

For this reason, the ALJ should deem the issues raised by Intervenors either forfeited or waived.² CWRC nonetheless files this anticipatory response brief in the interest of: (1) promoting a fair, timely, and appropriate outcome in this proceeding, (2) preserving its right to participate in oral argument, pursuant to Commission Rules,³ and (3) supporting the expressed efforts of the ALJ to keep this proceeding on track and on schedule.

The specific issues raised by NS and ICA, which this brief addresses, are (i) whether the scope of the proceedings in this docket include a determination on whether or not the proposed rail line should be built, or merely a determination on the safety measures required at the proposed crossing; and (ii) whether information on the cost of the proposed project is confidential information that falls outside the scope of these proceedings. *First*, the scope of the Commission's jurisdiction in these proceedings is limited to establishing safety measures at the proposed crossings, according to well-established Illinois and federal law, as well as principles of federal preemption. The Commission does not have jurisdiction to grant or deny pre-construction approval of CWRC's proposed rail line or rail crossings, according to the express preemption clause of the Interstate Commerce Commission Termination Act of 1995 ("Termination Act"), 49 U.S.C. § 10501(b). Further, the Commission may not issue an order in these proceedings with respect to rail crossing safety that would unreasonably burden interstate commerce, or that is incompatible with a law, regulation, or order of the United States Government. *See* 49 U.S.C.S. § 20106. *Second* (subject to and without waiving CWRC's

² "Waiver is an intelligent relinquishment of a known right or privilege, whereas a [forfeiture] . . . relates to a failure by counsel to comply with certain procedural requirements." *State of Illinois v. Jackie Lynn Corrie*, 294 Ill. App. 3d 496, 506 (4th dist. 1997). Whichever has occurred here, as set forth in the contemporaneously filed Expedited Motion, NS and ICA have lost the opportunity to further address these issues.

³ 83 Ill. Adm. Code § 200.850(b), which provides that "no party shall participate in oral argument without having filed a brief." It would likewise be unfair to allow ICA and NS, or any other parties who do not comply with the briefing schedule, to present their arguments on these issues for the first time in oral argument. Because NS and ICA failed to file timely briefs in compliance with the Ruling, they have forfeited any opportunity to argue these

objections to ICA's untimely filed brief), the cost information ICA once sought falls far outside the scope of the Commission's jurisdiction over the safety issues before it in this docket.

Moreover, ICA and NS must not be allowed to obtain confidential and commercially sensitive information regarding CWRC's transportation costs through these proceedings, which would be the effect of granting ICA's cost information request.

I. The ALJ and the Commission May Only Consider Safety Measures at Railroad Crossings in This Proceeding.

The question raised by NS, and about which the ALJ requested and scheduled briefing, is whether "the issue before this Commission [is] to approve or to authorize the construction of the track or . . . [to determine] the crossing protections which may be necessary based on the evidence presented at each of the crossings of a line that the Surface Transportation Board may at some point approve." (Mr. Flynn, representing NS, Transcript of 05/09/05 hearing p. 242, lines 16-22.) NS also requested clarification as to "the relationship between decisions and orders in this case laid over or on top of the proceeding pending before the Surface Transportation Board." (*Id* at p. 244, lines 2-4.)

NS chose not to brief this issue, thereby obviating the need for the Commission to reach a finding on it.⁴ However, NS and other railroad companies support the conclusion reached by the majority of state and federal jurisdictions visiting this issue:⁵ (1) the Termination Act preempts all state pre-construction authority over railroad projects, and (2) the States maintain jurisdiction

issues.

⁴ CWRC has not and does not request that the Commission reach a finding on this issue, although such a finding may be necessary as a matter of course. *See Brotherhood of R. Trainmen v. Elgin, J. & E. R. Co.*, 374 Ill. 60, 63 (1940) ("The [Illinois] Commerce Commission must conform its orders to the specific requirements and limitations of the act of the legislature from which its authority is derived.").

⁵ *See, e.g., Norfolk S. Rwy Co., et al., v. City of Austell, et al.*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist LEXIS 17236 (N.D. Ga., Aug. 9, 1997) (granting summary judgment to Norfolk Southern, and holding that City's zoning ordinance and land-use permit requirement is preempted by Termination Act) (attached as Exhibit A); *see also* discussion and cases cited *infra* at pp. 5-7.

to regulate public health and safety at rail crossings, but only to the extent that such regulation does not unduly burden interstate commerce. Further, it is well-settled in Illinois that the Commission does not have the authority to grant or deny approval for construction of rail projects. Under the Termination Act and the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20134, Illinois has retained limited authority to determine safety measures at rail crossings.

A. Congress Expressly Limited State Jurisdiction Over Railroad Construction Projects with Passage of the 1995 Termination Act.

Congress enacted the Termination Act to implement and promote the following United States rail transportation policy initiatives: (1) “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;” (2) “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers . . .;” (3) “to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers . . .;” (4) “to reduce regulatory barriers to entry into and exit from the industry;” (5) “to operate transportation facilities and equipment without detriment to the public health and safety;” and (6) “to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;” among many other policy goals. 49 U.S.C. § 10501(b)(2) (emphasis added). In furtherance of these nationwide goals, Congress created the Surface Transportation Board (“STB”), gave it exclusive jurisdiction over rail transportation, and expressly limited state authority to regulate matters concerning railroads:⁶

⁶ Congress may preempt state law through enactment of federal law, pursuant to the Supremacy Clause of the U.S. Constitution. U.S. Const. art. VI, cl.2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992). Courts have recognized three types of circumstances in which federal law preempts state law, where: (1) Congress has explicitly stated that a federal law preempts state law; (2) state law regulates an area or field that Congress intended to control exclusively; or (3) state and federal law directly conflict, making it impossible for a party to comply with both laws. *Id.* Courts look to congressional intent, “discerned from the language of the pre-emption statute and the statutory framework surrounding it,” to determine whether state law is preempted. *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638, 641 (2nd Cir.

(b) The jurisdiction of the [STB] over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located entirely in one state,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b)(emphasis added). The Termination Act defines “transportation” as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. § 10102(9)(A).

While federal law has preempted state authority to approve construction of a new rail line for many decades, *see Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission ex rel. J.K. Dering Coal Co., et al.*, 315 Ill. 461, 469 (1925) (recognizing that authority to approve construction of a new rail line is vested in the federal government), courts in various jurisdictions have found that enactment of the Termination Act, and its preemption clause, significantly limited the scope of state jurisdiction even further. *See CSX Transp. Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D.Ga. 1996) (“It is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.”), *quoted by*

2005) (internal quotations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)).

Wisc. Central Ltd. v. City of Marshfield, 160 F.Supp. 2d 1009, 1013 (W.D. Wisc. 2000); also quoted by *City of Auburn v. U.S.*, 154 F.3d 1025, 1030 (9th Cir. 1998). Specifically, numerous courts are in agreement that the Termination Act preempts state and local authority to permit or approve railroad construction projects of any type. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 641 (2nd Cir. 2005) (finding Termination Act preempts state environmental law requiring discretionary preconstruction approval to build railroad transloading facility); *City of Auburn v. U.S.*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (affirming STB order holding that Termination Act preempted local environmental pre-construction permit requirement); *Canadian Nat'l Rwy Co. v. City of Rockwood and Wayne County*, No. COV/04-40323, 2005 WL 1349077, slip op.at *1 (E.D. Mich. June 1, 2005) (attached as Exhibit B) (granting preliminary injunction against governmental entities, to prevent enforcement of zoning laws, permitting and preclearance requirements, and other state and local regulations that would prohibit railroad construction project); *Boston & Maine Corp. v. Town of Ayer*, 191 F.Supp.2d 257 (D.Mass. 2002) (affirming STB order holding that Termination Act preempted Town of Ayer's pre-construction permit requirement); *Dakota, Minn. & Eastern RR Corp. v. State of S. Dakota*, 236 F.Supp. 2d 989, 1004-08 (D.S.D. 2002) (enjoining South Dakota from enforcing portions of its eminent domain statute, which offended the Termination Act by requiring the railroad to obtain discretionary state approval to exercise eminent domain authority, based on economic, public safety, and environmental implications); *Wisc. Central Ltd. v. City of Marshfield*, 160 F.Supp. 2d 1009 (W.D. Wisc. 2000) (holding that the Termination Act preempts Wisconsin's eminent domain statute); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D.Minn. 1998) (holding that City's prevention of the demolition of buildings in rail yards violates the Termination Act); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1585

(N.D.Ga. 1996) (determining that Georgia Public Service Commission's authority to regulate rail agency closings was preempted by Termination Act); *25 Residents of Sevier County v. Arkansas Highway and Trans. Comm'n*, 330 Ark. 396 (S.Ct. Ark. 1997) (upholding Arkansas Commission decision that states no longer have jurisdiction over railroad station operations); *Burlington Northern and Santa Fe Railway Co. v. City of Houston, Texas*, No. 14-03-01311-CV, 2005 WL 1118121 (Tex. App. Hous. (14 Dist.) May 12, 2005) (attached as Exhibit C) (holding that the conditions imposed by City to regulate use of condemnation authority amounted to regulations, and were preempted by Termination Act).

For example, in *Green Mountain R.R. Corp. v. Vermont*, the Second Circuit Court of Appeals determined that Vermont's environmental permitting process was facially preempted by federal law, because the process gave a state agency the power to grant or deny construction of a rail project. 404 F.3d at 644. The court noted that the Termination Act preempted "the [state] permitting process itself, not the length or outcome of that process in particular cases." *Id.* The court opined, in dicta, that the Termination Act's express preemption clause allows states and local government authority to exercise "traditional police powers over the development of railroad property," but only "to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Id.* at 643.

Courts have found that the Termination Act does not preempt state authority over regulating safety measures at grade crossings. *See, e.g., Iowa, Chi. & RR Corp. v. Wash. County*, 384 F.3d 557, 561 (8th Cir. 2004) (holding that Iowa statute requiring railroads to build and maintain separated grade crossings was not preempted by Termination Act). However, such

state authority is limited by the FRSA, which has provided federal guidelines for grade crossing safety measures through the Federal Railroad Administration, *see* 49 USCS § 103, and expressly preempts state regulation that would unreasonably burden interstate commerce:

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters, or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(1) is necessary to eliminate or reduce an *essentially local* safety or security hazard;

(2) *is not incompatible with a law, regulation, or order of the United States Government; and*

(3) does not unreasonably burden interstate commerce.

49 U.S.C.S. § 20106 (emphasis added). Courts considering the preemptive effect of the Termination Act on at-grade crossing safety issues have thus considered the FRSA preemption clause in concert. *See Iowa, Chicago, & Eastern R.R. Corp.*, 384 F.3d at 599; *see also, CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp. 2d 643, 655 (E.D. Mich. 2000) (holding that the City’s regulation limiting the amount of time a train is permitted to block a crossing ran afoul of the Termination Act and the FRSA, to the extent that the railroad would need to upgrade its track, relocate its yards, or upgrade speed along its “wyes”); *see also* Tex. Atty. Gen. Op. GA-0331, 2005 WL 1428666 at *1 (June 17, 2005) (Exhibit D) (stating that the Termination Act and the FRSA preempts Texas law imposing a criminal penalty against a railway company if the train blocks a crossing for more than ten minutes, because the law would impose an undue

economic burden). The Sixth Circuit Court of Appeals explained the relationship between the Termination Act and FRSA, and their resulting preemptive effect, in this way:

The [Termination Act] and its legislative history contains no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety. Rather, the agencies' complementary exercise of their statutory authority accurately reflects Congress's intent for the ICCTA and FRSA to be construed *in pari materia*. For example . . . the FRA exercise[s] primary authority over rail safety matters under 49 U.S.C. § 20101 *et seq.*, while the STB handle[s] economic regulation and environmental impact assessment.”)

Tyrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001).

The Seventh Circuit Court of Appeals and the State of Illinois have yet to examine the Termination Act and the FRSA's preemptive effect on the Illinois statutes and Commission regulations at issue in this case. However, the Commission is the primary interpreter of its own jurisdiction, and it “must conform its orders to the specific requirements and limitations of the act of the legislature from which its authority is derived.” *Brotherhood of R. Trainmen v. Elgin, J. & E. R. Co.*, 374 Ill. 60, 63 (1940). Comparing the relevant Illinois statute and cases governing the Commission's jurisdiction in this matter with the plain language of the Termination Act's express preemption clause, in light of the numerous persuasive opinions from other jurisdictions, it is evident that the Termination Act preempts, at least to some extent, the General Assembly's statutory grant of jurisdictional authority over rail crossing construction projects. *See Cipollone*, 505 U.S. at 516 (“[S]tate law that conflicts with federal law is ‘without effect.’”) (citation omitted).

B. The Scope of the Commission's Jurisdiction is Limited to Determining Safety Measures at the Proposed Crossings.

Illinois courts have long recognized that the Commission does not have jurisdictional authority to grant approval or denial of a proposed new rail line. *Cleveland, C., C. & St. L. Ry.*

Co. v. Commerce Commission ex rel. J.K. Dering Coal Co., et al., 315 Ill. 461, 469 (1925) (recognizing that authority to approve construction of a new rail line is vested in the federal government). Further, there is no Illinois statute authorizing the Commission to grant or deny approval or denial for construction of a proposed rail line, and the Commission's jurisdiction is strictly limited to the authority that is expressly conferred to it by statute. *Ill. Commerce Comm'n et al. v. N. Y. Centr. R.R. Co. et al.*, 398 Ill. 11, 16 (1947) ("The Commission has no arbitrary powers.") The first question posed by NS at the June 9, 2005, hearing is thus easily determined—the Commission may not decide whether CWRC's proposed rail line is built, because (1) the Commission does not have statutory authority to do so, and (2) authority to approve or deny a rail construction project rests exclusively with the appropriate federal agency (now, the STB), as Illinois courts have long recognized.

However, the Commission has well-settled jurisdictional authority over railroad crossings. *See* 625 ILCS 5/18c-7401. The more appropriate question, then, seems to be whether the scope of the Commission's jurisdictional authority over proposed rail crossing construction projects has been limited by the recently enacted Termination Act (and/or the FRSA), as many other jurisdictions have determined. To answer this question, one must first look to Illinois law.

The plain language of the Commission's statutory grant of jurisdictional authority shows the General Assembly's intent to provide the Commission with a broad grant of discretionary authority over the construction of railroad crossings:

No public road, highway, or street shall hereafter be constructed across the track of any rail carrier at grade, nor shall the track of any rail carrier be constructed across a public road, highway or street at grade, without having first secured the permission of the Commission The Commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. The Commission shall have power to determine and prescribe the manner, including the particular point of crossing,

and the terms of installation, operation, maintenance, use and protection of each such crossing.

625 ILCS 5/18c-7401 (Safety Requirements for Track, Facilities, and Equipment). However, the statute expressly recognizes the preemptive effect of federal law as a limit to the Commission's jurisdiction:

The jurisdiction of the Commission . . . shall be exclusive . . . except to the extent that its jurisdiction is preempted by valid provisions of the Staggers Rail Act of 1980 *or other valid federal statute, regulation, or order.*

625 ILCS 5/18c-7101 (Emphasis added).

In contrast, the Termination Act's express preemption clause states that the STB has exclusive authority over all "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, *routes*, services, and facilities of such carriers . . ." From a practical standpoint, it is impossible that the STB has exclusive authority over whether, how, and where a rail line is built, while the ICC could still retain its jurisdiction over whether, how, and where a rail *crossing* is built. Thus, the plain language of the Termination Act's preemption clause leaves no question that the Commission's authority to determine whether or not a rail crossing construction project may be built has been preempted. While Illinois courts have not yet visited this question, the overwhelming majority of court opinions in other jurisdictions support the conclusion that state authority to grant or deny approval of the construction of *any* rail project has been preempted by the Termination Act. *See* cases cited *infra* pp 5-6.

Further, as mentioned by counsel for Norfolk Southern at the June 9, 2005, hearing, an order will eventually issue in the STB proceedings concerning the construction project at issue in this docket. In that order, the STB will, in all likelihood (given the preliminary "no significant

impact” finding of the Environmental Assessment in the STB docket),⁷ grant authority to build the proposed rail line at issue in this docket. As previously noted, courts have recognized three types of circumstances in which federal law preempts state law, where: (1) Congress has explicitly stated that a federal law preempts state law; (2) state law regulates an area or field that Congress intended to control exclusively; or (3) state and federal law directly conflict, making it impossible for a party to comply with both laws at the same time. *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638, 641 (2nd Cir. 2005) (internal quotations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)); *see also* 625 ILCS 5/18c-7101 (stating that the Commission’s authority is limited by a valid federal statute, regulation, or order). The Commission may not issue an order in this docket that could conflict with a *possible* order in the STB docket, such that it would be impossible for CWRC to comply with both laws. *See Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39 (2003) (where a federal agency has authority over a particular subject matter, the Supremacy Clause dictates that a state agency may not second-guess a federal agency’s decision); *see also G.M. Corp. v. Ill. Commerce Comm’n*, 143 Ill.2d 407, 414-17 (1991) (holding that Congress’s clear intent to occupy the field of wholesale gas rates preempted the ICC’s authority to review those rates).

Petitioner does not dispute, however, that the ICC retains police power authority to determine safety measures at rail crossings, to the extent that such authority does not cause an undue economic burden, as mandated by the FRSA. 49 U.S.C.S. § 20106.

II. ICA May Not Procure The Commercially Sensitive Cost Information It Seeks Through This Proceeding.

ICA was ordered to file a brief regarding the propriety of its request for CWRC’s confidential cost estimates for construction of the proposed line. For all of the reasons set forth

⁷ Available at www.stb.gov.

in the contemporaneously filed Expedited Motion, ICA's request must be rejected as a procedural matter. But even if ICA had timely filed its brief, its request would still be inappropriate, as the information that ICA seeks is both: (1) irrelevant to the safety issues before the Commission in this proceeding, and (2) commercially sensitive information, that, if discovered, would put CWRC at a competitive disadvantage in any future negotiations with NS and ICA's members.

A. The Information ICA Seeks Falls Outside the Scope of this Proceeding.

As is apparent from the above discussion regarding the Commission's limited jurisdiction in this matter, the cost of CWRC's proposed project falls far outside the scope of matters relevant to determining the safety issues before the Commission in this proceeding. Tellingly, ICA cites no Illinois statute, case, or legal authority in support of its assertion that the cost information it seeks is relevant information. Indeed, there is no such Illinois statute authorizing the Commission to review a railroad company's financial records before determining safety measures at a rail crossing.⁸ The Commission cannot create authority for itself arbitrarily; its jurisdiction is strictly limited to that which is expressly conferred to it by statute. *Ill. Commerce Comm'n, et al. v. N. Y. Centr. R.R. Co., et al.*, 398 Ill. 11, 16 (1947).

Even if there were such a statutory grant of authority in Illinois, it would be preempted by federal law. *See, e.g., Tyrell v. Norfolk S. Ry*, 248 F.3d 517, 523 (6th Cir. 2001) (interpreting Termination Act as preempting financial and economic matters with respect to rail construction); *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp. 2d 643, 655 (E.D. Mich. 2000); *see also* 49 U.S.C. § 10501(b)(2) (stating U.S. policy and congressional intent to minimize overregulation of railroad transportation); *see also* discussion and cases cited *infra* at pp. 7-8. As previously

⁸ The Commission's statutory authority over public utilities, *see* 220 ILCS 5/4-101, is inapplicable here. CWRC is not a public utility. *See* 220 ILCS 5/3-105.

stated, federal preemption occurs where a state law regulates an area or field that Congress intended to control exclusively. *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638, 641 (2nd Cir. 2005) (internal quotations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)). Congress has shown clear intent to occupy the field of financial matters with respect to railroad companies. Congress has enacted laws, and the STB has enacted regulations, which occupy the field of determining the financial fitness of a new railroad, such as CWRC. *See, e.g.*, 49 U.S.C 10901; 49 C.F.R. 1150.6. Whether or not the STB ever eventually makes a finding on CWRC's financial fitness is irrelevant; the mere fact that it has the authority to do so preempts the ability of a state agency to inquire into or to make such a finding. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) (where a federal agency has authority over a particular subject matter, the Supremacy Clause dictates that a state agency may not second-guess a federal agency's decision); *see also G.M. Corp. v. Ill. Commerce Comm'n*, 143 Ill.2d 407, 414-17 (1991) (holding that Congress's clear intent to occupy the field of wholesale gas rates preempted the ICC's authority to review those rates).

Further, the background testimony of Mr. Robert Neff at the May, 2, 2005, hearing, cited in ICA's brief at page 1, has done nothing to remedy the Commission's want of jurisdiction over a railroad company's financial matters, or expand the Commission's jurisdiction in any way. CWRC, and Mr. Neff, cannot create jurisdiction for the ICC. Where a state agency or court has no jurisdiction over a particular subject matter, parties cannot create such jurisdiction through waiver, agreement, or any other means. *Rensing v. Turner Aviation Corp.*, 166 F. Supp. 790. 794 (N.D. Ill. 1958) ("Jurisdiction of the subject matter is the fundamental power of the Court to hear and decide a cause on its merits and therefore is beyond the scope of litigants to confer."); *see also Abbott Laboratories, Inc. v. Ill. Commerce Comm'n*, 289 Ill. App. 3d 705 (1997) (in

order to hear and decide a case, the Commission must have personal, subject matter, and statutory jurisdiction).

B. The Information ICA Seeks Is Commercially Sensitive and Confidential.

Further, the information that the ICA seeks is commercially sensitive and confidential. CWRC and its Ameren affiliates engage in negotiations with rail and coal companies on a regular basis. Providing ICA and NS confidential information regarding the cost of the proposed rail line, *i.e.*, information regarding CWRC's transportation costs, will provide these parties with an unfair business advantage in such negotiations. For that reason, CWRC's cost information is precisely the type of information that the Commission typically deems protected in proceedings before it. *See* 83 Ill. Admin. Code 200.605. The Commission is required by statute to protect the confidential and proprietary information of the parties before it. 220 ILCS 5/4-404. If the Staff and the ALJ needed CWRC's cost information, in order to make some type of determination, the parties could establish rules by which CWRC could protect itself. But here, Staff has not requested such confidential cost information – a fact which tellingly underlines the fact that it is outside the scope of relevancy to the safety determinations before the Commission. The ALJ and the Commission must not allow the ICA and NS to obtain commercially sensitive information from CWRC and its Ameren affiliates through this proceeding.

CONCLUSION

For all the above reasons, and for all the reasons set forth in the contemporaneously filed Expedited Motion, CWRC respectfully requests that the ALJ limit the scope of these proceedings to determinations on safety measures at the proposed crossings, according to well-established Illinois and federal law, as well as mandatory principles of federal preemption. Further, CWRC respectfully requests that the ALJ disallow oral argument participation for any party who has not

timely filed a brief, according to 83 Ill. Admin. Code 200.850(b), and deem the issues raised by NS and ICA waived and/or forfeited.

Dated: July 8, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura M. Earl, certify that on July 8, 2005, I served a copy of the foregoing Response Brief on Issues by Federal Express to the individuals on the Commission's official Service List for Docket T04-0084.

/s/ Laura M. Earl

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