

> Whenever the commission orders in any proceeding before it, regardless of by whom or how such proceeding was commenced, that automatic or other safety appliance signals or devices be installed, reconstructed, or improved and operated at any crossing at grade of any public highway or road over the tracks of any railroad corporation, the commission shall also determine and order, after notice and hearing, how the cost of installing, reconstructing, or improving such signals or devices shall be divided between and paid by the interested railroad corporation whose tracks are located at the crossing on the one hand and the highway operations and maintenance division and the interested city, city and county, town, county, or other political subdivision of the state on the other hand.
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> ***
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> In order to compensate for the use of the crossings by the public generally, the commission shall also order that such part of the cost of installing, reconstructing, or improving the signals or devices as will not be paid by the railroad corporation be divided between the highway-rail crossing signalization fund and the city, town, city and county, county, or other political subdivision in which the crossing is located, and the commission shall fix in each case the amount to be paid from the highway-rail crossing signalization fund and the amount to be paid by the city, town, city and county, county, or other political subdivision. Any order of the commission under this section for the payment of any part of any such costs from the highway-rail crossing signalization fund shall be authority for the state treasurer to pay out of said fund to the person, firm, or corporation entitled thereto under the commission's order the amount so determined to be paid from said fund.

28. UPRR surveys the legislative history of § 40-4-106(2)(b), C.R.S., in support of its argument that the statute requires an allocation to the highway-rail signalization fund. It argues that the requirement that the Commission allocate costs against both the highway authority and the highway rail crossing signalization fund protects the railroads from having to bear the entire cost of the safety devices. UPRR contends that it has not been able to find any instance of a cost allocation pursuant to § 40-4-106(2)(b), C.R.S., without an allocation to the fund.

b. The City

29. In response, the City argues that the current amount of funds in the highway-rail crossing fund is irrelevant. The City argues that the Commission is not obligated to allocate any portion of the costs against the fund. The City claims that the plain language of the statute states that the Commission shall first allocate costs to the railroad, and, second allocate any remaining amount between the fund and the roadway authority. Therefore, whether any money exists in the fund has no bearing on the amount allocated to UPRR in this matter.

c. Discussion

30. We agree with the City regarding the meaning of § 40-4-106(2)(b), C.R.S. That statute requires an allocation of signal costs to the railroad first, and allocation of any remainder between the highway rail signalization fund and the city, town, city and county, county, or other political subdivision second. Section 40-4-106(2)(b), C.R.S., plainly states that only "such part of the cost of installing, reconstructing, or improving the signals or devices as will *not* be paid by the railroad corporation," is subject to an allocation between the local highway authority and the highway-rail signalization fund (emphasis added). Therefore, an allocation to the fund does not so much protect the railroads, but rather the local highway authorities for the use of the crossing by the "public generally," which does not contribute into

the local tax base. Therefore, we agree with the City that the present lack of funds in the highway-rail crossing fund does not prevent the Commission from allocating signal costs against UPRR. We deny the exceptions filed by UPRR on this ground.

4. The Argument that the Recommended Decision and the Proceedings Below have Deprived UPRR of Due Process of Law

a. UPRR

31. In its exceptions, UPRR argues that the proceedings before the ALJ have deprived it of due process of law. The railroad states that when the City and CDOT filed the application in 2010, no mention was made of cost allocation. In addition, according to UPRR, the issue of cost allocation did not come up during the discovery stage, motions practice, or the evidentiary hearing that began on July 25, 2011. Following that hearing, the ALJ closed the record.

32. Subsequently, the ALJ reopened the evidentiary record out of a concern that the original notice provided in this proceeding did not sufficiently address the cost allocation issues. Decision No. R11-1264-I, mailed November 25, 2011. UPRR contends that the original notice provided in this proceeding was not merely "insufficient" as to cost allocation issues, it was totally lacking and in fact gave notice that there would be no cost allocation. UPRR states that it has proceeded with the development of its case upon a valid belief that cost allocation was not part of this case and that, had it known this case was going to be about cost allocation to begin with, it would have structured its case much differently. UPRR argues that changing the scope and subject matter of the hearing, retroactively, violates fundamental fairness and due process.

b. The City

33. In its response to exceptions, the City points out that Rule 1504(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 permits the ALJ to reopen

the evidence for good cause shown. The City argues that the ALJ had good cause to reopen the evidentiary record because he has determined that cost allocation was necessary and that proper notice of that issue has not been provided. The City argues that due process means notice and an opportunity for a hearing, at a meaningful time and in a meaningful manner. *See, e.g., Whiteside v. Smith*, 67 P.2d 1240, 1258 (Colo. 2003). The City argues that the additional notice and the hearing held by the ALJ on January 17, 2012 sufficiently provided UPRR with due process, as the notice gave UPRR 52 days to prepare for the additional hearing. The City also argues that UPRR could have requested additional discovery on the issue of cost allocation as soon as the ALJ issued the additional notice, but failed to do so timely.

c. Discussion

34. We agree with the City that UPRR was provided with sufficient due process on the cost allocation issues. The ALJ not only issued additional notice regarding cost allocation, but has held an additional evidentiary hearing on the issue on January 17, 2012. These steps provided UPRR notice and opportunity for a hearing, at a meaningful time and in a meaningful manner. UPRR does not discuss in its exceptions why this additional hearing was not sufficient and, in fact, does not mention the hearing at all. Further, UPRR was given a timely opportunity to propound additional discovery on the issue of cost allocation, but did not do so. We therefore deny the exceptions filed by UPRR on this ground.

5. The Argument that Cost Allocation has been Waived in this Proceeding

a. UPRR

35. On exceptions, UPRR argues that, to the extent that the City and the Commission have the authority to request cost allocation, such has been waived in this proceeding.

In support of this argument, UPRR cites to Section 8(c) of the Application, where the City has stated that it "shall provide for 100% of the cost of the modifications to roadway elements and will reimburse the UPRR for 100% of the eligible costs." UPRR argues the City cannot request cost allocation now and neither can the Commission, as its Staff did not intervene in this matter.

b. The City

36. In response, the City argues that the doctrine of estoppel does not apply here, because UPRR neither has asserted nor has shown that the City or the Commission intended UPRR to act in reliance upon their conduct. The City also argues that nothing in its application or its course of conduct in the proceedings supports the claim that the City has waived cost allocation. The City contends that it has only offered to pay **eligible** costs for the work items described in its application, which does not include at least 20 percent of the costs of the safety signals or devices that the railroad is obligated to pay per § 40-4-106(2)(b), C.R.S. Further, the City argues that at the time the application was filed, it was not yet known precisely what elements the Commission would order and which party would be required to pay the costs thereof.

c. Discussion

37. We agree with the City and find that cost allocation has not been waived in this proceeding. The statement within the Application on which UPRR relies does not support the claim that the City has waived all cost allocation. We also agree that, at the time the application was filed, it was not yet known what the Commission may order. Finally, the Commission is not precluded from ordering cost allocation solely because its Staff did not intervene in the docket. In making its argument, UPRR ignores the fact that the Commission is not bound by proposals presented by the parties and it can order a result that no party advocated for, so long as it is

just and reasonable, and supported by evidence in the record. We therefore deny the exceptions filed by UPRR on this ground.

6. The Arguments Related to Cost Allocation-Roadway and Track Work

a. UPRR

38. In its exceptions, UPRR takes exceptions to the cost allocation of costs associated with roadway and track work within the crossing. In the Recommended Decision, at paragraphs 301 and 302, the ALJ allocated the costs of track and switch removal to UPRR and the costs of constructing the roadway to the City. UPRR argues that § 40-4-106(3)(a)(I), C.R.S., only allows the Commission to allocate costs of grade separated crossings, but not at-grade crossings. UPRR relies on the legislative history of the statute in support of its argument. Further, UPRR argues that § 40-4-106(3)(a)(I), C.R.S., does not apply to surface work at at-grade crossings, in this instance the removal of track and switch. UPRR also argues that Rule 7211(e) of the Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 CCR 723-7, which requires the owner of the track to pay the costs of track construction or removal, including the crossing surface and highway approaches, does not apply in this proceeding. This is because, according to UPRR, a track is not being constructed or removed from the crossing. Rather, a highway is being widened.

b. The City

39. In response, the City argues that the plain language of § 40-4-106(3)(a)(I), C.R.S., as it exists now, authorizes the Commission to prescribe the proportion in which the expense of the alteration of the crossing *or* a grade separation should be divided between the railroad and the local authority. Section 40-4-106(3)(a)(I), C.R.S., states that:

> *The commission also has power* upon its own motion or upon complaint and after hearing, of which all the parties in interest including the owners of adjacent property shall have due notice, *to order any crossing constructed at grade or at the same or different levels to be relocated, altered, or abolished*, according to plans and specifications to be approved and upon just and reasonable terms and conditions to be prescribed by the commission, *and to prescribe* the terms upon which the separation should be made and *the proportion in which the expense of the alteration or abolition of the crossing or the separation of the grade should be divided between the railroad corporations affected or between the corporation and the state, county, municipality, or public authority in interest*.

(Emphasis added.) The City concludes that the Commission is authorized to allocate the costs of work at an at-grade crossing to the railroad. The City urges the Commission to uphold the ALJ on this issue.

c. Discussion

40. We agree with the City that the plain language of § 40-4-106(3)(a)(I), C.R.S., permits the Commission to allocate the costs associated with both at-grade and grade separated crossings. The interpretation presented by UPRR, on the other hand, would essentially read the "of the alteration or abolition of the crossing" language out of the statute.

41. Further, we disagree with UPRR's statement that no track is being constructed or removed from the crossing and that this is solely a highway widening project. To the contrary, the roadway is being widened into an area where a power switch and track that are part of the Hazeltine siding are currently located. The track and the switch will need to be removed for the construction of the roadway to occur.

42. We also find that what the ALJ has ordered in the Recommended Decision falls squarely within applicable Commission Rules. Rule 7211(d) requires that "[w]henever a grade crossing is widened the governmental or quasi-governmental entity that owns the highway shall pay the cost of the highway improvement, including the highway approaches and the initial cost of the necessary crossing surface extension." Pursuant to Rule 7211(d), the ALJ ordered the City

to pay for the cost of the crossing surface extension on 104th Avenue and the costs of highway widening and approaches to the crossing. For its part, Rule 7211(e) requires that "[w]henever a track is constructed at, or removed from a highway-rail crossing, the owner of the track shall pay the cost of the track construction or removal, including the crossing surface and the highway approaches." In this instance, there are no crossing surfaces or roadway approaches to remove, but some track and a switch must be removed. Pursuant to Rule 7211(e), the ALJ allocated these costs to UPRR.[17] We uphold the Recommended Decision, as the ALJ has allocated the costs of the required work to the appropriate parties, in compliance with Rules 7211 (d) and (e).

7. The Arguments Related to Cost Allocation-Crossing and Queue Cutter Signals

a. UPRR

43. In its exceptions, UPRR faults the ALJ for relying upon the GradeDec model to allocate the costs of the signals at the crossing. The railroad argues that the GradeDec model is not in the record in this case. Indeed, according to UPRR, the only mention of the GradeDec model during the hearing was questioning of witnesses about whether they had used GradeDec, to which the witnesses responded in the negative. UPRR also points out that no party introduced GradeDec into the record to calculate accident probability or for any other purpose.

44. UPRR states that it has attempted to replicate the computation and results reached by the ALJ in GradeDec, within the parameters listed in the Recommended Decision, but could not do so, due to a large number of other variables that go into the calculation. UPRR also states that it cannot reconstruct from the references in the Recommended Decision the data on which the ALJ relied, which handicapped its ability to make appropriate rebuttal. UPRR argues that the use of the model that is not in the record violates its due process. It argues that the Commission

[17] We note that in its exceptions UPRR does not request a waiver of Rules 7211(d) and (e).

must support its decision with evidence in the record and give the parties an opportunity to rebut evidence that it introduces into the record on its own motion. Further, UPRR states it is possible that some of the inputs are based on evidence not in the record.

45. UPRR argues the fact that an increase in highway volume amounts to a 76 percent increase in probable accidents within 20 years does not mean that the City should pay 76 percent of the signal costs, with the remainder going to the railroad. UPRR argues the fact that the large increase in highway traffic will cause a 76 percent increase in probable accidents in 20 years has nothing to do with the benefit of the signals to UPRR. UPRR argues that, in the absence of any increases in train volumes, the Recommended Decision should have assigned 100 percent of the costs to the City.

b. The City

46. In response, the City does not address the contention that the GradeDec model is not in the record or that the ALJ relied on that model in allocating 24 percent of the costs to the railroad. Instead, the City argues that the statute does not provide a specific guidance to the Commission regarding how to allocate costs, merely that it shall consider the benefits, if any, which accrue from the project and the responsibility for need, if any, for such project. The City also argues that the Commission does not need to gather statistical or other empirical evidence of the benefit that affected railroads and the highway authorities receive from a particular crossing. The City cites *Atchison, Topeka and Santa Fe Ry. Co. v. Pub. Utils. Comm'n,* 572 P.2d 138, 142 (Colo. 1977) for the propositions that the railroads benefit from the installation of safety devices on the crossings because these devices significantly reduce the risk of accidents. In *Atchison,* the court also noted that a prior version of § 40-4-106(2)(b), C.R.S.,

unequivocally indicates that a railroad must bear these costs even where a local authority has requested both the closing and the reopening of the crossing.

c. Discussion

47. First, we agree with UPRR that the GradeDec model is not in the record in this case and that the ALJ should not have relied on this model to allocate the costs of safety signals between the railroad and the City. However, we also agree with the City that § 40-4-106(2)(b), C.R.S., mandates a minimum 20 percent allocation of the costs of the signals to the railroad, even where the changes to the crossing have been caused by a local authority. In enacting that statute, it appears that the legislature has determined that the railroads receive benefits, on some level, from the installation of safety devices at the highway-rail crossings.

48. That being said, in this case the City both initiated the need for the updates at the crossing and will be the primary beneficiary of the project. The benefits the railroad will receive from installation of the railroad crossing and queue cutter signals include a reduction in the risk of accidents with a motor vehicle using the crossing with the warning from the active railroad signals versus the warning that would be provided by passive signs only, and a reduction in risk of vehicles queuing along 104th Avenue onto the railroad tracks with the installation of the queue cutter signal. On the other hand, benefits the City will receive from the installation of the railroad crossing and queue cutter signals include the same reductions in risk to the traveling public of accidents, but also include an increase in capacity as more motorists will be able to use the crossing at the same time. While reductions in risk are the same for both the railroad and the City, the City and the traveling public experience the larger benefit given that more motorists use the crossing than trains.

49. We note that none of the parties presented an alternative cost allocation method during the hearing and therefore an additional hearing on this issue will not likely be fruitful. Further, we agree with the City in that the Commission is not required to base its decisions on quantitative, empirical, or statistical evidence.[18] For these reasons, rather than remanding the matter to the ALJ to conduct a new hearing on the cost allocation issues and in light of the fact that the City both initiated the need for the project and will be its primary beneficiary, we will allocate the costs of the safety signals (crossing and queue cutter) signals in accordance with the statutory minimum: 20 percent to UPRR and 80 percent to the City. We therefore grant the exceptions filed by UPRR on this ground, in part.

8. The Argument that Federal Law Preempts the Commission's Authority Over Hazeltine Side Track

a. UPRR

50. On exceptions, UPRR argues the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10501(b) preempts all state regulation of railroad sidetracks, including the remedies related to the construction, operation, or discontinuance of railroad sidetracks. This is the case regardless of the purpose of state regulations, whether for public safety or environmental or economic reasons, according to UPRR. It states that the relocation of the Hazeltine sidetrack would cost nearly $5 million in construction and operation costs alone. UPRR concludes that the ALJ erred in ordering UPRR to relocate the Hazeltine sidetrack, because the Commission has no authority to do so.

[18] *See, e.g., CF&I Steel, L.P.*, 949 P.2d at 587 (citing *Integrated Network Servs. v. Pub. Utils. Comm'n*, 875 P.2d 1373, 1381 (Colo. 1994)); *Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n*, 763 P.2d 1037, 1043 (Colo. 1988).

51. UPRR further argues that the ICCTA expressly preempts all state regulation of sidetracks. This is because the ICCTA expressly gives the Surface Transportation Board (STB) exclusive jurisdiction over transportation by rail carriers, including the construction, acquisition, operation, abandonment, or discontinuance of side tracks. Further, the ICCTA states that the remedies provided with respect to rail transportation are exclusive and preempt the remedies provided under federal or state law. UPRR contends that, due to the broad language of the ICCTA, the United States Court of Appeals for the Tenth Circuit, other federal and state courts, and the STB have repeatedly rejected any form of state regulation over the construction or operation of a rail sidetrack. UPRR relies on cases such as *Port City Properties v. Union Pacific Ry. Co.*, 518 F.3d 1186 (10th Cir. 2008); *Texas Central Business Lines v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012); *Pace v. CSX Transportation, Inc.*, 613 F.3d 1066 (11th Cir. 2010); and *Fort Bend County v. Burlington Northern and Santa Fe Ry. Co.*, 237 S.W.3d 355 (Tex. App. 2007) in support of its argument. Finally, UPRR distinguishes the case relied on by the ALJ, *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007), arguing that the case did not implicate actual rail transportation, but rather the railroad's disposal of old rail ties in a drainage ditch adjacent to the tracks.[19]

52. UPRR argues that the Hazeltine sidetrack falls within the broad preemptive scope of the ICCTA, 49 U.S.C. § 10501(b). UPRR argues that it is a "rail carrier" and its side track operation constitutes "transportation," as these terms are used within the ICCTA. UPRR further states that its side track operations are a necessary and integral part of its railroad transportation. UPRR states that, if adopted, the Recommended Decision would necessitate shutting down its

[19] The ALJ did not discuss UPRR's federal preemption arguments in the Recommended Decision. Instead, he did so in an interim order, while addressing UPRR's motion for summary judgment. Decision No. R11-1412-I, at ¶ 41, issued December 29, 2011. The ALJ found that, as of the time of UPRR's motion for summary judgment, substantial issues of material fact remained as to the impact of proposed modifications at the crossing.

side track operations, pulling up the tracks, and moving the tracks to a new location. This, in turn, would interfere with railroad operations by causing scheduling problems and time delays throughout the mainline corridors, not just the side track itself. UPRR states that, should the Commission adopt the Recommended Decision, it would be forced to make substantial capital investments in excess of $4.1 million, to relocate the Hazeltine side track. UPRR also states that it would lose in excess of a half a million dollars in train delay costs. UPRR relies on two affidavits by its employees in making these assertions, which affidavits are not in the record. UPRR concludes that, by forcing UPRR to make these substantial capital investments to relocate the side track, the Recommended Decision seeks to regulate rail transportation, something that is within the exclusive jurisdiction of the STB.

53. UPRR also faults the ALJ for finding that the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20106, a federal statute that is independent from the ICCTA, authorizes state and local governments to impose certain safety regulations on railroad companies.[20] UPRR argues that the FRSA expressly preempts state and federal regulation if there are federal regulations that cover the same subject matter, in this case the ICCTA. UPRR argues that the FRSA cannot authorize state regulation that is otherwise preempted by the ICCTA.

54. Finally, UPRR contends that this case can be decided without preemptive effect if the Commission establishes a just and reasonable point of crossing without adversely impacting the Hazeltine siding. UPRR contends that Option 5 would be most appropriate as the ALJ has already found that it would promote safety at the crossing to a greater extent than Option 4 (the configuration that UPRR believes the ALJ ultimately recommended).

[20] Decision No. R12-0050-I, at ¶ 47.

b. The City

55. In its response to exceptions, the City argues that the cases on which UPRR relies on do not address safety at highway rail crossings, but rather state and local environmental and nuisance regulations and/or state tort claims. The City argues that state and local governments have traditional authority, or state police power, over safety at highway-rail crossings, which is something quite different from nuisance or tort issues. The City argues that, if UPRR is correct, the Commission would have no authority to regulate any highway-rail crossing by non-mainline track for safety or any other purpose, since all such track would be considered "facility" under the ICCTA.

56. The City argues that states and local governments are authorized to impose certain safety regulations on railroads. In support of its argument, the City relies on both the FRSA, 49 U.S.C. § 20106 and *Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004) in support of its argument. In *Iowa, Chicago & Eastern*, the court found that the ICCTA was not the sole federal statute applicable to disputes between state/local authorities and the railroads with respect to railroad crossings. This is because Congress, when it enacted the ICCTA, left other federal statutes intact, one of them being the FRSA. The *Iowa, Chicago & Eastern* court, according to the City, held that the FRSA, and not the ICCTA determines whether a state law relating to safety is preempted. The court also held that the FRSA did not preempt an Iowa statute requiring railroads to build and maintain bridges necessary for the crossing of roads, even though bridges were railroad facilities that may otherwise be under the jurisdiction of the STB.

57. In addition, the City cites *Tyrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001) to argue there is no evidence that Congress, when it enacted the ICCTA,

intended for the STB to supplant authority of the Federal Railroad Administration (FRA), a federal agency that administers the FRSA. The City also distinguishes *Port City Properties* and *Texas Central Business Lines*, the cases on which UPRR relies, by arguing neither case involved safety at the highway-rail crossings. Finally, the City argues that *Fort Bend County* is distinguishable from the instant case. This is because, in *Fort Bend County*, there was ample evidence that the county's actions would interfere with railroad operations and cause safety hazards. The City contends that the opposite is true here and that UPRR did not adequately show that proposed modifications would prevent or unreasonably interfere with railroad transportation.

c. Discussion

(1) Types of Federal Preemption

58. Federal preemption of state or local laws may be either express or implied. First, express preemption occurs when Congress explicitly defines the extent to which an enactment preempts state laws. For its part, implied preemption comes in two varieties. The first is field preemption, which is when the scope of a statute indicates that Congress intended federal law to occupy a given field exclusively. The second is implied conflict preemption, which occurs when it is impossible for a private party to comply with both federal and state requirements or where a state law is an obstacle to the accomplishment of congressional objectives. *See, e.g., Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (internal citations and quotations omitted).

59. The STB uses slightly different terminology to describe different ways in which the ICCTA can preempt state or local actions or regulations: (1) categorical, or *per se* preemption; and (2) "as applied" preemption. Categorical preemption occurs when a state or local action is preempted on its face despite its context or rationale. If an action is

not categorically preempted, it may be preempted "as applied," based upon the degree of interference that the particular action has on railroad transportation. This occurs when the facts show that the state action would have the effect of preventing or unreasonably interfering with railroad transportation. *See, e.g., Union Pacific R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675, 679 (7th Cir. 2011) (citing *CSX Transp., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at *2-3 (S.T.B. May 3, 2005)). *Accord*, *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008).

60. From UPRR's exceptions, it is not clear whether the railroad is arguing that *per se*/categorical or "as applied" preemption is at issue in this case. On one hand, UPRR claims the ICCTA preempts "*all* state regulation of railroad sidetracks" (emphasis added). This statement suggests UPRR believes that categorical preemption applies here. However, if this is the case, the Commission would be preempted not only from ordering Option 4, but from also ordering Option 5. In its exceptions, UPRR also contends that the Commission should adopt Option 5 because it will not burden the railroad to the same degree as Option 4. That statement suggests UPRR is claiming "as applied" preemption. If that type of preemption applies, a state action is not preempted *per se*, but it may be preempted depending on the degree of interference that the particular action has on railroad transportation. Below, we discuss the applicability of both types of preemption to this case.

(2) Categorical Preemption

61. We must determine whether the ICCTA categorically preempts the Commission from exercising its authority over the Hazeltine side track and the crossing at issue in this docket, pursuant to § 40-4-106, C.R.S. For the reasons discussed below, we find that it does not.

(a) The ICCTA Does Not Preempt Routine Crossing Matters

62. The federal courts as well as the STB have held that the ICCTA does not preempt state or local authority over routine crossing matters. The most recent federal court decision on the subject is *Franks Investment Co. v. Union Pacific Railroad Co.*, 593 F.3d 404, 407-10 (5th Cir. 2010). In *Franks*, the Fifth Circuit Court of Appeals has relied on prior case law from the Eleventh, Fourth, Sixth, and Third Circuits in finding that the ICCTA categorically preempts only those state or local laws that have the effect of managing or governing rail transportation. *Id.*, at 410. The *Franks* court also stated that "[r]esolving the typical disputes regarding rail crossings is not in the nature of regulation governed by the exclusive jurisdiction of the STB." *Id.*, at 411.

63. Likewise, in *Iowa, Chicago & Eastern*, 384 F.3d 557, 561 (8th Cir. 2004), the Eighth Circuit Court of Appeals has held that the ICCTA did not preempt Iowa state proceedings related to whether the railroad should be ordered to replace four bridges at its own expense because their antiquated design resulted in substandard highway safety conditions. Finally, in *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008), the Sixth Circuit Court of Appeals has found that a Michigan statute, which required the railroads to pay for the installation and upkeep of sidewalks that abut and cross its property was not preempted by the ICCTA. In that case, the local authority argued that it was acting under its police power to provide walkways across the railroad tracks for pedestrian safety and that the state statutes did not regulate rail transportation on their face. *Id.*, at 538. The court agreed and noted that, despite the fact that they touch on the tracks in some literal sense, routine crossing disputes are not typically preempted by the ICCTA. *Id.*, at 540. The court thus utilized the as-applied preemption analysis, the touchstone of which is whether the regulation imposes an

unreasonable burden on railroading, to determine whether the local authority was preempted from exercising jurisdiction in that case.[21]

64. Section 40-4-106, C.R.S., gives the Commission jurisdiction over several types of public utility crossings, including the crossings between railroad tracks and public highways. In enacting that statute, the General Assembly charged the Commission with, *inter alia*, promoting and safeguarding health and safety of the public and preventing accidents. *See,* §§ 40-4-106(1) and (2)(a), C.R.S. The Commission has the power to determine the just and reasonable manner, including the particular point of crossing; prescribe the terms and conditions of installation and operation, maintenance, and warning at such crossings; and to allocate the costs of safety signals or devices, among other things. These routine crossing safety issues are the central issues in the instant docket. Consistent with the precedent in *Franks*, *Iowa*, *Chicago & Eastern,* and *Adrian & Blissfield,* we find that the ICCTA does not preempt the Commission's jurisdiction over these issues. This conclusion is also consistent with the principle that public safety is within the field of traditional state regulation and the courts presume that state laws related to those matters can coexist with federal regulations. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008).

65. We also agree with the City that the cases cited by UPRR, where the courts have found that ICCTA preempted a state or local action involving a railroad, did not involve a state's authority over safety at highway-rail crossings. Instead, these cases involved environmental and

[21] *Accord, Union Pac. R.R. Co. v. Louisiana Pub. Serv. Comm'n*, 722 F.Supp.2d 699 (M.D. La 2010); *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 778 A.2d 785 (Pa.Commw.Ct. 2001); *Maumee & Western R.R. Corp. and RMW Ventures, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34354 (March 2, 2004), available at 2004 LW 395835.

nuisance regulations or state tort claims. For example, *Port City Properties v. Union Pacific Ry. Co.*, 518 F.3d 1186 (10th Cir. 2008), involved claims for breach of contract, tortuous interference with business relations, and defamation. That case did not involve safety at railroad crossings. Neither did *Texas Central Business Lines* or *Pace*. We therefore find that the cases relied on by UPRR are distinguishable from the instant docket.

(b) In Matters Involving Safety at Railroad Crossings, the FRSA Rather than the ICCTA Determines Whether a State or Local Law is Preempted

66. We also agree with the City that, in matters involving safety at railroad crossings, the FRSA rather than the ICCTA determines whether a state or local law is preempted. In *Iowa, Chicago & Eastern*, 384 F.3d 557, at 561, the Eighth Circuit Court of Appeals discussed pre-ICCTA cases touching upon the FRSA. The court further noted that, before the enactment of the ICCTA, the Congress "has forged a federal-state regulator partnership to deal with problems of rail and highway safety and highway improvement in general…" The ICCTA, according to the court, did not address these problems. The court also found that the silence of Congress on these issues, when it enacted the ICCTA, does not reflect "a requisite clear and manifest purpose" to preempt the traditional state regulation of public roads and bridges which the Congress has encouraged in numerous other statutes. *Id.* The *Iowa, Chicago & Eastern* court finally declined to find that the ICCTA impliedly repealed the FRSA, citing the general presumption against implied repeals. *Id*. Similarly, in *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 108 (2nd Cir. 2009), the Second Circuit Court of Appeals examined the interplay between the ICCTA and the FRSA. The court found that the federal regulatory scheme places principal federal regulatory authority for rail safety with FRA, not the STB. Thus, FRSA provides the appropriate basis for

analyzing whether a state law, regulation, or order affecting rail safety is preempted by federal law. *Id.* (citing *Tyrell*, 248 F.3d at 521-524).

67. In its exceptions, UPRR argues that FRSA does not affect the question of whether the Commission is preempted from exercising authority over the crossing and the Hazeltine side track under § 40-4-106, C.R.S. UPRR contends that the FRSA does not authorize state actions that the ICCTA otherwise preempts. Further, according to UPRR, the FRSA expressly preempts state regulations where there are federal regulations covering the same subject matter. We reject these contentions. First, the cases mentioned above hold that a state's authority over safety at the railroad crossings is not one of the subject matters covered by the ICCTA. Thus, the provisions of the FRSA on which UPRR relies on do not apply. Second, to the extent UPRR argues that the ICCTA implicitly repeals the FRSA, the courts in *Iowa, Chicago & Eastern* have already rejected this argument.

(c) As Applied Preemption

68. Because we find that the ICCTA does not categorically preempt the Commission from exercising its authority over the Hazeltine side track and the crossing at issue in this docket, we must now examine whether "as applied" preemption is at issue in this case. The test for "as applied" preemption, in this case, is whether the relief ordered in the Recommended Decision would "prevent or unreasonably interfere with the railroad operations." *See, e.g., Emerson*, 503 F.3d at 1130.

69. In its exceptions, UPRR states that this case can be decided without preemptive effect if the Commission adopts Option 5 (instead of Option 4 which is what it believes the ALJ

ordered). UPRR states that Option 5 would not adversely impact the Hazeltine siding.[22] However, as discussed above, the ALJ ordered neither Option 4 nor Option 5, but merely the removal of the switch and track. The ALJ declined to order the manner or extent of modification to railroad facilities outside of the crossing.[23] Thus, if Option 5 would not adversely impact the Hazeltine siding and railroad operations, it also follows that a removal of the switch and track (which can develop into either Option 5 or Option 4) does not have this impact either. We therefore find that "as applied" preemption is not at issue in this case, as the removal of the switch and track would not prevent or unreasonably interfere with UPRR's operations. Further, we agree with the City that *Fort Bend County* is factually distinguishable from this case. This is because, in *Fort Bend County*, unlike here, there was ample evidence that the county's actions would interfere with railroad operations and cause safety hazards.

(d) Conclusion

70. We conclude that the ICCTA does not categorically preempt the Commission from exercising its authority over the Hazeltine side track and the crossing at issue in this docket, pursuant to § 40-4-106, C.R.S. First, the ICCTA does not preempt state or local authority over routine crossing matters and the states' authority over safety at highway-rail crossings. Second, in matters involving safety at railroad crossings, the FRSA and not the ICCTA determines if a state or local law is categorically preempted. We also find that the ICCTA does not preempt the Commission from exercising its authority "as applied" to the facts of this case. This is because UPRR concedes that Option 5 would not adversely affect its operations and thus would not have the preemptive effect. If Option 5 would not have an adverse impact upon

[22] UPRR's exceptions, p. 30.
[23] Recommended Decision, at ¶ 255.

UPRR, it follows that a mere removal of the switch and track would not have this impact either. Ultimately, we conclude that the Commission is not preempted from exercising its authority in this matter and we deny the exceptions filed by UPRR on this ground.

F. Motion to Strike

71. In its exceptions, UPRR argues that the Recommended Decision would force it to make substantial capital investments in excess of $4.1 million to relocate the Hazeltine sidetrack. The railroad further states that it would lose in excess of a half a million dollars in train delay costs. In making these assertions, UPRR relies on two affidavits by its employees, Exhibits H and J to its exceptions. These affidavits are not part of the evidentiary record in this case and they are dated May 29, 2012, the date that UPRR filed its exceptions.

72. In its response to exceptions, the City moves to strike Exhibit H (but it does not mention Exhibit J). The City argues that the evidentiary record in this matter is closed, therefore it had no opportunity to depose or cross-examine the UPRR affiant who signed Exhibit H. The City concludes that failing to strike Exhibit H (as well as any portion of the exceptions supported in whole or in part by such Exhibit H) would be substantially prejudicial.

73. UPRR filed a response in opposition to the Motion to Strike on June 26, 2012. UPRR argues that the Commission has the authority to consider the affidavits attached to its exceptions. UPRR argues that the Commission may rely on information other than that obtained at a formal hearing. In support of this argument, UPRR cites § 40-6-113(6), C.R.S., and *Colo. Energy Advocacy Office v. Pub. Serv. Co. of Colorado*, 704 P.2d 298, 304 (Colo. 1985). UPRR argues that the Commission is not precluded from considering the affidavits merely because they were attached to the exceptions as opposed to being included at a formal hearing.

74. UPRR further argues that the affidavit of Mr. Wilson largely contains information that is already in the record. The only new information pertains to estimated costs to UPRR due to train delays from having to take the Hazeltine sidetrack out of service in order to relocate it. UPRR argues these costs are part of the reason why the Recommended Decision will result in adverse impact to the railroad, and the adverse impact is not new information. UPRR further argues that this adverse impact is part of its federal preemption argument. UPRR argues that the issue of federal preemption is not something that can be waived by any party, thus the fact that UPRR did not introduce the information contained in the affidavits during the hearing does not preclude it from introducing this information now.

75. We grant the City's motion to strike Exhibit H. Further, we strike Exhibit J on our own motion. We find that the City has had no opportunity to depose or cross-examine the UPRR employees who have signed Exhibits H and J or introduce its own evidence to rebut their assertions.

76. In addition, UPRR is correct that, under § 40-6-113(6), C.R.S., and *Colo. Energy Advocacy Office*, the Commission may add to the record on its own initiative. However, when the Commission opts to do so, *Colorado Energy Advocacy Office* requires it to provide all parties with an opportunity to consider and rebut the new evidence, just like with the evidence presented by a party. In this case, the City would not have such an opportunity if the Commission were to consider the substance of the affidavits. A response to exceptions does not provide a sufficient opportunity for the City to rebut and cross-examine the new evidence, as an evidentiary hearing would.

77. Finally, it is not necessary for the Commission to consider the statements made in the affidavits in order to make a decision on federal preemption. The adverse impact is relevant

only to whether or not there is "as applied" preemption in this case. In its exceptions, UPRR states that this case can be decided without preemptive effect if the Commission adopts Option 5 rather than Option 4. However, the ALJ did not order Option 4. Instead, the ALJ only ordered a removal of the switch, which can then develop into either Option 5 or Option 4 or yet some other crossing configuration. If Option 5 would not adversely impact the Hazeltine siding and railroad operations, as UPRR concedes, it also follows that a removal of the switch (which can develop into either Option 5 or Option 4) does not have this impact either.

G. Filings

78. In the Recommended Decision, the ALJ ordered the parties to file the plans and estimates for the crossing surface, railroad signal, queue cutter signal, and interconnection on or before July 31, 2012. The ALJ ordered the parties to file signed Construction and Maintenance Agreements (CMAs) on or before September 30, 2012. Finally, he ordered the parties to file a project completion letter and updated National Inventory Form on or before December 31, 2012. The ALJ based these dates on the mailed date of the Recommended Decision.

79. Because the filing of exceptions to the Recommended Decision delayed the final decision in this docket, we will extend the above-mentioned filing dates on our own motion. We will require the plans and estimates for the crossing surfaces, railroad signal, queue cutter signal, and interconnection to be filed with the Commission on or before October 31, 2012. We will also require the signed CMAs to be filed with the Commission on or before December 31, 2012. Finally, we will require the project completion letter and the updated National Inventory Form to be filed on or before March 31, 2013.

II. ORDER

A. The Commission Orders That:

1. Exceptions to Recommended Decision No. R12-0400 (Recommended Decision), filed on May 29, 2012 by the Union Pacific Railroad Company (UPRR) are granted, in part, and denied, in part, consistent with the discussion above.

2. Exceptions to the Recommended Decision filed on May 29, 2012 by the City of Commerce City (City) are denied, consistent with the discussion above.

3. The Motion to Strike filed by the City on June 12, 2012 is granted.

4. Exhibit J attached to the exceptions filed by UPRR is stricken on our own motion.

5. The parties are ordered to file the plans and estimates for the crossing surfaces, railroad signal, queue cutter signal, and interconnection with the Commission on or before October 31, 2012.

6. The parties are ordered to file signed Construction and Maintenance Agreements with the Commission on or before December 31, 2012.

7. The parties are ordered to file the project completion letter and updated National Inventory Form on or before March 31, 2013.

8. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

9. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING July 18, 2012.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director