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JUL 01 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 330311

**IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

TRI-CITY RAILROAD COMPANY, LLC, a Washington municipal
corporation,

Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, a Washington state agency,

Respondent.

REPLY BRIEF OF APPELLANT

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I. SCOPE OF REPLY

In response to the Brief filed by Tri City Railroad LLC (“TCRY”) in the instant appeal, both the State of Washington (“State”), on behalf of the Washington State Utilities and Transportation Commission, (“Commission”), and each of the cities of Kennewick and Richland (collectively “Cities”) have filed a Response Brief. This Reply Brief addresses both the State’s and the Cities’ Briefs.

II. INTRODUCTION

There is no dispute that at-grade crossings are disfavored under Washington law. Until the present case, the Commission has considered whether an “acute public need” for the proposed at-grade crossing outweighed the risks inherent in establishing such a crossing. “Acute public need” traditionally required the showing of a net benefit to public safety. Yet, here, the Commission acted outside its statutory authority, and, despite finding no net benefit to public safety, approved the crossing.

The basis for the Commission’s decision rests upon three factors it articulated which do not appear in the Commission’s authorizing statutes, a Washington case of record, or a prior Commission opinion: “economic development interests”; “deference to local government”; and “the broader public policy environment”. The Commission neither quantifies nor qualifies these factors, nor explains how they are to be considered or

applied in future crossing petitions. Under Washington statutory law and Commission precedent, “economic development interests”, “deference to local government”, and “the broader public policy environment” are not valid factors to be considered when determining whether to permit an at-grade crossing, and the Final Order should be reversed.

Neither the State nor the Cities provide citation to pertinent authority justifying the Commission’s reliance upon those three newly-announced factors. Moreover, RCW 81.53.020, RCW 81.53.030, and RCW 81.53.040, the statutes which control the Commission’s authority to approve at-grade crossings, do not describe the three new factors announced by the Commission in the Final Order.

Additionally, under established Commission procedural and evidentiary regulations, public comments are not to be treated as evidentiary (*i.e.* for the truth of the matter asserted) unless and until particular notice and opportunity provisions are followed. The Commission erred in considering non-evidentiary public comments as substantive evidence without following its own procedure, and the Final Order issued on the basis of consideration of inadmissible public comment should be reversed.

III. ARGUMENT

A. RCW 81.53.020 ~ .040 Are Unambiguous, And Do Not Provide For Consideration Of “Economic Development Interests”, “Deference To Local Government”, And “The Broader Public Policy Environment”.

1. The Commission’s authority is defined and limited by statute.

“[A]n administrative agency ... has no more authority than is granted to it by the Legislature. Determining the extent of that authority is a question of law[.]” *Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995) (citation omitted). Whether it would be beneficial, useful, or reasonable for an agency to have certain powers is not the issue; it is the statutory authorization of that power which must be determined as a matter of law. *Washington Independent Telephone Ass’n v. Telecommunications Ratepayers Ass’n for Cost-Based & Equitable Rates*, 75 Wn. App. 356, 364, 880 P.2d 50 (1994).

For the Commission to have the authority to consider “economic development interests”, “deference to local government”, and “the broader public policy environment” in the context of evaluating the approval of a new at-grade crossing, the Commission needed to establish that RCW 81.53.020, RCW 81.53.030, and RCW 81.53.040 authorize consideration of these factors, and it failed to do so. Moreover, in this appeal, the State

and Cities must likewise demonstrate that the authorizing statutes allow such considerations, which they have not done.

2. *Mind The Gap?*

The State and Cities argue that the Commission's consideration of "economic development interests", "deference to local government", and "the broader public policy environment" constitutes 'gap filling' which should be afforded deference.

However, the Commission did not state in the Final Order that it was engaging in 'gap filling', nor did it provide any analysis as to what gap it was filling in which statute, nor why such 'gap filling' was justified.

Gap filling is an appropriate agency measure only when a statute is ambiguous. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). "A statute is ambiguous when it is 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) (quoting *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009)). The court cannot add words or clauses to unambiguous statutes. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The agency may fill in a gap to effectuate the general statutory scheme, though not to amend the statute. *Hama* at 448.

RCW 81.53.020, .030, and .040 are unambiguous, and address grade separations petitions for at-grade crossings. RCW 81.53.020 directs the Commission to take into consideration “the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country; and all other circumstances and conditions naturally involved in such an inquiry.”

RCW 81.53.030 provides, in pertinent part:

Whenever ... the municipal authorities of a city... desire to extend a highway across a railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving the petition, the commission shall immediately investigate it, giving ... notice ... of the time and place of the investigation, to the end that all parties interested may be present and heard. ... [If] the commission ... finds that it is not practicable to cross the railroad ... either above or below grade, the commission shall enter a written order ... either granting or denying the right to construct a grade crossing at the point in question. The commission may provide in the order authorizing a grade crossing [for] ... proper signals, warnings, flaggers, interlocking devices, or other devices or means to secure the safety of the public[.]

The Commission, in applying the above statutes to petitions for new at-grade crossings, has explained that it normally considers the following when evaluating such a petition:

The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous ... [T]he Commission will direct the opening of a grade crossing within its jurisdiction when the inherent and the site-specific dangers of the crossing are moderated to the extent possible with modern design and signals and when there is an **acute public need** which outweighs the resulting danger of the crossing.

(TCRY's Br. at p. 8 (*quoting City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06, at pp. 4-5)) (emphasis added).

A good example of the Commission's traditional consideration of 'acute public need' is the case relied upon by the Commission in the present matter, *Benton County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order Granting Benton County's Petition for an At-Grade Railroad Crossing, Subject to Conditions (Feb. 15, 2011) (cited by the Commission in the Final Order, at CP 635).

In *Benton County*, several existing at-grade crossings were closed, and others opened across a lightly-used industrial spur, so as to divert commercial trucks carrying hazardous chemicals away from residential areas and several schools. In addition to the net benefits to public safety of the closure of other at-grade crossings and the diversion of hazardous commercial traffic away from schools and homes, it was noted that the proposed at-grade crossing changes "would open up approximately 300

acres of land in the Finley industrial area that is currently difficult to access.” *Benton County* concluded:

Considering both the improvement in public safety in the community and the greater economic development prospects in Benton County that will result from the proposed project, the Commission determines that there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.

Id. at 14-15.

Here, inconsistent with the Commission’s precedent, the Commission reversed the Initial Order on the legal basis that “improvements to public safety or improved economic development opportunities” can establish ‘acute public need’ sufficient to outweigh the ‘hazards inherent in at-grade crossings’. (*See* CP 635) Neither the Cities nor the State cite any Commission precedent supporting this disjunctive proposition.

In the Final Order, either as a sub-set of “improved economic development opportunities”, or in addition to, the Commission stated that it considered “economic development interests”, “deference to local government”, and “the broader public policy environment”. The Commission provided no analysis in the Final Order of how these three factors arise from the Commission’s authority under RCW 81.53.020, .030, and .040.

The Cities argue that the term “all other circumstances” in RCW 81.53.020 is, in essence, a ‘catch all’ which grants the Commission legal authority to consider “economic development interests”, “deference to local government”, and “the broader public policy environment”. (Cities’ Resp. Br. p. 17) As noted above, that statute specifically directs the Commission to take into consideration “the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country; and all other circumstances and conditions naturally involved in such an inquiry.” RCW 81.53.020.

“Under *ejusdem generis*, wherever a law lists specific things and then refers to them in general, the general statements apply only to the same kind of things that were specifically listed.” *Bowie v. Dep’t of Revenue*, 171 Wn.2d 1, 12, 248 P.3d 504 (2011).

RCW 81.53.020 concerns the engineering question of the practicability of grade separation, and the enumerated considerations all pertain to engineering and the cost to taxpayers. The factors “economic development interests”, “deference to local government”, and “the broader public policy environment” do not concern engineering practicalities, and are not within the scope of the Commission’s statutory authority vis-à-vis RCW 81.53.020.

Moreover, though the Commission explained that it reversed the Initial Order though its consideration of “economic development interests”, “deference to local government”, and “the broader public policy environment”, it neither quantified nor qualified any of these phrases, nor did it give any guidance as to how these factors are to be interpreted or applied.

The Commission does not explain how “economic development interest” should be considered, nor how it should be weighed against public safety in order to determine ‘acute public need’. Recall, TCRY received no notice that “economic development interests” was a factor to be considered until after the Final Order was issued. TCRY was never afforded the notice nor opportunity to be heard on its own economic development interest. Moreover, the Commission’s consideration of the hearsay letter of Mr. Ramsay III on the issue of economic development¹ begs the question of TCRY’s economic interests, and, indeed, TCRY’s due process rights. After evidence and briefing were closed, the Commission determined to consider undefined economic interests of Mr. Ramsay III and give an inchoate plan referenced in a letter submitted as

¹ Outside of the UTC’s jurisdiction is the question of whether the proposed at-grade crossing “unreasonably interferes with current or planned railroad operations.” This specific issue is presently before the Surface Transportation Board. *See Tri-City Railroad, LLC v. City of Kennewick and City of Richland*, No. FD 35915, S.T.B., 2015 WL 2433979 (Service Date May 21, 2015).

public comment significant weight, but not afford TCRY notice that this was at issue, nor opportunity to produce evidence of TCRY's own economic interest in an uninterrupted 1900 foot parallel main track and siding. This is inconsistent with the Commission's own rules and with State and Federal due process protections.

Indeed, it does not appear the Commission considered settled Washington law on the issue of "economic development interest" as it pertains to using municipal authority for the ultimate benefit of private developers.

In *City of Seattle*, the city tried to condemn land for a Westlake project that included land for public purposes (a park) as well as private purposes (retail space). *In Re City of Seattle*, 96 Wn.2d 616, 625-26, 638 P.2d 549 (1981). The projects' principal design was to provide additional shopping opportunities. *Id.* at 634. The Court held that the project's combined use of private and public in such a way that could not be separated was not within the power of eminent domain. *Id.* at 627. Moreover, although a project may be in the 'public interest', it is not necessarily a 'public purpose' or a 'public need' if the purpose is private economic development. *Id.*

Here, Mr. Ramsay III's plans (assuming admissible) do not constitute an "acute public need" under either the controlling statutes or

the Commission's established precedent. Both the Commission's and the Cities reliance upon inchoate "economic development interests" are insufficient to justify the risks inherent in a new at-grade crossing, particularly where safe established crossings, either grade separated or signalized at-grade, are available within several thousand feet to either side of this proposed crossing location.

Finally, the Commission does not explain what the factors "deference to local government" and "the broader public policy environment" mean, nor how they are to be applied. For example, "public policy" in the Commission's formulation appears to only include enactments of municipalities. This appears to be against both the trend, and the weight of railroad law, which places nearly all jurisdiction over railroads with the federal government.²

B. The Precedent Relied Upon By The Commission Does Not Provide A Legal Basis for the Final Order.

1. The Commission premised the Final Order upon Benton County, a case which does not support the Commission's holdings.

The Final Order considers "economic development interests," "deference to local government," and "the broader public policy context" as the basis for reversing the Initial Order and approving the crossing. The precedent cited by the Commission in support of those factors, and the

² See TCRY's Br., p. 14 note 7. See also note 1, *supra*.

disjunctive proposition that “improvements to public safety or improved economic development opportunities” can establish acute public need is *Benton County*, discussed *supra*. As described in *Benton County*, and quoted *supra*, the primary basis for permitting that crossing was multiple improvements to public safety, with economic development expressly a subordinate consideration.

As described in the Initial Order, this proposed crossing will interface 7000 vehicles per day with multiple trains per day, and the danger is increased by the presence of multiple tracks, rail car storage, and switching operations. Further, as agreed by the Commission in the Final Order,

It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(CP 636)

The Commission agreed that the proposed crossing here does not result in a net improvement to public safety. More importantly, *Benton County* contradicts the proposition for which it was cited by the Commission: “economic development interests,” “deference to local government,” and “the broader public policy context” do not constitute

acute public need and warrant a new at-grade crossing, where there is no net public safety improvement.

2. *The State tacitly concedes that the Commission erred in relying upon Benton County.*

On appeal, the State tacitly concedes that the Commission erred in relying upon *Benton County*, through arguing that *Benton County*, being an Initial Order which became final by operation of law, has no precedential value. (State Br. at 14 (*citing* WAC 480-07-825(7)(c))

If the sole legal justification in the Final Order was citation to a case with no precedential value, then the State apparently concedes the Commission erred in relying upon it.

Moreover, *Benton County* does not support the proposition for which the Commission cited it, and no other internal precedent has been cited to this Court which provides that “improvements to public safety **or** improved economic development opportunities” can establish acute public need, or that acute public need is determined by reference to “economic development interests,” “deference to local government,” and “the broader public policy context”.

Since *Benton County* does not support the proposition for which the Commission cited it, and since the State concedes the Commission

erred in citing *Benton County* in the first place, the Final Order should be reversed, pursuant to RCW 34.05.570(3)(c) and (d).

C. The Commission's WAC Provisions Prohibit Public Comments From Being Considered As Substantive Evidence Unless Particular Notice And Opportunity Procedures Are Followed. It Is Undisputed That The Procedures Were Not Followed In This Case.

1. *The Commission's evidentiary procedures controlled the treatment of public comment in the instant adjudicative proceeding.*

Concerning public comment:

The commission will receive as a bench exhibit any public comment filed, or otherwise submitted by nonparties, in connection with an adjudicative proceeding. The exhibit will be treated as an illustrative exhibit that expresses public sentiment received concerning the pending matter. The commission may convene one or more public comment hearing sessions to receive oral and written comments from members of the public who are not parties in the proceeding[.]

WAC 480-07-498.

The evidentiary status of public comments is defined:

Documents from the public. When a member of the public presents a document in conjunction with his or her testimony, the commission may receive the document as an illustrative exhibit. The commission may receive as illustrative exhibits any letters that have been received by the secretary of the commission and by public counsel from members of the public regarding a proceeding. Documents a public witness presents that are exceptional in their detail or probative value may be separately received

into evidence as proof of the matters asserted after an opportunity for cross-examination.

WAC 480-07-490(5).

Within administrative law, parties have the right to cross-examine the preparers of documents which are considered as evidence by the adjudicative agency. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 32-35, 873 P.2d 498 (1994).

2. *It is undisputed that the Commission's public comment notice and opportunity evidentiary procedures were not followed.*

Here, the procedural order permitted the parties three rounds of pre-filed testimony, with the final rebuttal testimony being filed by all parties on October 23, 2013. (CP 629) Evidentiary hearings were conducted on November 19 and 20, 2013. (CP 630) Public comment was accepted on November 20, 2013, with additional written public comments being filed in the weeks following. (*Id.*)

The Initial Order Denying Petition to Open At-Grade Railroad Crossing was issued on February 25, 2014. (*See* CP 428) The Initial Order neither mentions, nor treats as evidence any public comments.

The Cities petitioned for administrative review of the Initial Order on March 18, 2014. (CP 630) The Cities' petition does not reference the public comments as a basis to reverse the Initial Order. (*See* CP 457-547)

The Final Order, issued on May 29, 2014, provides, in pertinent part:

It is sufficient for us to observe that we agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.

(CP 635)

Despite the Commission's agreement with the Initial Order, the Final Order reversed and authorized the at-grade crossing. The factual basis for the reversal was five written public comments, all submitted after the evidentiary hearing on this matter was closed, without notice or opportunity to examine the submitters. (*See* CP 639-642)

3. *Parties cannot "waive" cross examination of non-witnesses.*

The State argues that "TCRY had no right of cross-examination. Even if it did, it failed to preserve the issue for review." (State Resp. Br. p 22)

The Cities' witnesses included Jeff Peters, Rick Simons, John Deskins, Chief Skinner, Chief Baynes, Neal Hines, Kenneth Hoagnberg, Kevin Jeffers, Susan Grabler, and Spencer Montgomery. (CP 1196-1198) The Commission's witnesses included Kathy Hunter. (CP 1198)

Neither Mr. Malley nor Mr. Ramsey, III, the offerors of the public comments described in the Final Order and challenged by TCRY in this appeal were offered as witnesses by the Commission or the Cities. (CP 1196-1205)

A party cannot, by definition, “waive” cross examination of a person never called as a witness.

The Commission’s reliance upon the comments of Malley and Ramsey III as being true for the matters asserted violates WAC 480-07-490 and WAC 480-07-498. A document must be specifically designated as evidence to be treated as such. WAC 480-07-490(1). Public comments may only be treated as evidence after an opportunity for cross examination. WAC 480-07-490(5).

In this case, neither the Commission nor the Cities sought to designate the public comments as evidence. A party cannot “fail to object” to documents neither designated as, nor offered into evidence.

The State now argues that TCRY should have predicted the Commission’s decision based upon the public comments, attempted to cross-examine the authors, and petitioned to re-open the public record prior to entry of the final order. However, it is undisputed that prior to the Final Order, TCRY (and, for that matter, the Cities) had no notice that the Commission would treat a selection of public comments as substantive

evidence. TCRY was under no duty to predict that the Commission would not follow the law by disregarding its own procedures without notice.

The State argues that “What happened below can be summarized as follows. TCRY stood by silently while the Commission accepted public comments... [then] suddenly claimed a right of cross examination.” (State Resp. Br., p. 26) Through this argument, the State appears to misunderstand its own evidentiary regulations promulgated by the Commission. As set forth in those WAC provisions, as a matter of due process, the onus is upon the party wishing to use public comment as substantive evidence to notify all others, and to follow the procedure to bring the public comment into evidence once it (or its maker) is subject to cross examination. If the Commission, or the Cities, intended to use public comment as substantive evidence, they were required by rule to provide notice and opportunity.

Instead, here, the Commission accepted public comment and used selected comments as substantive evidence to support its own findings and conclusions, without following its own WAC procedures for bringing public comments into evidence – *i.e.* direct examination of those persons. The opportunity for cross-examination never arose, no “direct examination” having been conducted by the Cities or the State in the first place.

The Commission failed to follow its prescribed procedure by admitting public comments as substantive evidence without notice or the opportunity of cross-examination. Due process was violated. As a result, the Final Order should be reversed.

4. *The JUB study does not use the word “economic” and does not discuss the subject matter contained in the public comments accepted by the Commission as evidence.*

The Commission, in its Final Order, states that the Cities “focused almost exclusively on public safety benefits,” especially improved emergency responder times with some evidence that the crossing would ease congestion. (CP 635-36) However, the Commission agreed with the Initial Order and concluded that both contentions were to slight to demonstrate public need. (*Id.*)

The Cities relied heavily upon the JUB study. The JUB study is a fourteen page traffic engineering study and does not purport to be an economic analysis. In fact, it does not use the word “economic.” The JUB study referred to “improved access” in two places for vehicle traffic. First, the study identified possibilities of “Improved Access” to currently undeveloped land. (CP 97) It indicated that roadway access might improve, and pointed to potential improvements in the flow of traffic. Second, the study summary stated: “nearly 60 developable acres of commercial land between the railroad and SR 240 which has desirable

visibility will have improved access and will gain the synergy that commercial areas often seek.” (CP 105)

The JUB study indicates that local traffic and property access could benefit from the project and invokes a corporate buzzword (“synergy”). The traffic study focuses on safety and traffic considerations. The JUB study does not discuss the subject matter of the public comments that the Commission treated as substantive evidence; therefore, the public comments cannot “underscore” the study.

The Commission has already created a procedure to (potentially) admit public comments as substantive evidence. *See* WAC 480-07-490 and WAC 480-07-498. However, the Commission neither invoked nor abided by its own procedure to admit the comments as substantive evidence. As a result, the Commission failed to follow a prescribed procedure, and the Final Order should be reversed. RCW 34.05.070(3)(d).

D. The State And The Cities Failed To Establish A Net Benefit To Public Safety And Did Not Appeal That Determination.

Neither the State nor the Cities assigned error to the findings of fact in the Final Order. Nonetheless, they persist in their Briefs to this Court in citing portions of the underlying record, and re-arguing issues they did not prevail upon, and did not appeal.

To Be Clear: The Commission did not reverse the Initial Order's findings and conclusions as to public safety, traffic congestion, and emergency vehicle response times. (CP 635-36, 642) Rather, the Commission noted that while the proposed new at-grade crossing would mitigate the risks created by the establishment of the crossing itself to the extent possible, though any other benefit to public safety was, at best, 'slight', and did not outweigh the inherent risks of the new crossing. (CP 635-36, 642-44)

The Commission then reversed the Initial Order upon consideration of "economic development interests," "deference to local government," and "the broader public policy context". (CP 642-44)

Unchallenged findings of fact of an administrative agency are verities on appeal. *Griffith v. Employment Security Department*, 163 Wn. App. 1, 6, 259 P.3d 1111 (2011). A party must assign error to the agency's findings for it to be at issue on appeal. *See Hilltop Terrace Ass'n v. Island County*, 126 Wn. App. 22, 30, 891 P.2d 29 (1995).

In their Response Briefs, the State and the Cities repeat arguments they made to the Commission upon which they did not prevail, and they do so based upon citations to portions of the underlying record no longer relevant given the lack of appeal on the issue. Both the State and the Cities spend portions of their briefs discussing the safety of the proposed

crossing's gates and signals, emergency response times of ambulances and first responders, and reduction of traffic congestion. (State Resp. Br. at 6, 29-30; Cities' Resp. Br. at 27)

More interestingly, both claim in their briefs that TCRY does not contest that the crossing will be equipped with modern signage and lighting. (State Resp. Br. pp. 28-29; Cities' Resp. Br. pp. 8, 19-20)

This claim is a red herring.

As described in TCRY's Initial Brief, the safety equipment proposed for this new crossing is not the issue. TCRY does not contest the crossing's *design*³; TCRY contests whether the crossing should be built at all. TCRY's opposition is based upon the Commission's lack of statutory authority to consider "economic development interests," "deference to local government," and "the broader public policy context"; and the Commission's failure to adhere to its own adjudicative evidentiary rules in considering public comment as proving the truth of the matter asserted, without complying with due process by providing notice and opportunity to cross examine.

³ ...anymore. As noted in TCRY's Brief, the Cities had requested the UTC approve removal of TCRY's 1900-foot parallel siding, and the Final Order appears to do so. However, the Cities later stated on the record they were no longer seeking removal of the siding, and instead sought to construct the crossing over both sets of tracks. (See TCRY's Br. at pp. 20-21 (*citing* CP 81, 85, 110, and 634; and VRP 29))

The Final Order, as did the Initial Order, considered the State and the Cities' arguments that the crossing would improve public safety for emergency responders and relieve traffic congestion to potentially reduce accidents; and it rejected those same arguments. The Initial Order's analysis on these specific issues were affirmed in the Final Order.

The question before the Court is whether "economic development interests," "deference to local government," and "the broader public policy context" are sufficient to justify an at-grade crossing, even where there will be no net benefit to public safety, as held by the Commission. The State and Cities' focus on issues they did not prevail upon, and which they did not appeal, are not pertinent to the Court's resolution of the legal issues presented of the Commission's statutory authority and adherence to its own internal rules of evidence in adjudicative proceedings.

E. Costs and Attorney's Fees.

A request for costs and attorney's fees requires that a party devote a section to the request in its opening brief, and provide the Court with citation to authority to advise the court of the appropriate grounds for an award of attorney fees as costs. RAP 18.1; *see, e.g., Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012).

Here, TCRY devoted the final section of its Brief to the request for fees, and provided citation to the appropriate authority. (TCRY's Br. at

p. 39 (*citing* RCW 4.84.350 and *Gerow v. Gambling Commission*, 181 Wn. App. 229, 245-46, 324 P.3d 800 (2014))). The question of whether the Commission has statutory authority to act as it did in the present matter is a “significant issue”, and TCRY should be awarded its costs and attorney’s fees should it prevail.

IV. CONCLUSION

The Commission’s statutory authority over approval of at-grade crossings is well defined. Absent a showing of “acute public need”, which includes a net benefit to public safety, establishment of a new at-grade crossing is not warranted, particularly where safe existing crossings are available within less than half a mile to both the east and the west of the proposed new crossing.

The Commission, an administrative agency, is limited to the authority provided it by the Legislature. The Legislature has not authorized the Commission to consider “economic development interests,” “deference to local government,” and “the broader public policy context” when evaluating a petition by a municipality, over the opposition of the railroad, to establish a new at-grade crossing over both a main track and siding.

Moreover, while the Commission is authorized to promulgate WAC provisions governing the admissibility of evidence in adjudicative

proceedings, the Commission is not authorized to modify or disregard those same provisions in evaluating a petition, particularly without warning any of the interested parties that the relevant regulations would not be followed.

For these reasons, the Final Order should be reversed pursuant to 34.05.570(3)(b),(c),(d) and (e), and costs and attorney's fees awarded to TCRY pursuant to RAP 18.1 and RCW 4.84.350.

RESPECTFULLY SUBMITTED this 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2105, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, by the method indicated below and addressed to the following:

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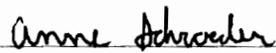
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