

CASE NO. 330311

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

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

Appellant,

v.

STATE OF WASHINGTON, UTILITIES AND TRANSPORTATION
COMMISSION,

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ISSUES PRESENTED AND ASSIGNMENTS OF ERROR.....4

A. Whether the Commission failed to follow its established precedent when it held that ‘improved economic development opportunities’ alone, without any improvement to public safety, constituted a public need which outweighed the hazards inherent in an at-grade crossing?4

B. Whether the Commission’s statutory authority in determining whether to permit construction of a new at-grade crossing allows consideration of “economic development interests,” “deference to local government,” and “the broader public policy environment”?5

C. Whether the Commission’s reliance upon written public comments as substantive evidence in reversing the Initial Order, without prior notice that public comments were being considered as evidence, was consistent with the Commission’s procedural and evidentiary rules?6

III. STATEMENT OF THE CASE6

A. The Richland Trackage, Including The Tracks At Issue, Were Constructed By The United States In The 1940s And 1950s.6

B. The United States Transferred Ownership Of The Tracks To The Port Of Benton; The Port Leases The Tracks To TCRY.7

C. The Cities’ 2006 Petition To Establish An At-Grade Crossing Over Tracks Was Denied.7

D. The Cities Petitioned Again In 2013 To Construct The Center Parkway At-Grade Crossing, And Were Initially Denied.11

E. Despite Agreeing That Public Safety Does Not Justify Constructing The Crossing, The Commission Reversed The Initial Order And

	Permitted The At-Grade Crossing Based Upon Consideration Of Three Factors: “Economic Development Interests,” “Deference To Local Government,” And “The Broader Public Policy Environment”	17
F.	The Cities Have Confirmed That They Do Not Seek Elimination Of Any Of TCRY’s Tracks, But Rather Intend To Construct The At-Grade Crossing Over Both Sets.	20
IV.	ARGUMENT	21
A.	Standard of Review.....	21
B.	Statutory Interpretation, And The Scope Of An Administrative Agency’s Authority, Are Questions Of Law For The Court.	23
C.	Washington Law Presumes At-Grade Crossings Are Dangerous, And The Primary Consideration Of The Commission Is Public Safety.	25
D.	Consistent With Washington Law, The Commission’s Precedent Reflects That Public Safety Is The Primary Concern In The Evaluation Of A Petition To Cross Existing Railroad Tracks With A New Public Highway.	28
E.	In The Present Case, The Initial Order Properly Applied The Commission’s Precedent, And Found That The Cities Failed To Demonstrate Sufficient Public Need To Outweigh The Inherent Risks Presented By The Proposed At-Grade Crossing.....	29
F.	The Precedent Relied Upon By The Commission In Reversing The Initial Order Does Not Support Its Decision, Because The Proposed Crossing In The Present Case Will Not Result In The Closure Of Other At-Grade Crossings Or A Net Improvement To Public Safety.....	30
G.	The Commission Treated Written Public Comments As Substantive Evidence, And Relied Upon Them In Reversing The Initial Order. Doing So Was Not	

Consistent With The Commission’s Procedural And Evidentiary Rules.....	35
H. Since The Evidence Relied Upon By The Commission In Reversing The Initial Order Was Inadmissible, The Final Order Lacked Substantial Evidence.....	38
I. Costs and Attorney’s Fees.	39
V. CONCLUSION.....	39

APPENDIX:

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order 06, Initial Order Denying Petition (January 26, 2007)

City of Kennewick v. Port of Benton, et al., Docket TR-130499, Order 02, Initial Order Denying Petition to Open At-Grade Railroad Crossing (February 25, 2014)

City of Kennewick v. Port of Benton, et al., Docket TR-130499, Order 03, Final Order Granting Petition for Administrative Review (May 29, 2014)

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 (February 15, 2011)

RCW 81.53 *et seq.* (LexisNexis annotated)

TABLE OF AUTHORITIES

CASES

<i>Benton County v. BNSF Railway Company</i> , Docket TR-100572, Order 06, Initial Order Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to Conditions (Feb. 15, 2011)	4, 19, 31, 33
<i>BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC</i> , 835 F.Supp.2d 1056 (E.D.Wash. 2011)	7
<i>Chicago Title Insurance Company v. The Office of the Insurance Commissioner</i> , 178 Wn.2d 120, 309 P.3d 372 (2013)	22
<i>City of Kennewick v. Union Pacific Railroad</i> , Docket TR-040664, Order 06, Initial Order Denying Petition; and <i>City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad</i> , Docket TR-050967, Order 02, Initial Order Denying Petition (January 26, 2007)	passim
<i>City of Lincoln v. Surface Transportation Board</i> , 414 F.3d 858 (8th Cir. 2005)	14
<i>City of Richland v. Tri-City Railroad and Port of Benton</i> , Docket TR-090912, Order Granting Petition to Reconstruct the Steptoe Street Highway-Rail Grade Crossing and Modify Active Warning Devices, Order 01 (July 2, 2009).....	13
<i>Dep’t of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 9, 43 P.3d 4 (2002).....	23
<i>Dept. of Trans. v. Snohomish Co.</i> , 35 Wn.2d 247, 212 P.2d 829 (1949).....	1, 27
<i>Edelman v. Washington</i> , 160 Wn. App. 294, 248 P.3d 581 (2011)	22, 38
<i>Gerow v. Gambling Commission</i> , 181 Wn. App. 229, 324 P.3d 800 (2014)	39
<i>Hallauer v. Spectrum Props., Inc.</i> , 143 Wn.2d 126, 146, 18 P.3d 540 (2001).....	23
<i>Harris County, Texas v. Union Pacific Railroad Company</i> , 807 F.Supp.2d 624 (S.D.Tex. 2011)	14
<i>Heinmiller v. Dep’t of Health</i> , 127 Wn.2d 595, 903 P.2d 433, 909 P.2d 1294 (1995)	23
<i>Human Rights Comm’n v. Cheney Sch. Dist. 30</i> , 97 Wn.2d 118, 641 P.2d 163 (1982)	24
<i>In re X.T.</i> , 174 Wn. App. 733, 300 P.3d 824 (2013)	38
<i>Jongeward v. BNSF Ry.</i> , 174 Wn.2d 586, 592, 278 P.3d 157 (2012)	23
<i>Kaiser Aluminum & Chem. Corp. v. Dept. of Labor & Indus.</i> , 121 Wn.2d 776, 854 P.2d 611 (1993)	24
<i>Local 2916, IAFF v. PERC</i> , 128 Wn.2d 375, 907 P.2d 1204 (1995).....	24
<i>Pub. Util. Dist. No. 1 of Pend Oreille County v. Dep’t of Ecology</i> , 146 Wn.2d 778, 51 P.3d 744 (2002)	22
<i>Reines v. Chicago, M., St. P. & Pac. R. Co.</i> , 195 Wn. 146, 80 P.2d 406 (1938)	1, 27
<i>Snohomish County Public Transportation Benefit Area v. Public Employment Relations Commission, et al.</i> , 173 Wn. App. 504, 294 P.3d 803 (2013)	24
<i>State v. Breazeale</i> , 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).....	23
<i>Verizon Nw., Inc. v. Emp’t Sec. Dep’t</i> , 164 Wn.2d 909, 194 P.3d 255 (2008)	22
<i>Washington Independent Telephone Ass’n v. Telecommunications Ratepayers Ass’n for Cost-Based & Equitable Rates</i> , 75 Wn. App. 356, 880 P.2d 50 (1994)	24
<i>Weyerhaeuser v. Pierce County</i> , 124 Wn.2d 26, 32-35, 873 P.2d 498 (1994).....	36

STATUTES

49 U.S.C. § 10501(b)	14
----------------------------	----

RCW 34.05.570(3)	passim
RCW 4.84.350	39
RCW 81.53.020	5, 25
RCW 81.53.030	5, 25
RCW 81.53.040	5, 27

RULES

RAP 10.3(h)	5, 6
RAP 18.1	39

REGULATIONS

WAC 480-07-490(5)	6, 36, 37, 38
WAC 480-07-498	6, 35, 38

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I. INTRODUCTION

“The statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous[.]” *Dept. of Trans. v. Snohomish Co.*, 35 Wn.2d 247, 251, 212 P.2d 829 (1949) (quoting *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938)).

This case concerns a petition by the cities of Richland and Kennewick (“Cities”) to construct a new at-grade railroad crossing, across two active tracks of the Tri-City Railroad Company, LLC (“TCRY”). The location for the proposed new at-grade crossing is near a shopping mall in Kennewick. Two crossings, one at-grade and one grade-separated, are within a few thousand feet to the east and west of the proposed crossing.

An administrative law judge for the Washington Utilities and Transportation Commission (“Commission”) denied the petition, finding:

The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

(CP 445, February 25, 2014 Initial Order Denying Petition to Open At-Grade Railroad Crossing (“Initial Order”))

The Commission agreed with the Initial Order, explaining:

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, May 29, 2014 Final Order Granting Petition for Administrative Review (“Final Order”)).

Yet, the Commission reversed the Initial Order, on the following basis:

It is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial developments in Richland and Kennewick, and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland[.]

(CP 638-639)

In reversing, the Commission reached its decision by considering “economic development interests,” “deference to local government,” and “the broader public policy environment”, and by considering certain written public comments as substantive evidence.

The Commission’s approval of the crossing on the basis of an alleged economic benefit to some partially developed commercial lots,

without a net benefit to public safety, is contrary to the Commission's own precedent.

Moreover, the three additional factors considered by the Commission, "economic development interests," "deference to local government," and "the broader public policy environment", have no statutory basis, and the Commission exceeded its statutory authority in considering those factors.

Finally, the Commission failed to follow its own procedures and evidentiary rules when it determined to treat public comment as substantive evidence, without providing notice to the parties or opportunity to examine the makers of the written public comments.

Having failed to follow its own precedent, the Commission's authorizing statutes, and the Commission's own procedural and evidentiary rules, the Commission erred in entering the Final Order approving this at-grade crossing, and the Commission's Final Order should be reversed.

II. ISSUES PRESENTED AND ASSIGNMENTS OF ERROR

- A. **Whether the Commission failed to follow its established precedent when it held that ‘improved economic development opportunities’ alone, without any improvement to public safety, constituted a public need which outweighed the hazards inherent in an at-grade crossing?**

The Commission did not reverse any of the findings or conclusions in the Initial Order, and explained that it “agree[d] 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[.]” (CP 635) Yet, the Commission reversed the Initial Order and permitted the crossing on the following legal basis: “To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.” (CP 635)¹

The statement that “improvements to public safety or improved economic development opportunities” can establish public need sufficient to outweigh the hazards inherent in at-grade crossings is not supported by the precedent cited, or other of the Commission’s precedent. Without improving public safety by, *e.g.*, closing other at-grade crossings, or diverting trucks carrying hazardous chemicals away from residential zones

¹ Citing *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 ¶¶ 33-37 (Feb. 15, 2011).

and schools, “improved economic development opportunities” by itself is insufficient to establish a public need which outweighs the hazards inherent in a new at-grade crossing.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (d), TCRY assigns error to the Final Order Granting Petition for Administrative Review, paragraphs 17, 22, 25, 28, 33, 39, and 41.

B. Whether the Commission’s statutory authority in determining whether to permit construction of a new at-grade crossing allows consideration of “economic development interests,” “deference to local government,” and “the broader public policy environment”?

The statutes concerning petitions for new at-grade crossings ask the Commission to consider: whether grade separation is practicable; whether the highway can be re-routed to either avoid a grade crossing or allow for a safer grade crossing; and the safety of the public and railroad employees. *See* RCW 81.53.020, RCW 81.53.030, and RCW 81.53.040.

The Commission then determines whether to grant or deny the right to construct the at-grade crossing. RCW 81.53.030.

The statutes do not specifically authorize consideration of “economic development interests,” “deference to local government,” and “the broader public policy environment”, nor do they authorize the consideration of similar subject matter as a basis to outweigh considerations of public safety.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (d), error is assigned to the Final Order Granting Petition for Administrative Review, paragraphs 17, 22, 25, 28, 33, 39, and 41.

C. Whether the Commission's reliance upon written public comments as substantive evidence in reversing the Initial Order, without prior notice that public comments were being considered as evidence, was consistent with the Commission's procedural and evidentiary rules?

Written comments submitted by members of the public were relied upon by the Commission to support its decision reversing the Initial Order. The Commission's use of public comments under these procedural circumstances is not consistent with the Commission's procedural and evidentiary rules. *See* WAC 480-07-490(5); WAC 480-07-498. Further, having relied upon inadmissible documents in arriving at its decision to reverse the Initial Order, the Commission's findings based upon those documents are not supported by substantial evidence.

Pursuant to RAP 10.3(h) and RCW 34.05.570(3)(c) and (e), error is assigned to the Final Order Granting Petition for Administrative Review, paragraphs 23, 24, 26, 27, 28, 37, 38, 39, and 40.

III. STATEMENT OF THE CASE

A. The Richland Trackage, Including The Tracks At Issue, Were Constructed By The United States In The 1940s And 1950s.

In 1947, the United States, acting through the Atomic Energy Commission, entered into an agreement with several railroads to establish

railroad service to the Hanford Nuclear Reservation.² In the following years, various sections of the Richland Trackage were constructed and then leased to the railroads for their use.

B. The United States Transferred Ownership Of The Tracks To The Port Of Benton; The Port Leases The Tracks To TCRY.

In 1998, the United States Department of Energy transferred ownership of the tracks to the Port of Benton. In 2002, TCRY and the Port negotiated a lease agreement which authorized TCRY to perform rail and track maintenance services on the tracks.

C. The Cities' 2006 Petition To Establish An At-Grade Crossing Over Tracks Was Denied.

In 2006, the Cities filed a petition to approve the construction of an at-grade crossing extending a city street across the four tracks then in operation in the area: TCRY's main and parallel passing track; and Union Pacific's parallel spur tracks. (*See* CP 429, 632)³ The petition was opposed by TCRY, Union Pacific, and Burlington Northern & Santa Fe Railroad ("BNSF").

² Some of the historical facts surrounding the railroad tracks at issue have already been before a federal court. *See BNSF Railway Co. v. Tri-City & Olympia Railroad Co., LLC*, 835 F.Supp.2d 1056 (E.D.Wash. 2011). For context, that history is briefly summarized in sections A and B.

³ *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06, Initial Order Denying Petition; and *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Docket TR-050967, Order 02, Initial Order Denying Petition (January 26, 2007).



In denying the petition, the UTC explained that under Washington law:

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. Such needs which have been found appropriate include the lack of a reasonable alternate access for public emergency services; and the sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order 06, at pp. 4-5.

⁴ This satellite image, for illustrative purposes, shows the location of the proposed crossing.

At the time of the 2006 petition by the Cities, TCRY and Union Pacific's operations at the crossing were:

UPRR uses these tracks to interchange cars with TCRY. TCRY sets out cars (primarily refrigerator cars or "reefers") in the morning and UPRR picks up the TCRY cars in the evening as well as setting out cars for TCRY to pick up the following morning. The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY. If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice. If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.

...

TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction. TCRY interchanges cars with both UPRR and the BNSF at that junction. TCRY has both a main line and a siding at Richland Junction. TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF. TCRY uses the UPRR Old Pass for interchanging traffic with UPRR. TCRY picks up and drops off UPRR cars at least once a day. Depending on the time of year, TCRY picks up BNSF cars multiple times a week. It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season. TCRY was unable to state with specificity the number of times it would cross Center Parkway during its switching operations, but with the combined UPRR and BNSF interchange traffic, it would be "a lot."

Id. at 6-7 (notes omitted).

Given that the location of the proposed crossing has multiple tracks and is actively used for switching, the Commission described the inherent dangers as follows:

The law disfavors at-grade crossings because certain risks are inherent. In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays. The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity. In addition, with this site involving four railroad tracks, the drivers of vehicles who ignore warning signs and drive too fast for the conditions may launch over the second track or “bottom out” depending the speed and direction of the vehicle. At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians. Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle’s driver and any passengers involved as well injury to train crews. Grade crossing accidents also have adverse psychological effects on train crews.

The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train approaching on another track that was hidden from view by the stationary cars. Motorists may

also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay. More than 50 percent of accidents occur at signalized crossings.

Id. at 8-9.

Finding that the Cities failed to meet their burden to demonstrate that the inherent and site-specific dangers of the crossing could be moderated to the extent possible by the installation of safety devices, the petition for the crossing was denied. *Id.* at 9-14.

D. The Cities Petitioned Again In 2013 To Construct The Center Parkway At-Grade Crossing, And Were Initially Denied.

On April 8, 2013, Kennewick filed a new petition to construct an at-grade crossing at Center Parkway. (CP 77-128) On May 31, 2013, Richland joined Kennewick's petition. (*See* CP 428)



(CP 430, 631) (from left to right, the circles mark the Steptoe street at-grade crossing, the proposed Center Parkway at-grade crossing, and the Columbia grade-separated crossing).

The proposed Center Parkway at-grade crossing is located about 1900 feet to the west of an existing grade-separated crossing at Columbia Center Boulevard. (CP 430-431)⁵

⁵ See also, *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06, at p. 12.



Similarly, the proposed at-grade crossing is about 3500 feet to the east of an existing at-grade crossing, over a single set of tracks, and is equipped with active warning devices, gates, and lights. (CP 430-431)⁶



⁶ See also CP 1788-1792, *City of Richland v. Tri-City Railroad and Port of Benton*, Docket TR-090912, Order Granting Petition to Reconstruct the Steptoe Street Highway-Rail Grade Crossing and Modify Active Warning Devices, Order 01 (July 2, 2009).

Prior to filing the 2013 petition for an at-grade crossing, the Cities negotiated with Union Pacific and BNSF to relocate their switching operations. (CP 429-430) Consequently, the two Union Pacific spur tracks were removed, and so now the proposed crossing will cross two active tracks – TCRY’s main track, and the parallel 1900-foot passing track. The Cities presented evidence contending that grade separation is not warranted at the proposed crossing site because of roadway characteristics, accident prediction models, and cost. (CP 432-434)

TCRY again opposed the crossing, because of the anticipated interference with its operations.⁷ As described in the Initial Order:

TCRY is a rail carrier conducting interstate rail operations through Kennewick and Richland. TCRY leases the track west and north of Richland Junction from the Port of Benton; BNSF and UPRR also operate on this track. Randolph V. Peterson, Managing Member of TCRY, explained that the second set of tracks immediately west of Richland Junction allows trains to meet and pass when entering or exiting the area. According to Mr. Peterson, this passing track is “absolutely essential” because TCRY makes frequent, if not daily, use of that facility. When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.

⁷ The Commission has limited jurisdiction, and took testimony concerning TCRY’s operations for purpose of evaluating public safety. The question of whether the existence of the crossing would “unreasonably interfere” with existing and projected railroad operations was not adjudicated, as such determinations are within the exclusive jurisdiction of the federal Surface Transportation Board. *See* 49 U.S.C. § 10501(b); *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (8th Cir. 2005); *Harris County, Texas v. Union Pacific Railroad Company*, 807 F.Supp.2d 624 (S.D.Tex. 2011).

Mr. Peterson estimates that TCRY presently operates 10 to 20 freight trains each week on the mainline track that passes through the Richland Junction. BNSF operates another 10 freight trains each week and, on occasion, UPRR operates a "unit train," a mile-long freight train consisting of approximately 100 to 120 cars all carrying the same cargo. No passenger trains operate on this track. Mr. Peterson testified that the combined annual train traffic through the Richland Junction increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013. Mr. Peterson expects further increases in train traffic because of TCRY's continued growth and new commercial developments in the Horn Rapids Industrial Park that will be served by rail.

Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area. Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day). Mr. Ballew also testified that Richland has entered real estate and development agreements with ConAgra Foods to build an automated cold storage warehouse in the Horn Rapids area served by a separate smaller loop track. Mr. Ballew expects an average of 30 rail cars each week will come and go from ConAgra's facility.

All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension. Considering the expected increase train traffic across Richland Junction, TCRY contends that the passing track will become even more essential and perhaps need to be extended to accommodate longer trains. Mr. Peterson testified that he

opposes the new Center Parkway crossing because rail operations could regularly require freight trains to block the crossing, occasionally for lengthy periods of time.

(CP 431-432)

The Cities propose to install at the proposed crossing “active warning devices, to include advanced signage, flashing lights, audible bell, automatic gates, and a raised median[.]” (CP 434). The Cities sought to justify the public need for the proposed crossing through three arguments, which the Initial Order rejected:

In this case, the Cities attempt to demonstrate public need by arguing improvements to public safety through faster emergency response times, reduced accident rates around the Columbia Center Mall, and relief of traffic congestion at nearby intersections with deficient levels of service. As explained below, the evidence in the record does not support the Cities’ arguments that opening the Center Parkway crossing will create such improvements or alleviate existing traffic problems.

...

The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

By its nature, opening a new at-grade crossing at Center Parkway would increase risk to motorists by creating another opportunity to interact with freight trains. Motorists who might deviate from Columbia Center Boulevard’s grade-

separated crossing in order to access the Tapteal Road area would trade safe and undelayed passage over the UPRR tracks for a potentially faster route that comes with a risk of collision. The active safety measures proposed to be installed at the crossing would mitigate, but would not eliminate, such risk.

The Cities' justifications for the crossing do not outweigh the risk. At most, the evidence demonstrates that, on occasion, a police, fire, or ambulance response *might* be faster if the Center Parkway crossing was available and no trains were blocking traffic. Some drivers also would find the option to use Center Parkway more appealing to enter or depart the north side of the Columbia Center Mall than Gage Boulevard, particularly during the busy holiday shopping season. Such slight benefits do not overcome the law's strong disfavor for at-grade crossings. Accordingly, the Commission should deny the Cities' petition for failure to demonstrate a public need for the proposed crossing.

(CP 445-449)

E. Despite Agreeing That Public Safety Does Not Justify Constructing The Crossing, The Commission Reversed The Initial Order And Permitted The At-Grade Crossing Based Upon Consideration Of Three Factors: "Economic Development Interests," "Deference To Local Government," And "The Broader Public Policy Environment"

The Cities sought review of the initial denial of the 2013 petition, which again was opposed by TCRY. (*See* CP 457-547; 548-581). On review, the Commission rejected the Cities' contentions concerning public safety:

The Initial Order determines that the Cities failed to carry their burden to show a "public

need” for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

Petitioners challenge this conclusion, focusing almost exclusively on asserted public safety benefits, largely in the form of improved response times from two local fire stations to the point where the planned Center Parkway extension would intersect Tapteal Drive. In other words, the Cities’ principal claim of improved public safety is that emergency responders could get to a single point on a one-mile long, two-lane collector roadway with a “T” intersection at both ends more quickly than they can today. In addition, there is some evidence that completion of this project would reduce traffic on other roadways in the vicinity, relieving congestion and potentially reducing accidents. The Initial Order analyzes the evidence on this issue in detail that does not bear repeating here. 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 635-636)

Nonetheless, in reversing the Initial Order, the Commission explained “[it] is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial

developments in Richland and Kennewick, and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland[.]” (CP 638-639)

The Commission explained that in order “[t]o establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.” (CP 635)⁸ “In addition to economic benefits, the Commission as a matter of policy should give some deference to the Cities’ transportation and land use planning goals, as these are matters of local concern and within the jurisdictional authority of the Cities[.]” (CP 640)

The factual basis for the Commission’s reversal of the Initial Order was five written public comments, submitted after the evidentiary hearing on this matter. (*See* CP 639-642)

The Commission concluded:

The Initial Order fairly weighs the evidence and argument presented in the post-hearing briefs, and reaches a legally sustainable result. The Cities’ almost exclusive focus on improved response times for first responders on a point-to-point basis as the principal benefit demonstrating “public need” does not weigh persuasively against even the demonstrated low level of “inherent risk” at the proposed crossing. Nor are the

⁸ *Citing 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 ¶¶ 33-37 (Feb. 15, 2011).

Cities' legal arguments that their comprehensive planning processes under the Growth Management Act mandate Commission approval persuasive. However, considering evidence the parties largely ignored that shows additional public benefits in the form of enhanced economic development opportunities, and considering the broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning, we determine that the Cities' petition for administrative review should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

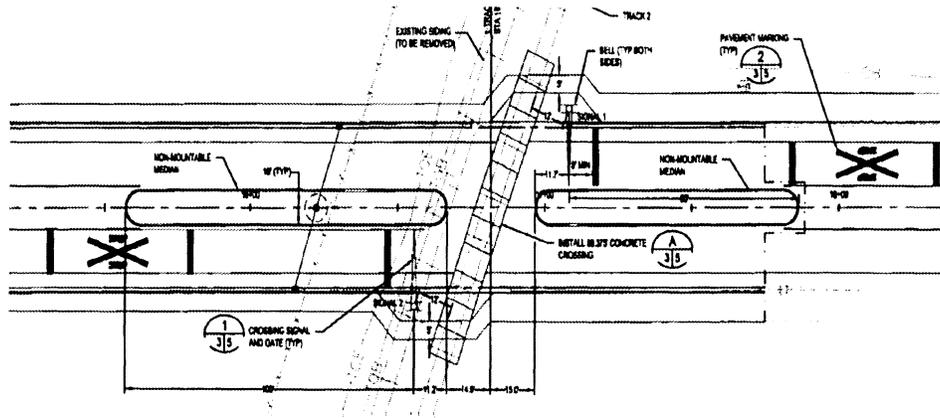
(CP 642-644)

F. The Cities Have Confirmed That They Do Not Seek Elimination Of Any Of TCRY's Tracks, But Rather Intend To Construct The At-Grade Crossing Over Both Sets.

The Cities' petition requested the elimination of TCRY's 1900-foot siding as part of the construction of the at-grade crossing. (*See* CP 81, 85, 110).

The Commission's Final Order incorporated a proposed design for the crossing which would necessitate the elimination of TCRY's parallel siding, though the language of the Final Order was ambivalent, or ambiguous, as to whether track removal was at issue. (*See* CP 634)

Figure 2
At-Grade Crossing Configuration



(CP 634)

The Cities have subsequently confirmed that they are not seeking removal of the passing track. The Cities intend to install an at-grade crossing over both the main track and the passing track. (VRP 29)

IV. ARGUMENT

A. Standard of Review.

RCW 34.05.570(3) governs judicial review of an order issued by the Commission. The statute provides, in pertinent part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review[.]

The standard of review is *de novo* for petitions brought pursuant to subsections (a) ~ (d). See *Chicago Title Insurance Company v. The Office of the Insurance Commissioner*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). “Legal determinations are reviewed using the 'error of law' standard, which allows the court to substitute its view of the law for that of the [agency].” *Chicago Title*, at 133 (citing *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008)).

To apply this standard, “the court determines the meaning and purpose of a statute *de novo*, although in the case of an ambiguous statute which falls within the agency’s expertise, the agency’s interpretation of the statute is accorded great weight, provided it does not conflict with the statute.” *Pub. Util. Dist. No. 1 of P end Oreille County v. Dep’t of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002).

Petitions brought pursuant to RCW 34.05.570(3)(e) are reviewed for substantial evidence. See *Edelman v. Washington*, 160 Wn. App. 294, 303, 248 P.3d 581 (2011). “Substantial evidence is evidence in sufficient

quantum to persuade a fair-minded person of the truth of the declared premises.” *Id.* at 304 (quoting *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995)).

B. Statutory Interpretation, And The Scope Of An Administrative Agency’s Authority, Are Questions Of Law For The Court.

The meaning of a statute is a question of law reviewed *de novo*. *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012) (citing *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)).

In interpreting a statute, the court’s objective is to ascertain and carry out the Legislature’s intent. *Jongeward*, 174 Wn.2d at 592 (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)).

If a statute’s meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. The plain meaning is discerned from all that the Legislature has said in the statute. Plain meaning may also be discerned from related statutes which disclose legislative intent about the provision in question. An examination of related statutes aids our plain meaning analysis because legislators enact legislation in light of existing statutes.

Jongeward, 174 Wn.2d at 595 (internal citations and quotations omitted).

Statutes relating to the same subject matter should be construed together. *See Jongeward*, 174 Wn.2d at 593 (citing *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001)).

“[U]nlike courts, which are granted the ‘judicial power of the state’ by the Washington Constitution, CONST. art. IV, § 1, agencies are limited to the powers the legislature has granted them.” *Snohomish County Public Transportation Benefit Area v. Public Employment Relations Commission, et al.*, 173 Wn. App. 504, 518, 294 P.3d 803 (2013) (citing *Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995)). “[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* at 379 (internal citations omitted).

Administrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute. *Kaiser Aluminum & Chem. Corp. v. Dept. of Labor & Indus.*, 121 Wn.2d 776, 780, 854 P.2d 611 (1993); *Human Rights Comm'n v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982).

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. *See 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).

C. Washington Law Presumes At-Grade Crossings Are Dangerous, And The Primary Consideration Of The Commission Is Public Safety.

The statutes concerning petitions to the Commission for new at-grade crossings ask the Commission to consider whether grade separation is practicable, whether the highway can be re-routed to either avoid a grade crossing or allow for a safer grade crossing, and the safety of the public and railroad employees. *See* RCW 81.53.020, .030, and .040. The Commission then determines whether to grant or deny the right to construct the at-grade crossing. RCW 81.53.030.

To determine whether a grade separate is practicable, the Commission shall 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.

RCW 81.53.030, concerning petitions to permit crossings, provides:

Whenever a railroad company desires to cross a highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade. Whenever the legislative authority of a county, or the municipal authorities of a city, or the state officers authorized to lay out and construct state roads, or the state parks and

recreation commission, 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 at least ten days' notice to the railroad company and the county or city affected thereby, of the time and place of the investigation, to the end that all parties interested may be present and heard. If the highway involved is a state road or parkway, the secretary of transportation or the state parks and recreation commission shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If it finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, 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, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flaggers, interlocking devices, or other devices or means to secure the safety of the public and its employees. In respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under a commission order authorizing it, the commission may in any event require the railroad company to install and maintain, at or near each crossing, on both sides of it, a sign known as the sawbuck crossing sign with the lettering "Railroad Crossing" inscribed thereon with a suitable inscription indicating the number of tracks. The sign shall be of standard design conforming to specifications furnished by the Washington state department of transportation.

When a new road and new at-grade crossing is at issue, the Commission also should consider whether an over-crossing, and under-crossing, or a safer grade crossing can be made at a different location. RCW 81.53.040.

“The statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous[.]” *Dept. of Trans. v. Snohomish Co.*, 35 Wn.2d 247, 251, 212 P.2d 829 (1949) (quoting *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938)).

TCRY did not locate a case of record construing the statutes applicable to crossing petitions on the specific issue of a petition to open a new at-grade crossing where the railroad opposes the crossing and the governmental entity proposing the crossing asserts economic development as a basis to proceed. In *Snohomish Co.*, the court noted, in the context of a petition to close an at-grade crossing:

It is contended by residents of Mukilteo that the closing of this crossing would damage business property due to the fact that the closing of the crossing would result in making the north portion of Park Avenue a dead end street. The department has no jurisdiction to consider damage to property as such.

Id. at 255.

The three factors described by the Commission in reversing the Initial Order, “economic development interests,” “deference to local government,” and “the broader public policy environment” do not appear in the crossing statutes. The Court should hold that those three factors do not have statutory basis, and that the Commission erred in reversing the Initial Order on the basis of its analysis of those factors.

D. Consistent With Washington Law, The Commission’s Precedent Reflects That Public Safety Is The Primary Concern In The Evaluation Of A Petition To Cross Existing Railroad Tracks With A New Public Highway.

When evaluating the Cities’ 2006 petition, the Commission described the inherent dangers of this particular at grade crossing as follows:

The law disfavors at-grade crossings because certain risks are inherent. In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays. The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity... At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians. Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle’s driver and any passengers involved as well injury to train crews. Grade crossing accidents also have adverse psychological effects on train crews.

The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train approaching on another track that was hidden from view by the stationary cars. Motorists may also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay. More than 50 percent of accidents occur at signalized crossings.

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order 06, Initial Order Denying Petition; and *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Docket TR-050967, Order 02, Initial Order Denying Petition (January 26, 2007), at pp. 8-9.

E. In The Present Case, The Initial Order Properly Applied The Commission's Precedent, And Found That The Cities Failed To Demonstrate Sufficient Public Need To Outweigh The Inherent Risks Presented By The Proposed At-Grade Crossing

As acknowledged by the Commission in the Final Order, “the benefits to public safety alleged by the Cities are too slight on their own to support the petition[.]” (CP 635) The Initial Order concluded that the Cities “failed to demonstrate sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing.” (CP 450) The

Cities argued that the Commission's precedent supported the petition for a new at-grade crossing, but the Initial Order distinguished each case:

The Cities cited open meeting dockets that were all uncontested and did not benefit from a thoroughly developed evidentiary record. The only case with any persuasive value resulted in a net closure of crossings, trading two existing passively protected private at-grade crossings in the City of Marysville for one new public crossing with active warning devices (Docket TR-111147). None of the other approved new crossings were in urban areas where over 7,000 vehicles per day were expected to cross tracks currently traveled by five or more trains per day (in one case, the Commission approved a new crossing to divert approximately 400 commercial vehicles per day away from residential roadways and across a single set of tracks traveled by up to two trains per day (Docket TR-112127); in two other cases, the commission approved installing new industrial rail lines across very lightly traveled roadways in order to promote industrial growth (the road in Docket TR-100072 had only 150 vehicles per day and the road in Docket TR-121467 had less than 1600 vehicles per day); and in two other cases, the Commission approved new pedestrian-only crossings across lightly used tracks (Docket TR-100041 had one weekly freight train and Docket TR-110492 had no active railroading operations)).

(CP 446).

F. The Precedent Relied Upon By The Commission In Reversing The Initial Order Does Not Support Its Decision, Because The Proposed Crossing In The Present Case Will Not Result In The Closure Of Other At-Grade Crossings Or A Net Improvement To Public Safety.

In the Final Order, the Commission described the applicable legal standard as follows:

The Commission, in practice, addresses two principal questions when considering whether to authorize construction of an at-grade crossing, which, by its nature, poses risks for motorists and pedestrians not present at grade-separated crossings: a) Whether a grade-separated crossing is practicable considering cost and engineering requirements and constraints; b) Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at grade configuration.

...

The Initial Order determines that the Cities failed to carry their burden to show a “public need” for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.

(CP 634-635) (citation omitted)

The case relied upon by the Commission, *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 ¶¶ 33-37 (Feb. 15, 2011) (“*Benton*”) concerned a series of petitions to close four private and one public at-grade crossing, and to establish four new public at grade crossings. *Benton* at pp. 1-4. The configuration of the roads in the area required commercial truck traffic passing from the Finley industrial area travelling to I-82 to navigate through a residential area, including past a middle school and a high

school. *Id.* at 4-5. The truck traffic included trucks carrying hazardous materials past the schools. *Id.* The purpose of the construction of the new at-grade crossings, in conjunction with the closings of other nearby crossing, was to “mitigate the problems and dangers of trucks passing through residential areas and school zones.” *Id.* at 5.

The particular at-grade crossing to be opened discussed in *Benton* was a public street crossing a single private industrial spur. *Id.* at 6. The train traffic across that private industrial spur averaged three trains per week, and there was no indication that rail traffic was expected to increase in the coming years. *Id.* at 7.

Due to the proposed roadway alignment, no switching operations would occur on the crossing, or were expected to block the crossing. *Id.* at 8.

There was no dispute that it was not practical, from an engineering or financial perspective, to build a grade separated crossing. *Id.* at 13.

Finding acute public need in the form of both an “overall improvement in public safety” and “improved economic development opportunities”, the *Benton* Commission:

The proposed extension of Piert Road will provide a more direct route for trucks entering and exiting the Finley industrial area on the way to I-82 via SR-397. As Mr. Thorp testifies, trucks currently travelling from the Finley industrial area

to I-82 via SR-397 must pass through a residential area and past a middle school and high school. This includes chemical trucks leaving the Agrium fertilizer facility. Completion of the Piert Road extension project, including the petitioned crossing, will provide a more direct route for this truck traffic thus mitigating the risks of trucks passing through residential areas and school zones. When the potential elimination of these existing risks to public safety are measured against the risks of an accident at the proposed crossing, which the record shows to be quite low, it appears there would be at least some improvement in public safety for the residents of Benton County and those traveling in the Finley area if the project is completed. While the record does not include quantitative measures of the relative risks, it is a matter of common sense to recognize that it is a good idea to divert truck traffic away from residential areas and school zones to a route through a lightly traveled industrial area with favorable topography and geography, and good sight distances for a relatively low risk at-grade rail crossing. In addition to producing an overall improvement in public safety for the community, the second advantage of the Piert Road Extension is that it would open up approximately 300 acres of land in the Finley industrial area that is currently difficult to access. This would promote development and job creation in the area. 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.

Benton was the only precedent cited by the Commission to justify the proposition that “improvements to public safety or improved economic development opportunities” can establish public need sufficient to outweigh the hazards inherent in at-grade crossings. As described in *Benton*, the primary basis for permitting the crossing was the improvement to public safety, with economic development a secondary benefit. Here, the proposed new at-grade crossing is merely for additional access to already partially-developed commercial lots. The proposed crossing is within 3500 feet to the east of an existing at-grade crossing, and is within 2000 feet to the west of an existing grade-separated crossing. As noted 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.

Unlike in *Benton*, the proposed at-grade crossing here will not eliminate hazardous material trucks travelling through residential areas, near middle and high schools. Unlike in *Benton*, the proposed crossing here will not result in the elimination of multiple other private and public crossings, to divert commercial traffic out of residential areas. Unlike in *Benton*, which concerned a road crossing an industrial spur, here the proposed crossing runs over multiple tracks where railcars are often stored and where switching operations are frequently performed. Unlike in

Benton, where there was no projected change to the railroad operations, here use of the tracks by three railroads is expected to increase in the coming years.

The proposed crossing here does not improve public safety, coupled with a potential economic benefit. *Benton* does not support supplanting public safety, disregarding it, or outweighing its consideration by invoking economics.

G. The Commission Treated Written Public Comments As Substantive Evidence, And Relied Upon Them In Reversing The Initial Order. Doing So Was Not Consistent With The Commission's Procedural And Evidentiary Rules.

Hearings on petitions for at-grade crossings are governed by the Administrative Procedures Act, RCW 34.05.410 ~ .494, RCW 81.53 *et seq.*, and the WAC provisions promulgated by the Commission. *See* WAC 480-07-300 ~ -498.

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 as follows:

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).

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, without notice or opportunity to examine the submitters. (*See* CP 639-642)

By elevating public comment to the status of admissible, substantive evidence, and basing its reversal of the Initial Order on public comments, the Commission was not consistent with WAC 480-07-490(5)

and WAC 480-07-498. The parties were not given notice that the Commission would consider public comment as “proof of the matters asserted,” nor were they afforded the opportunity to cross-examine the submitters of the public comments relied upon by the Commission.

Pursuant to RCW 34.05.570(3)(c), the Commission failed to follow its own evidentiary regulations and procedures.

H. Since The Evidence Relied Upon By The Commission In Reversing The Initial Order Was Inadmissible, The Final Order Lacked Substantial Evidence.

An agency’s order must be supported by substantial evidence in the record. *See* RCW 34.05.570(3)(e); *Edelman v. Washington*, 160 Wn. App. 294, 303, 248 P.3d 581 (2011). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Edelman* 160 Wn. App. at 304 (internal quotation omitted). *Cf. In re X.T.*, 174 Wn. App. 733, 739, 300 P.3d 824 (2013) (“In the absence of the testimony based on inadmissible hearsay, substantial evidence did not support the juvenile court's findings of fact.”).

Per the Commission’s evidentiary rules, public comment is to be treated as illustrative exhibit, rather than evidence. WAC 480-07-498. Public comment cannot be “received into evidence as proof of the matters asserted” unless there is an opportunity for cross-examination. WAC 480-07-490(5). Nonetheless, the Commission based its reversal of the Initial

Order upon five written public comments, which, as argued above, are not admissible evidence. (*See* CP 639-642)

Since 1) the Commission accepted all of the facts found in the Initial Order; 2) the basis for the reversal of the Initial Order was public comment; and 3) public comment is not itself “proof of the matters asserted”; the Commission lacked substantial evidence for paragraphs 23, 24, 26, 27, 28, 37, and 38 of the Final Order.

I. Costs and Attorney’s Fees.

Under RCW 4.84.350, a party that prevails in a judicial review of an agency action is entitled to attorney fees and other expenses up to \$25,000 unless “the court finds that the agency action was substantially justified or that circumstances make an award unjust.” Pursuant to that statute, and to RAP 18.1, TCRY requests an award of its costs and attorney’s fees, should it obtain relief on a significant issue. *See Gerow v. Gambling Commission*, 181 Wn. App. 229, 245-46, 324 P.3d 800 (2014).

V. CONCLUSION

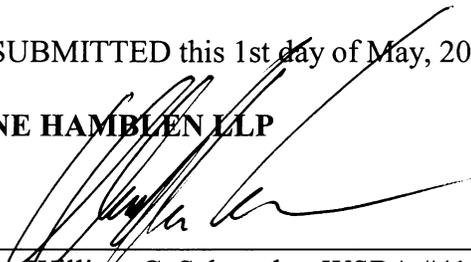
The factors considered by the Commission in reversing the Initial Order, “economic development interests,” “deference to local government,” and “the broader public policy environment”, are not supported by the Commission’s precedent or by the statutes from which the Commission’s authority is drawn. The Commission’s own rules do not

allow it to consider public comments as substantive evidence in the manner it did. TCRY could not have predicted that the Commission would disregard its precedent, exceed its statutory authority by creating new factors to consider, or consider public comment in violation of the Commission's own rules, and so was deprived of the opportunity to present argument and evidence to the Commission on those issues.

For the reasons described above, TCRY requests that the Court reverse the Commission's Final Order.

RESPECTFULLY SUBMITTED this 1st day of May, 2015.

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CERTIFICATE OF SERVICE

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

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WILLIAM C. SCHROEDER



APPENDIX

City of Kennewick v. Union Pacific Railroad, Docket TR-040664, Order 06, Initial Order Denying
Petition (January 26, 2007)

[Service Date January 26, 2007]

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK,	)	DOCKET TR-040664
)	
Petitioner,	)	ORDER 06
)	
v.)	
	)	INITIAL ORDER DENYING
UNION PACIFIC RAILROAD,	)	PETITION
)	
Respondent.)	
)	
.....)	
CITY OF KENNEWICK,	)	DOCKET TR-050967
)	
Petitioner,	)	ORDER 02
)	
v.)	
	)	INITIAL ORDER DENYING
PORT OF BENTON AND TRI-CITY	)	PETITION
& OLYMPIA RAILROAD,)	
)	
Respondent.)	
)	
.....)	

1 **Synopsis:** *This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the petitions for an at-grade crossing of Center Parkway with the Union Pacific Railroad’s dead end spur west of Richland Junction and the Port of Benton and Tri-City & Olympia Railroad’s Hanford Industrial Branch west of Richland Junction will be denied.*

2 **Nature of the Proceedings:** The City of Kennewick (Kennewick)¹ filed two petitions for at-grade crossings. The first petition is for approval of an at-grade crossing of Center Parkway with the Union Pacific Railroad’s (UPRR) dead end spur west of Richland Junction. The second petition is for approval of an at-grade crossing

¹ Kennewick filed the petitions on behalf of the City of Kennewick and the City of Richland. References to the acronym “Kennewick” refer to both cities.

of Center Parkway over the Port of Benton (Benton)² and Tri-City & Olympia Railroad's (TCRY) Hanford Industrial Branch west of Richland Junction. The petitions were consolidated for hearing.³

- 3 **Procedural history:** A comprehensive procedural history of the initial stages of these petitions was set forth in previous orders of the Washington Utilities and Transportation Commission (Commission) and will not be repeated herein.⁴ The petitions were heard upon due and proper notice to all interested parties before Administrative Law Judge Patricia Clark October 19, and 20, 2006, in Olympia, Washington.
- 4 During the hearing, on October 19, 2006, Kennewick and the Port of Benton reached an agreement whereby the Port of Benton granted Kennewick an easement allowing Kennewick to construct a railroad crossing over its tracks subject to the rights of its lessee, TCRY.⁵ The Agreement recognized that the lessee, TCRY, and UPRR, opposed the at-grade crossing. Given the agreement, the Port of Benton did not appear at hearing.
- 5 At the conclusion of the hearing on October 20, 2006, the Administrative Law Judge established two post-hearing briefing schedules after input from the parties. During testimony adduced at hearing it became apparent that there was a potential conflict between Washington state law and Federal Railroad Administration (FRA) requirements for silent, at-grade crossings. The first briefing schedule was mandatory and required parties to address the apparent conflict in law and, if there was a conflict, an analysis of which requirement would prevail. On November 20, 2006, the parties timely filed a joint brief on this issue. The joint brief demonstrated that there is no conflict of law. The second briefing schedule was discretionary and permitted post-hearing briefs on the issues in these proceedings. If Kennewick elected to file post-hearing briefs, the remaining parties were permitted to file responsive briefing. Kennewick elected to file post-hearing briefing and timely filed its brief on December 20, 2006. The TCRY, UPRR, BNSF, and Commission Staff timely filed briefs on or before the deadline of January 22, 2007.

² The Port of Benton leases its track to Tri-City & Olympia Railroad.

³ Order 05 entered in Docket TR-040664 on January 19, 2006, and Order 01 entered in Docket TR-050967 on the same date.

⁴ *Id.*

6 **Initial Order:** The presiding administrative law judge proposes to deny the petitions.

7 **Appearances:** The parties were represented as follows.

Petitioner, City of Kennewick by John Ziobro
City Attorney's Office
P.O. Box 6108
Kennewick, WA 99336-0108
Attorney City

Commission Staff by Jonathan Thompson
Assistant Attorney General
1400 S. Evergreen Park Dr. SW
Olympia, WA 98504-0128

Respondent, UPRR by Carolyn L. Larson
Dunn Carney Allen Higgins & Tongue LLP
851 SW Sixth Avenue, Suite 1500
Portland OR 97204-1357

Respondent, Port of Benton by Daryl Jonson⁶
Cowan Moore Stam & Luke, P.S.
P.O. Box 927
Richland, WA 99352

Respondent, TCRY by Brandon L. Johnson
Minnick-Hayner
P.O. Box 1757
Walla Walla, WA 99362-0348

⁵ The Agreement renders moot the outstanding motion to dismiss for lack of jurisdiction filed by the Port of Benton on February 7, 2006.

⁶ The Port of Benton reached an agreement with the Cities of Kennewick and Richland and did not enter an appearance at hearing.

Respondent, BNSF Railway by Kevin MacDougall
Montgomery Scarp MacDougall, PLLC
Seattle Tower, 27th Floor
1218 Third Avenue
Seattle, WA 98101

DISCUSSION

8 **Issue:** The principal issue in these proceedings is whether Kennewick should be authorized to extend Center Parkway between Tapteal Drive and Gage Boulevard with an at-grade crossing over four sets of railroad tracks owned by the UPRR and the Port of Benton. The tracks owned by the Port of Benton are leased to the TCRY. The other parties to these proceedings, UPRR, TCRY, BNSF, and the Commission Staff oppose granting the request for an at-grade crossing.

9 **Applicable Law:** The Commission's authority to regulate the safety of grade crossings is set forth in Chapter 81.53, RCW. The law, RCW 81.53.020, disfavors at-grade railroad crossings and requires railroad crossings to be constructed with a grade separation, where practicable. The same statute provides that Kennewick must obtain authority from the Commission for the at-grade crossing. According to RCW 81.53.030, the Commission has discretion to grant or deny petitions for opening at-grade crossings.

10 The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous.⁷ The Commission then considers the following analysis:

[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. Such needs which have been found appropriate include the lack of a reasonable alternate access for public emergency services; and the

⁷RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146,150, 80 P.2d 406 (1938).

sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.⁸

- 11 If the petitioner demonstrates that the inherent and site-specific dangers are moderated to the extent possible and there is an acute public need for the crossing that outweighs the danger, then the analysis turns to application to the factors in RCW 81.53.020, to determine whether a separation of grades is practicable. That statute provides in pertinent part, that:

[I]n determining whether a separation of grades is practicable, the commission shall 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.

- 12 **Burden of Proof:** Kennewick has the burden of proving that the inherent and site-specific dangers at the proposed crossing have been moderated to the extent possible and that there is an acute public need to construct an at-grade crossing at Center Parkway between Tapteal Drive and Gage Boulevard that outweighs the danger. If Kennewick meets that burden, then Kennewick bears the burden of demonstrating that a separation of grades is impracticable.
- 13 **Petitions for At-Grade Crossings:** The Cities of Kennewick and Richland are interested in extending Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick.⁹ At the present time, four sets of railroad tracks obstruct the southern extension of Center Parkway from Tapteal Drive and the northern extension of Center Parkway from Gage Boulevard.¹⁰ There is a regional shopping mall on the southern side of the railroad tracks and other commercial and retail development north of the railroad tracks.¹¹ The closest ingress and egress between the two commercial and retail areas is at either Columbia Center Boulevard or Steptoe

⁸ *Town of Tonasket*, Docket No. TR-921371 (1993).

⁹ Darrington, Exh. No. 1 at 1:24-25

¹⁰ Darrington, Exh. No. 2.

¹¹ Darrington, Exh. 2.

Street. Columbia Center Boulevard is approximately 0.38 miles to the east of the proposed crossing.¹² There is a separated grade crossing, an overpass, at Columbia Center Boulevard.¹³ Steptoe Street is approximately 0.6 miles to the west of the proposed crossings.¹⁴ There is an at-grade crossing at Steptoe Street.¹⁵

- 14 *Inherent Danger in At-Grade Crossings:* There are two petitions at issue in this proceeding because four sets of railroad tracks, used and operated by three different railroads, would be affected by this crossing.¹⁶ The first petition involves UPRR. The proposed extension of Center Parkway would cross two UPRR tracks that are used for interchanging cars with the TCRY.¹⁷ The southerly track is the end portion of the Kalan Industrial lead and is referred to as the old Union Pacific (UP) Main.¹⁸
- 15 UPRR uses these tracks to interchange cars with TCRY.¹⁹ TCRY sets out cars (primarily refrigerator cars or “reefers”) in the morning and UPRR picks up the TCRY cars in the evening as well as setting out cars for TCRY to pick up the following morning.²⁰ The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY.²¹ If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice.²² If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.²³
- 16 The second petition at issue involves TCRY and BNSF’s use of the Port of Benton track. BNSF uses the track to interchange cars with TCRY.²⁴ TCRY sets out cars for BNSF in the morning and BNSF picks them up between noon and 6:00 p.m., and sets out cars for TCRY to pick up the following morning.²⁵ BNSF performs these switching operations in the location of the proposed crossing approximately one time

¹² Darrington, Exh. No. 2 and Plummer Exh. No. 6 at 8:22-24.

¹³ Plummer, Exh. No. 6 at 8:22-24

¹⁴ Darrington, Exh. No. 2 and Plummer, Exh. No. 6 at 8:21-22.

¹⁵ Plummer, Exh. No. 6 at 8:21-22.

¹⁶ Plummer, Exh. No. 6 at 3:6-8.

¹⁷ Leathers, Exh. No. 15 at 2:8-9.

¹⁸ Leathers, Exh. No. 15 at 2:9-11.

¹⁹ Leathers, Exh. No. 15 at 2:22.

²⁰ Leathers, Exh. No. 15 at 2:22-24.

²¹ Leathers, Exh. No. 15 at 2:25-26.

²² Leathers, Exh. No. 15 at 3:24.

²³ Leathers, Exh. No. 15 at 3:25-26.

²⁴ Labberton, Exh. No. 50 at 2:25-26.

²⁵ Labberton, Exh. No. 50 at 2:26-27.

per day, five days per week.²⁶ BNSF would cross Center Parkway approximately four times for each switching operation.²⁷

- 17 TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction.²⁸ TCRY interchanges cars with both UPRR and the BNSF at that junction.²⁹ TCRY has both a main line and a siding at Richland Junction.³⁰ TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF.³¹ TCRY uses the UPRR Old Pass for interchanging traffic with UPRR.³² TCRY picks up and drops off UPRR cars at least once a day.³³ Depending on the time of year, TCRY picks up BNSF cars multiple times a week.³⁴ It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season.³⁵ TCRY was unable to state with specificity the number of times it would cross Center Parkway during its switching operations, but with the combined UPRR and BNSF interchange traffic, it would be "a lot."³⁶
- 18 Kennewick stated that there are other at-grade crossings in Washington that have extensive rail movement.³⁷ There is an at-grade crossing at East D Street, in Tacoma, where over 45 freight and 10 passenger trains pass daily.³⁸ Numerous switching operations occur at the same location 24 hours a day.³⁹ This street is currently being grade separated.⁴⁰ At the Stacy Street Yard in Seattle, there is an at-grade crossing at Royal Brougham, a major roadway, where switching occurs 24 hours a day, seven days a week.⁴¹

²⁶ Labberton, Exh. No. 50 at 3:15-16.

²⁷ Labberton, Exh. No. 50 at 3:24.

²⁸ Peterson, Exh. No. 41 at 2:20-23.

²⁹ Peterson, Exh. No. 41 at 2:23-24.

³⁰ Peterson, Exh. No. 41 at 2:28-29.

³¹ Peterson, Exh. No. 41 at 2:9 and 3:1.

³² Peterson, Exh. No. 41 at 3:1-2.

³³ Peterson, Exh. No. 41 at 9:6-9.

³⁴ Peterson, Exh. No. 41 at 9:10-13.

³⁵ Peterson, Exh. No. 41 at 9:27-29.

³⁶ Peterson, TR. 357:9-12.

³⁷ Short, Exh. No. 48 at 7:19-25 and 8:1-2.

³⁸ Short, Exh. No. 48 at 7:21-22.

³⁹ Short, Exh. No. 48 at 7:22-23.

⁴⁰ Short, Exh. No. 48 at 7:23-24.

⁴¹ Short, Exh. No. 48 at 7:24-25 and 8:1-2.

- 19 It is apparent from the foregoing facts that extensive switching operations for three railroads are conducted at the proposed Center Parkway crossing. Naturally, the nature and extent of the railroad traffic will impact the site-specific crossing dangers that are presented by the proposed crossing and that Kennewick must address in its demonstration of the types of signals and warning devices that Kennewick would need to install to moderate those dangers to the extent possible. The danger present at the proposed crossing also influences Kennewick's demonstration of acute public need.
- 20 The law disfavors at-grade crossings because certain risks are inherent.⁴² In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays.⁴³ The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity.⁴⁴ In addition, with this site involving four railroad tracks, the drivers of vehicles who ignore warning signs and drive too fast for the conditions may launch over the second track or "bottom out" depending the speed and direction of the vehicle.⁴⁵ At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians.⁴⁶ Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle's driver and any passengers involved as well injury to train crews.⁴⁷ Grade crossing accidents also have adverse psychological effects on train crews.⁴⁸
- 21 The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train

⁴² RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 406 (1938).

⁴³ Plummer, Exh. No. 6 at 5:20-21.

⁴⁴ Deskins, Exh. No. 13:15; Hammond, Exh. No. 37 at 4:14-17 and 5:4-6; Peterson, Exh. No. 41 at 6:17-18.

⁴⁵ Deskins, Exh. No. 13 at 3:15-17.

⁴⁶ Trumbull, Exh. No. 32 at 3:3-5.

⁴⁷ Trumbull, Exh. No. 32 at 3:7-8.

⁴⁸ Trumbull, Exh. No. 32 at 3:8-9.

approaching on another track that was hidden from view by the stationary cars.⁴⁹ Motorists may also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay.⁵⁰ More than 50 percent of accidents occur at signalized crossings.⁵¹

22 *Moderation of Danger to the Extent Possible:* The first prong of the legal test is for Kennewick to demonstrate that the inherent and site-specific dangers of the crossing are moderated to the extent possible by the installation of safety devices. The evidence on this topic was sparse. Kennewick stated that it intended to seek approval from the FRA to install a silent at-grade crossing.⁵² For this type of crossing, Kennewick asserted that the FRA would require the installation of median barriers and crossing gates that fully block all four quadrants of the roadway.⁵³ However, in response to inquiry by Commission Staff, Kennewick was unable to articulate exactly the type of safety devices it would install to moderate the danger at the Center Parkway crossing site.⁵⁴ Specifically, Kennewick was asked if it proposed to put in four quadrant gates and median barriers if the FRA did not approve a silent crossing and Kennewick indicated that “we’re not really that far into the design. . .”⁵⁵ Kennewick was also unable to respond to inquiry regarding whether wayside horns constitute supplemental safety devices.⁵⁶ Kennewick indicated that information regarding crossing safety devices would be the type of work to be addressed by a consultant.⁵⁷ However, the study performed by the consultants hired by Kennewick contains a paucity of information on this topic. The study does address installing a railroad crossing with arms at a cost of \$220,000, but Kennewick did not present any specific design to protect the crossing.⁵⁸ One proposal was to install a median separator and four quadrant gates, but that was presented as only “one possible design.”⁵⁹ It is clear from the absence of a sufficient record on this topic that

⁴⁹ Trumbull, Exh. No. 32 at 3:24-26 and 4:1-2.

⁵⁰ Peterson, Exh. No. 41 at 7:5-11.

⁵¹ Trumbull, TR. 231:3-10,

⁵² Kennewick has not yet sought approval from the FRA.

⁵³ Plummer, Exh. No. 6 at 8:3-6.

⁵⁴ Plummer, TR. 147:7-12.

⁵⁵ Plummer, TR. 147:10-12.

⁵⁶ Plummer, TR 148-5-25 and 149:1-4.

⁵⁷ Plummer, TR. 149:1-4.

⁵⁸ Plummer, Exh. No. 7 at 37:21.

⁵⁹ Deskins, TR. 198:10-14.

Kennewick did not meet its burden of proof that the site-specific and inherent risks of the Center Parkway crossing have been moderated to the extent possible.

- 23 Having failed to meet its burden of proof on the first prong of the applicable legal standard, the petitions could be denied without further discussion. However, it may provide some guidance to Kennewick for future filings to consider the second prong of the legal standard.
- 24 *Acute Public Need:* The second prong of the legal test applicable in these proceedings is for Kennewick to demonstrate that there is an acute public need for the crossing that outweighs the danger. For the City of Richland, the road extension would serve two purposes: (1) it would facilitate new commercial and retail development along Tapteal Drive,⁶⁰ and (2) it would improve traffic circulation.⁶¹ The City of Kennewick cites the primary benefit of the crossing as relief of present and future traffic congestion from Columbia Center Boulevard which is currently approximately 40,000 vehicles per day.⁶² The City of Kennewick also asserted that there would be greater accessibility to Kennewick retail business which would improve the economic strength and vitality of this area.⁶³
- 25 With respect to commercial and retail development along Tapteal Drive, it appears that there is new commercial and retail development even absent the at-grade crossing at Center Parkway.⁶⁴ A newly-constructed Holiday Inn Express is located immediately north of the railroad tracks off Tapteal Drive.⁶⁵ There is also a Home Depot, a Costco, Circuit City, and Staples in the same area.⁶⁶ In addition, within the past two years, a Macy's furniture store was constructed and a second furniture store is under construction.⁶⁷ Thus, it appears that economic development in this area is occurring even without the proposed crossing. In any event, while economic

⁶⁰ Darrington, Exh. No. 1 at 3:1-3 and Plummer, Exh. No. 6 at 3:13-15..

⁶¹ Darrington Exh. No. 1 at 3:3-5

⁶² Hammond, Exh. No. 5 at 2:17-18 and Hammond, TR. 120:10-20. The testimony of the City of Kennewick is in conflict on this issue. While one witness, Hammond cites relief of traffic congestion at the "primary benefit", another witness, Deskins, cites stimulation of economic growth as the "primary need." Deskins, Exh. No. 13 at 4:16.

⁶³ Hammond, Exh. No. 5 at 2:18-20 and Plummer, Exh. No. 6 at 3:13-15.

⁶⁴ Darrington, TR. 285:6-9.

⁶⁵ Darrington, Exh. No. 2 and Leathers, Exh. Nos. 23-26.

⁶⁶ Darrington, Exh. No. 2; Deskins, TR. 19:19-25 and 20:1-4; Deskins TR 204:5-11; Darrington, TR. 285:16-17; Darrington, TR. 294:13-14..

⁶⁷ Deskins, TR. 19:19-25 and 20:1-14 and Deskins, TR. 204:5-11.

development is definitely a positive goal for these cities, it does not rise to the level of an acute public need.

- 26 The second goal cited by Kennewick, traffic mitigation, may constitute acute public need if alternate crossings are insufficient to accommodate traffic.⁶⁸ Based on the record, it does not appear that the Center Parkway crossing would be particularly effective in achieving the goal of traffic mitigation. According to Kennewick, if the Center Parkway crossing is approved, the projected average daily volume of traffic on this roadway would be 2,200 vehicles.⁶⁹ The average daily volume of traffic is projected to increase to 4,250 by the year 2023.⁷⁰ Therefore, assuming that Kennewick is accurate in its estimates, only approximately 5-6 percent of the traffic would be diverted from Columbia Center Boulevard.⁷¹ In 2023, approximately 700 vehicles could be diverted off Steptoe Street onto the new Center Parkway extension.⁷² The traffic diversion from Steptoe Street was characterized as slight and probably within the daily variation of traffic on Steptoe Street.⁷³ Alleviating traffic congestion is a positive goal. However, the *de minimis* level of traffic diversion anticipated by Kennewick does not appear to be an effective means to accomplish that goal. Moreover, the two alternate crossings at Columbia Center Boulevard and Steptoe Street appear adequate to accommodate this level of traffic and both alternate crossings are within 0.6 miles or less of the proposed Center Parkway crossing. Therefore, Kennewick did not meet its burden of proof on the second prong of the legal standard.
- 27 Having concluded that Kennewick failed to meet its burden of proof for the first two prongs of the legal standard; that is, to demonstrate that it has moderated the risks associated with the crossing to the extent possible and that there is an acute public need for the crossing that outweighs the danger, the petitions should be denied.

⁶⁸ See n. 8.

⁶⁹ Plummer, Exh. No. 6 at 6:18.

⁷⁰ Plummer, Exh. No. 6 at 6:18-19.

⁷¹ Plummer, TR. 152:12-25 and 153:1-7 and Hammond, TR. 243:18-19..

⁷² Hammond, TR. 243:8-12.

⁷³ Hammond, TR. 242:14-17.

FINDINGS OF FACT

- 28 Having discussed above in detail all matters material to the Commission's decision, and having stated general findings, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the Commission's ultimate decisions are incorporated by this reference.
- 29 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to determine whether a highway may be extended across a railroad at grade.
- 30 (2) The City of Kennewick filed two petitions on behalf of the Cities of Kennewick and Richland to construct an at-grade crossing of four railroad tracks at Center Parkway.
- 31 (3) The first petition involves extending Center Parkway across two Union Pacific Railroad tracks.
- 32 (4) The second petition involves extending Center Parkway across two Port of Benton railroad tracks that are leased to Tri City and Olympia Railway.
- 33 (5) There is a regional shopping mall on the southern side of the railroad tracks and commercial and retail development north of the railroad tracks.
- 34 (6) Access between the regional shopping mall and the commercial and retail development is via either Columbia Center Boulevard or Steptoe Street.
- 35 (7) Columbia Center Boulevard is approximately 0.38 miles east of the proposed crossing and has an over-grade crossing of the railroad tracks.
- 36 (8) Steptoe Street is approximately 0.6 miles west of the proposed crossing and has an at-grade crossing of the railroad tracks. .

- 37 (9) Union Pacific Railroad, Tri City and Olympia Railway, and BNSF conduct
extensive switching operations on the four tracks that are at issue in these
petitions.
- 38 (10) Railway crossings at-grade are inherently dangerous because they present the
potential for train and vehicular, pedestrian, or bicycle conflict.
- 39 (11) The potential for train and vehicular, pedestrian, or bicycle conflict is
exacerbated by the existence of four railroad tracks and the presence of three
railroads conducting switching operations at the proposed crossing site.
- 40 (12) Kennewick does not have a definitive plan for the types of safety equipment,
including gates, signals, lights, and signage that would be installed at the
proposed crossing.
- 41 (13) Kennewick proposed the railroad crossing to facilitate new commercial and
retail development both north and south of the railroad tracks and to reduce
traffic congestion.
- 42 (14) The other parties to these proceeding, Union Pacific Railroad, Tri City and
Olympia Railroad, BNSF Railway, and the Commission Staff oppose granting
the petitions.

CONCLUSIONS OF LAW

- 43 Having discussed above in detail all matters material to the Commission's decision,
and having stated general findings and conclusions, the Commission now makes the
following summary conclusions of law. Those portions of the preceding detailed
discussion that state conclusions pertaining to the Commission's ultimate decisions
are incorporated by this reference.
- 44 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of, and parties to, these proceedings, according to RCW
81.53.
- 45 (2) Pursuant to RCW 81.53, at-grade crossings are disfavored because of the
inherent public risk.

- 46 (3) Pursuant to RCW 81.53.030 and case law,⁷⁴ the Commission may either grant
or deny petitions for at-grade crossings.
- 47 (4) At-grade crossings may be permitted if the inherent and site-specific dangers
of the crossing are moderated to the extent possible and there is an acute
public need for the crossing that outweighs the danger.
- 48 (5) Kennewick has the burden of proof in these proceedings.
- 49 (6) Kennewick failed to meet its burden of proof that the inherent and site-specific
dangers of the crossing are moderated to the extent possible and there is an
acute public need for the crossing that outweighs the danger.
- 50 (7) The petition filed by the City of Kennewick for approval of an at-grade
crossing of Center Parkway with the Union Pacific Railroad's dead end spur
west of Richland Junction should be denied.
- 51 (8) The petition filed by the City of Kennewick for approval of an at-grade
crossing of Center Parkway over the Port of Benton and Tri-City and Olympia
Railroad's Hanford Industrial Branch we of Richland Junction should be
denied.

ORDER

THE COMMISSION ORDERS THAT

- 52 (1) The petition filed by the City of Kennewick for approval of an at-grade
crossing at Center Parkway with the Union Pacific Railroad's dead end spur
west of Richland Junction is denied.

⁷⁴ *Town of Tonasket*, WUTC Docket No. TR-921371 (1993) and *Department of Transportation v. Snohomish County*, 35 Wn 2d 247, 254, 212 P.2d 829 (1949).

- 53 (2) The petition filed by the City of Kennewick for approval of an at-grade crossing of Center Parkway over the Port of Benton and Tri-City & Olympia Railroad's Hanford Industrial Branch west of Richland Junction is denied.

Dated at Olympia, Washington, and effective January 26, 2007.

PATRICIA CLARK
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

DOCKET TR-040664
ORDER 06
DOCKET TR-050967
ORDER 02

PAGE 16

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

APPENDIX

City of Kennewick v. Port of Benton, et al., Docket TR-130499, Order 02, Initial Order Denying
Petition to Open At-Grade Railroad Crossing (February 25, 2014)

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,) DOCKET TR-130499
Petitioner,) ORDER 02
v.)
PORT OF BENTON, TRI-CITY &) INITIAL ORDER DENYING
OLYMPIA RAILROAD COMPANY,) PETITION TO OPEN AT-GRADE
BNSF RAILWAY COMPANY; AND) RAILROAD CROSSING
UNION PACIFIC RAILROAD,)
Respondents.)
.....)

BACKGROUND

- 1 On April 8, 2013, the City of Kennewick filed with the Washington Utilities and Transportation Commission (Commission) a petition to construct a highway-rail grade crossing at Center Parkway, Kennewick, Washington and remove an existing railroad siding. On May 31, 2013, the City of Richland petitioned to intervene in support of this petition.
2 On June 4, 2013, the Commission held a prehearing conference in Olympia, Washington, before Administrative Law Judge Adam E. Torem. At that time, the Commission granted intervenor status to the City of Richland and adopted a procedural schedule for this docket.
3 At the prehearing conference, the City of Kennewick indicated compliance with the State Environmental Policy Act (SEPA) by its 2003 completion of a SEPA checklist for the Center Parkway Extension project and subsequent issuance of a Mitigated Determination of NonSignificance (MDNS). On July 26, 2013, the City of Kennewick updated its previous environmental assessment and prepared an Addendum to its SEPA checklist. On August 20, 2013, the City of Kennewick confirmed to the Commission that all SEPA compliance work was complete.
4 The Commission conducted evidentiary hearings on November 19-20, 2013, and a public comment hearing on November 20, 2013, in Richland, Washington. Judge Torem performed a site visit and toured the area on November 21, 2013. The parties simultaneously filed written post-hearing briefs on December 20, 2013.

5 *Representatives.*¹ P. Stephen DiJulio and Jeremy Eckert, Foster Pepper PLLC, Seattle, represent petitioner City of Kennewick and intervenor City of Richland (Cities). Paul J. Petit, Richland, represents respondent Tri-City & Olympia Railroad (TCRY). Steven W. Smith, Assistant Attorney General, Olympia, represents the Commission's regulatory staff (Commission Staff or Staff).²

EVIDENCE

A. Center Parkway and Surroundings

6 Center Parkway is a minor arterial roadway in Kennewick. As currently constructed, its northbound traffic moves into a roundabout intersection with Gage Boulevard and cannot proceed further north to Tapteal Drive.³ As part of their comprehensive plans, the Cities intend to connect Tapteal Drive in Richland with Gage Boulevard in Kennewick by extending Center Parkway northward.⁴ In order to accomplish this, Center Parkway would cross two sets of railroad tracks owned by the Port of Benton.⁵

7 Seven years ago, the Commission denied the City of Kennewick's original petition to construct this at-grade crossing.⁶ At that time, extending Center Parkway northward would have required crossing four sets of tracks. However, in 2011, the City of Richland completed negotiations with the Union Pacific Railroad Company (UPRR) and Burlington Northern Santa Fe Railway Company (BNSF) to relocate their switching operations from the area, allowing removal of the two UPRR spur tracks.⁷

¹ The following parties appeared at the prehearing conference but did not participate in any other portion of the proceedings: Thomas A. Cowan, Richland, represents respondent Port of Benton. Tom Montgomery and Kelsey Endres, Seattle, represent respondent Burlington Northern Santa Fe Railway Company (BNSF). Carolyn Larson, Portland, OR, represents respondent Union Pacific Railroad Company (UPRR).

² In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

³ Exh. JP-5-X, at 2-3 (overview maps of area).

⁴ Exh. JP-1T, 2:11-24; *see also* Exh. JP-2, Exh. JP-3, and Exh. JP-4.

⁵ *See* Exh. KH-2 (aerial view of surrounding area) and Exh. KH-3 (crossing configuration).

⁶ *See* Docket TR-040664, *City of Kennewick v. Union Pacific Railroad*, Order 06, Initial Order Denying Petition; Docket TR-050967, *City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad*, Order 02, Initial Order Denying Petition (January 26, 2007) (2007 Order).

⁷ Exh. JP-6-X (UPRR) and Exh. JP-7-X (BNSF).

8 Commercial and retail properties dominate the area surrounding the proposed crossing. As shown in Figure 1,⁸ the Columbia Center Mall, a major regional shopping center, is located immediately southeast of the proposed crossing, bordered by Center Parkway (west side), Quinault Street (south side), and Columbia Center Boulevard (east side). The Mall's northern boundary abuts Port of Benton and UPRR railroad tracks that connect at Richland Junction, just east of the proposed crossing.

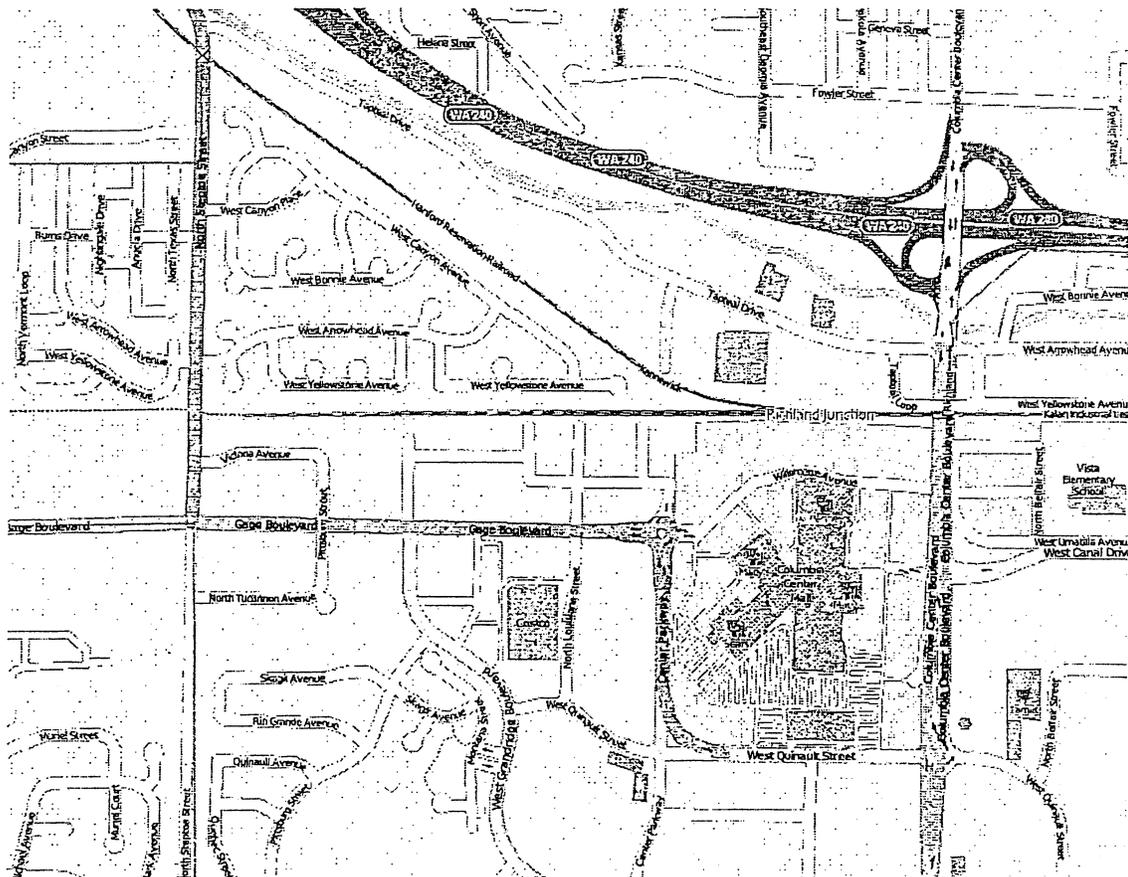


Figure 1. Overview Map of Area (including old UPRR spur track, now removed)

9 North of the proposed crossing, Tapteal Drive provides access to a hotel and various retail, commercial and undeveloped properties located in a mile-long pocket of land below Highway 240. The proposed Center Parkway crossing would provide a more direct connection from this area to the Columbia Center Mall.⁹

10 Road access between these two areas now exists where Tapteal Drive intersects Columbia Center Boulevard, approximately 0.4 miles east of the proposed crossing.

⁸ Aerial imagery of the area is provided by Exhs. JD-27-X, JD-28-X, JD-29-X, and JD-30-X.

⁹ See Petition at 8; see also Exh. RS-1T, 8:20 – 9:2 and Exh. JD-1T, 3:6 – 4:20.

Columbia Center Boulevard has a grade-separated overpass to cross the UPRR mainline track; however, as this section of the roadway is divided, northbound traffic accessing Tapteal Drive must make a series of right turns to loop up and over the major arterial roadway (Tapteal Loop). Alternatively, Tapteal Drive meets Steptoe Street approximately 0.7 miles west of the proposed crossing. From there, southbound motorists currently pass through a regular at-grade crossing to connect with Gage Boulevard, another major arterial roadway that provides eastbound access to the mall area via the current roundabout intersection with Center Parkway.¹⁰

B. Rail Operations at Richland Junction

- 11 TCRY is a rail carrier conducting interstate rail operations through Kennewick and Richland. TCRY leases the track west and north of Richland Junction from the Port of Benton; BNSF and UPRR also operate on this track. Randolph V. Peterson, Managing Member of TCRY, explained that the second set of tracks immediately west of Richland Junction allows trains to meet and pass when entering or exiting the area. According to Mr. Peterson, this passing track is “absolutely essential” because TCRY makes frequent, if not daily, use of that facility.¹¹ When no passing operations are scheduled, TCRY also uses the second track as a siding to store idle freight cars.¹²
- 12 Mr. Peterson estimates that TCRY presently operates 10 to 20 freight trains each week on the mainline track that passes through the Richland Junction. BNSF operates another 10 freight trains each week and, on occasion, UPRR operates a “unit train,” a mile-long freight train consisting of approximately 100 to 120 cars all carrying the same cargo. No passenger trains operate on this track. Mr. Peterson testified that the combined annual train traffic through the Richland Junction increased from nearly 4,500 railcars in 2012 to over 5,100 railcars in 2013.¹³ Mr. Peterson expects further

¹⁰ See Exh. JP-5-X, at 2-3. In 2009, the Commission granted the City of Richland’s petition to realign the Tapteal-Steptoe intersection atop the at-grade crossing to create Washington’s first-ever roundabout intersection with a rail line running through the middle. See Exh. GAN-10-X, Docket TR-090912, *City of Kennewick v. Tri-City & Olympia Railroad*, Order 01, Order Granting Petition to Reconstruct the Steptoe Street Highway-Rail Grade Crossing and Modify Active Warning Devices (July 2, 2009). Although the Benton-Franklin Council of Governments 2011-2032 Regional Transportation Plan projected this construction to begin in 2012, the City has not yet initiated any construction work. See Exh. RS-4, at 16 (Steptoe Street Phase 3).

¹¹ Peterson, TR. 381:5 – 383:15.

¹² The Cities contend TCRY makes only sparing use of the passing track. See Exh. KJ-13-X, at 2. The Cities argued that several tank cars present on the siding during the evidentiary hearing had not been moved for days or even weeks. Peterson, TR. 405:14 – 410:19; see also Exh. RVP-9-X.

¹³ Exh. RVP-1T at 3-4; see also Exh. RVP-3-X at 1-3. The Cities estimate current train traffic to be appreciably lower, between 3.2 to 5.02 trains per weekday, or 2,310 total railcars moved by TCRY annually. See Exhs. KJ-10T-R, KJ-11, and KJ-12; see also Jeffers, TR. 143:1 – 146:25.

increases in train traffic because of TCRY's continued growth and new commercial developments in the Horn Rapids Industrial Park that will be served by rail.¹⁴

13 Gary Ballew, the City of Richland's Economic Development Manager, testified that the Richland City Council recently approved a series of development agreements to construct a rail loop of sufficient size to service unit trains in the Horn Rapids area.¹⁵ Mr. Ballew expects this new rail loop will be operational by summer 2015 and able to process the equivalent of two and a half unit trains per week (approximately one unit train entering or leaving the facility each day).¹⁶ Mr. Ballew also testified that Richland has entered real estate and development agreements with ConAgra Foods to build an automated cold storage warehouse in the Horn Rapids area served by a separate smaller loop track.¹⁷ Mr. Ballew expects an average of 30 rail cars each week will come and go from ConAgra's facility.¹⁸

14 All trains traveling to the Horn Rapids area must pass through the Richland Junction and cross the proposed Center Parkway extension.¹⁹ Considering the expected increase train traffic across Richland Junction, TCRY contends that the passing track will become even more essential and perhaps need to be extended to accommodate longer trains.²⁰ Mr. Peterson testified that he opposes the new Center Parkway crossing because rail operations could regularly require freight trains to block the crossing, occasionally for lengthy periods of time.²¹

C. Grade Separation

15 Grade separation refers to the method of aligning the junction of two or more surface transportation rights-of-way at different heights (grades) to avoid conflicts or disruption of traffic flows as they cross each other. In the case of highway-rail junctions, underpasses, overpasses, or bridges are the most common forms of grade

¹⁴ Exh. RVP-1T at 5-6; *see also* Exh. GAN-16-X.

¹⁵ Richland's rail loop will be approximately 8400 feet in total length. Ballew, TR. 354:25 – 357:22; *see also* Exhs. JD-37-X, JD-38-X, JD-39-X, KJ-14-X, and King, TR. 334:1 – 336:15 and 337:21 – 340:16.

¹⁶ Ballew, TR. 358:2-12, 364:15 – 365:3, 369:21 – 370:6, 375:4 – 376:24; *see also* Exh. JD-38-X.

¹⁷ Ballew, TR. 342:23 – 345:15; *see also* Exhs. JD-9-X, JD-10-X, and JD-11-X.

¹⁸ Ballew, TR. 345:16 – 346:17 and 373:6-14.

¹⁹ Ballew, TR. 346:22 – 347:8; *see also* Jeffers, TR. 173:10-19.

²⁰ Post-Hearing Brief of Respondent Tri-City & Olympia Railroad Co. at 9; *see also* Jeffers, TR. 154:24 – 159:12.

²¹ Peterson, TR. 414:23 – 418:5.

separated crossings. The Cities presented evidence contending that grade separation is not warranted at the proposed crossing site because of roadway characteristics, accident prediction models, and cost.

- 16 Rick Simon, Development Services Manager for the City of Richland, testified that constructing a grade-separated crossing at Center Parkway is not feasible due to differences in topography on the north and south sides of the rail line.²² Susan Grabler, a railroad engineer from David Evans and Associates, Inc. (DEA), explained that roadway geometry at Center Parkway and the close proximity of Columbia Center Boulevard make grade separation impracticable.²³ Ms. Grabler pointed out that a grade-separation project would require increasing the steepness of the track approaching the crossing from the existing one percent grade to something greater than two percent, exceeding the operational capabilities of most trains now using that track.²⁴ Kevin Jeffers, a DEA associate working with Ms. Grabler, determined that grade separation would require either replacement of the existing rail bridge over Columbia Center Boulevard (to the east) or elimination of existing access to the hotel immediately north of the crossing due to the depth of the undercrossing.²⁵
- 17 Ms. Grabler also testified that the expected average daily traffic (ADT) on the Center Parkway extension would not justify grade separation. The Federal Highway Administration (FHWA) Railroad-Highway Grade Crossing Handbook establishes a threshold of 100,000 ADT to require grade separation at an urban crossing.²⁶ The Cities estimate that Center Parkway's traffic will reach only 7,000 ADT by 2033, much lower than the FHWA threshold.²⁷ This low traffic volume contributes to a low predicted accident frequency rate, further reducing justification for grade separation. Using an FHWA model, Mr. Jeffers predicted that the crossing's accident frequency would be 0.145 accidents per year, or 1 accident every 6.9 years.²⁸ Kathy Hunter, testifying for Commission Staff, analyzed a similar crossing in Prosser and forecast an even lower likelihood of accidents at the proposed Center Parkway crossing.²⁹

²² Exh. RS-1T, 6:17-23.

²³ Exh. SKG-1T, 3:13-20; *see also* Grabler, TR. 205:21 – 206:13.

²⁴ Exh. SKG-1T, 6:11-23; *see also* Exh. KJ-1T, 9:7-19.

²⁵ Exh. KJ-1T, 4:12-17.

²⁶ Exh. KJ-2, at 11 (*see* paragraph 6.a.iv).

²⁷ Exh. SKG-1T, 3:21-25; *see also* Exh. KJ-1T, 6:14-20.

²⁸ Exh. KJ-1T, 7:11-20; *see also* Exh. KJ-2 (at 4-8) and Exh. KJ-7 (at 2-3).

²⁹ Exh. KH-1T, 24:21 – 26:22; *see also* Exh. KH-12. Ms. Hunter's calculation predicts 0.018701 collisions per year, or one accident every 53.5 years.

- 18 Jeff Peters, Transportation and Development Manager for the City of Richland, testified that constructing the proposed at-grade crossing would cost approximately \$250,000. Mr. Peters estimated that a grade-separated crossing for Center Parkway would cost between \$15 million and \$200 million.³⁰ Mr. Jeffers identified four different design options for a grade-separated crossing within that price range, each requiring extensive retaining walls due to excavation depths of 20 feet or more for the roadway or, alternatively, fill depths under the tracks in equivalent amounts.³¹
- 19 Commission Staff concurred with the Cities that grade separation is not warranted at this location.³² Noting the low traffic volumes and determining that train crossings would be infrequent, Ms. Hunter endorsed the Cities' proposal to mitigate the dangers of an at-grade crossing through installation of active warning devices, to include advanced signage, flashing lights, audible bell, automatic gates, and a raised median to prevent drivers from going around the gates.³³ Staff believes these measures adequately moderate the dangers presented by the proposed at-grade crossing.³⁴

D. Public Need for Proposed Crossing

- 20 The Cities seek to complete a planned network of roadways and address traffic issues in the area by extending Center Parkway from Tapteal Drive to Gage Boulevard. The Center Parkway extension project has been included in the Cities' comprehensive planning process since 2006.³⁵ The project is also noted for funding in the Benton-Franklin Council of Governments Regional Transportation Plan.³⁶ According to the Cities, extending Center Parkway to Tapteal Drive and constructing the necessary at-grade crossing will decrease emergency vehicle response times, reduce the amount of accidents near the Columbia Center Mall, and improve traffic circulation in an important commercial area.³⁷

³⁰ Exh. JP-1T, 3:1-8.

³¹ Exh. KJ-1T, 10:3-13; *see also* Exhs. KJ-6 and KJ-7 and Jeffers, TR. 195:8 – 201:2.

³² Exh. KH-1T, 8:1 – 12:9.

³³ Exh. KH-1T, 21:15 – 24:19; *see also* Exhs. KH-3 and KH-9.

³⁴ Exh. KH-1T, 27:1-3.

³⁵ Deskins, TR. 58:7-15; *see also* Exhs. RS-2, RS-3, GAN-2-X, GAN-3-X, GAN-4-X, GAN-6-X, GAN-7-X at 2, GAN-13-X, GAN-14-X, and GAN-15-X.

³⁶ *See* Exhs. RS-4, GAN-8-X, and GAN-9-X. The Executive Summary of the Regional Transportation Plan only discusses current congestion on Gage Boulevard in Kennewick being relieved in future years by extension of the Steptoe Street Corridor. The Plan has no specific discussion of anticipated benefits from extending Center Parkway. Exh. RS-4 at 6.

³⁷ Exh. JD-1T, 5:1-21; *see also* Exh. KJ-5.

1. Emergency Response Times

- 21 The Cities' police and fire departments have each established response time objectives for arriving at emergency incidents or high priority calls. In Richland, the police department has a one-to-five minute average response goal for high priority calls.³⁸ Similarly, Richland's Fire & Emergency Services first responders seek to arrive at incidents within five minutes or less from time of dispatch, 90 percent of the time.³⁹ Kennewick's fire response goal is five minutes and the emergency medical response goal is four minutes, each for 90 percent of events.⁴⁰
- 22 The Cities' emergency response providers support each other and respond to each other's calls for help.⁴¹ The Cities and three local fire districts signed a Master Interlocal Partnership and Collaboration Agreement in 2010 that includes an "automatic aid agreement" for prioritizing and sequencing certain aid calls.⁴² The Cities' emergency service providers all agree that extending Center Parkway from Gage Boulevard to Tapteal Drive will improve emergency response times in the area. However, none of these witnesses testified that any of the Cities' emergency services providers were not routinely meeting their response time objectives.
- 23 Richland Chief of Police Chris Skinner explained that police response times are sometimes difficult to evaluate because officers are often already deployed in the community and can be responding from varied distances.⁴³ Chief Skinner testified that extending Center Parkway would provide better access for his officers, providing them a potentially faster alternative route to choose from when responding to emergency calls.⁴⁴ Kennewick Chief of Police Kenneth Hohenberg testified similarly.⁴⁵ Neither police chief conducted or consulted specific studies to support their claims of faster response times if the proposed crossing was opened.⁴⁶

³⁸ Exh. RS-1T, 5:11-12; *see also* Exh. GAN-4-X.

³⁹ Exh. RS-1T, 5:5-11; *see also* Exh. GAN-3-X.

⁴⁰ Exh. GAN-6-X at 2.

⁴¹ Exh. CS-1T, 3:12-14 and KMH-1T, 2:10-15; *see also* Skinner, TR. 93:19 – 94:5.

⁴² Exh. NH-1T, 2:13-25, and Exh. RGB-1T, 2:18—3:15. *See also* Baynes, TR. 109:4 – 110:15.

⁴³ Skinner, TR. 87:20 – 88:17.

⁴⁴ Exh. CS-1T, 4:1-6.; *see also* TR. Skinner, 95:4-8.

⁴⁵ Exh. KMH-1T, 3:1-21.

⁴⁶ Skinner, TR. 95:4-14; Hohenberg, TR. 138:11-25.

- 24 Kennewick Fire Chief Neil Hines testified that the best emergency response routes for fire and medical units are on “straight arterial-type roadways providing the most direct route with the least amount of traffic, traffic control systems, intersections, and turns to negotiate.”⁴⁷ Without a direct connection between Gage Boulevard and Tapteal Drive, Kennewick emergency responders must travel north of the Mall via Columbia Center Boulevard or Steptoe Street, routes that are less direct, occasionally burdened with heavy traffic, and with multiple intersections and numerous turns to negotiate. According to Chief Hines, improving response times by even a few seconds could significantly impact the outcome for a patient in a critical event.⁴⁸ Richland Fire & Emergency Services Director Richard Baynes testified that the Center Parkway extension would provide a viable north-south route for fire and medical units if the primary routes on Steptoe Street or Columbia Center Boulevard were obstructed, growing in value as the Tapteal area continues its development.⁴⁹
- 25 In support of their petition, the Cities submitted a traffic study completed by JUB Engineers, Inc. (JUB Study).⁵⁰ Using the hotel on Tapteal Drive and Center Parkway as an example, the JUB Study claimed that extending Center Parkway northward would reduce the response distance from the City of Kennewick’s fire station to this point by one-third of a mile and reduce the response time from 2 minutes, 48 seconds, down to only 2 minutes. Coming from the Richland Fire Station, the JUB Study found that the response distance would be reduced by almost two-thirds of a mile and reduce response time from 5 minutes, 42 seconds, down to 4 minutes, 18 seconds.⁵¹ Chief Baynes reviewed the response times in the JUB Study against his Department’s records and calculated that “there’s about a minute difference between accessing Tapteal via the proposed crossing versus the traditional routes.”⁵²
- 26 Gary Norris, a traffic engineer hired by TCRY, questioned whether the JUB Study should be relied upon to demonstrate a public need for extending Center Parkway and opening an at-grade crossing. Mr. Norris pointed out that the above-noted 2 minute,

⁴⁷ Exh. NH-1T, 3:15-18.

⁴⁸ *Id.* at 3:18-24.

⁴⁹ Exh. RGB-1T, 4:12-22.

⁵⁰ Exh. KJ-5; *see also* Petition.

⁵¹ Exh. KJ-5, at 9; Exh. JP-5-X, at 1. Exh. KJ-5 provides a vicinity map showing the locations of both fire stations on page 7. Chief Hines stated his agreement with the JUB Study’s response times. *See* Exh. NH-1T, 3:15.

⁵² Baynes, TR. 105:16-18; *see also* Baynes, TR. 107:13-15 and Exh. GAN-18-X. However, Chief Baynes noted that the 2:48 response time could not include the firefighters’ turnout time, as it would only be possible under optimum driving conditions (averaging 28 miles per hour) and probably could not be replicated during heavier daytime traffic. Baynes, TR. 123:4 – 124:13.

48 second response time to the hotel already meets the Cities' goal for response times by a wide margin. Further, Mr. Norris contends that the JUB Study fails to consider that existing or increased future train traffic may make the new roadway unavailable for reliable emergency response.⁵³

27 Acknowledging the possibility of a train blocking the Center Parkway crossing, Chief Baynes explained "the more routes into areas we have, the better" number of alternatives there are for working around such problems.⁵⁴ Even so, Chief Baynes conceded that a unit train could block traffic at both the existing Steptoe Street crossing and the proposed Center Parkway crossing for lengthy periods of time, delaying emergency response times even longer if a fire or medical unit committed to a particular crossing before knowing the train's direction of travel.⁵⁵

28 Mr. Norris presented an alternate response route from the Richland Fire Station to the hotel that avoided the potentially congested intersection of Steptoe Street and Gage Boulevard and would not require crossing a rail line at-grade. Mr. Norris contended that his alternate route over existing streets would take less than four minutes and perhaps be advantageous because it avoided potential delays from traffic and trains.⁵⁶

29 Mr. Norris asserted that the JUB Study does not document an existing lack of reasonable alternate access for public emergency services.⁵⁷ Mr. Simon, Richland's Development Services Manager, conceded that he did not know if there were any areas in the City of Richland where meeting emergency response objectives would be improved by construction of the proposed Center Parkway crossing.⁵⁸

2. Accident Reduction

30 The Cities also contend that opening the Center Parkway crossing would reduce traffic on Columbia Center Boulevard and therefore the number of accidents on that route and also remove the temptation for drivers to use the Mall's ring road as a through-route, endangering pedestrians.⁵⁹ Mr. Deskins likened the new Center

⁵³ Exh. GAN-1T, 5:1 – 6:17.

⁵⁴ Baynes, TR. 108:9 – 109:3 and 119:9-11.

⁵⁵ Baynes, TR. 114:1 – 120:12; *see also* TR. 130:3 – 132:1.

⁵⁶ Norris, TR. 308:7 – 309:19; *see also* Exh. GAN-19-X. Mr. Norris calculated response speed to be approximately 28 miles per hour, the same as that relied upon in the Cities' JUB Study. Norris, TR. 310:8 – 312:16.

⁵⁷ Exh. GAN-1T, 5:1-16.

⁵⁸ Simon, TR. 60:13 – 61:5.

⁵⁹ Exh. JD-1T, 4:1-20 and Exh. JD-2TR, 2:23 – 3:4; *see also* Exh. SM-1TR, 6:9-12.

Parkway crossing to “connecting the parking lots between two popular businesses so that drivers don’t have to enter the busier city street to travel between the two.”⁶⁰

31 Mr. Deskins provided an exhibit listing 12 years of crash data for two Columbia Center Boulevard intersections: Quinault Avenue and Canal Drive.⁶¹ Going back to 2001, the intersection reports show 154 total crashes at Quinault Avenue and 165 total crashes at Canal Drive.⁶² According to Mr. Deskins, opening the Center Parkway crossing on the other side of the Mall would reduce traffic at these intersections and “should ultimately reduce crashes” at these locations.⁶³ Spencer Montgomery, a transportation specialist with JUB Engineers, explained that JUB did not perform a study to support this conclusion because “if you reduce the traffic volume on a road, and it has a certain accident rate, then you will reduce the number of accidents.”⁶⁴

3. *Mitigation of Traffic Congestion*

32 In compliance with the Growth Management Act (GMA), the Transportation Element of Richland’s Comprehensive Plan adopts standards and threshold levels of service (LOS) for the City’s intersections. The LOS scale goes from A to F, measuring the length of delay a vehicle will experience at a signalized intersection. Richland’s threshold LOS for acceptable delay is LOS D, a delay of 35-55 seconds; any intersection rated worse (E or F) is considered deficient.⁶⁵

33 The Cities presented evidence that Columbia Center Boulevard is one of the busiest roadways in the region and that Steptoe Street could occasionally be congested at peak hours.⁶⁶ Further, the roadways around Columbia Center Mall can become extremely congested during the holiday shopping season in late November and early December.⁶⁷ According to the JUB Study, extending Center Parkway to Tapteal Drive will relieve some of this traffic congestion, but the study provides no further explanation of how the proposed crossing will achieve this result.⁶⁸

⁶⁰ Exh. JD-1T, 4:5-7.

⁶¹ Exh. JD-3.

⁶² *Id.* at 7 and 14.

⁶³ Exh. JD-2TR, 3:8-14.

⁶⁴ Montgomery, TR. 222:14-23.

⁶⁵ Exh. RS-2 at 17-19; *see also* Exh. RS-1T, at 4-5 (generalized explanation of LOS).

⁶⁶ Exh. KJ-5, at 9.

⁶⁷ Exh. JD-1T, 3:6-26.

⁶⁸ Montgomery, TR. 219:2-12 (acknowledging that the JUB Study provides no data or explanation of the methodology used to arrive at its conclusions).

34 JUB's Mr. Montgomery estimated that 7,000 vehicles per day would make use of the new Center Parkway crossing, some coming from Columbia Center Boulevard and some coming from Steptoe Street.⁶⁹ The JUB Study predicts that in 20 years, opening the Center Parkway crossing will decrease the afternoon peak hour volumes on those streets by 210 and 310 vehicles, respectively.⁷⁰ The JUB Study makes no further predictions on how opening Center Parkway would improve LOS ratings at surrounding intersections currently suffering congestion issues.⁷¹

35 Mr. Simon testified that "one way to reduce congestion is to increase the number of access routes between any two points" and contended "the extension of Center Parkway would provide an important link, not only for emergency vehicle response, but also to reduce overall traffic congestion."⁷² As to LOS levels, Mr. Simon testified that Tapteal Drive was not currently operating at a deficient level,⁷³ but two other intersections south of the railroad tracks were identified as deficient: Columbia Center Boulevard at Quinault⁷⁴ and Steptoe Street at Gage Boulevard.⁷⁵ When asked to explain the effect of extending Center Parkway on the LOS E for eastbound left turns at the intersection of Columbia Center Boulevard and Quinault, Mr. Simon stated "I'm not sure that I can."⁷⁶ Even though he had not seen any data or traffic studies to inform his opinion, Mr. Simon also asserted that a Center Parkway crossing

⁶⁹ Montgomery, TR. 222:24 – 225:6; see also Exh. KJ-5, at 11.

⁷⁰ Exh. KJ-5, at 13, 17, and 19; *see also* Exh. GAN-1T, 7:13-19.

⁷¹ The JUB Study claims that after construction of the proposed crossing, the Center Parkway / Tapteal Drive intersection would operate a LOS C for northbound left turns and LOS B for northbound right turns. Exh. KJ-5, at 14.

⁷² Exh. RS-1T, 5:22-25.

⁷³ Simon, TR. 61:18-22.

⁷⁴ According to information provided to Kevin Jeffers by John Deskins and Spencer Montgomery, the intersection of Columbia Center Boulevard and Quinault Street is deficient because the eastbound left-turn movement is currently LOS E, degrading to LOS F by 2028. The overall intersection is currently LOS C, but expected to degrade to LOS F by 2028. *See* Exh. GAN-17-X.

⁷⁵ According to that same information, the intersection of Steptoe Street and Gage Boulevard is deficient because the southbound left-turn movement is currently LOS F, with three out of four left-turn movements degrading to LOS F by 2028. The overall intersection is currently LOS E and expected to remain at that level in 2028. *See* Exh. GAN-17-X.

⁷⁶ Simon, TR. 67:1-13. Mr. Simon conceded that other than the JUB Study, he had no other evidence to support his opinion. Simon, TR. 62:16 – 63:6 (referring to the intersection of Columbia Center Boulevard and Quinault Street).

could improve the deficient LOS at the Steptoe Street and Gage Boulevard intersection by allowing some traffic to divert to the proposed crossing.⁷⁷

- 36 Mr. Deskins, the City employee most familiar with the City's traffic modeling simulation, conceded that he did not perform an LOS analysis specifically focused on the result of installing the proposed crossing at Center Parkway.⁷⁸ Mr. Deskins also acknowledged that he did not attempt to consider or model potential delays from trains at the proposed crossing or at the existing Steptoe Street crossing.⁷⁹

DISCUSSION AND DETERMINATIONS

A. Res Judicata Does Not Bar the Cities' Petition

- 37 TCRY argues that the Commission's 2007 Order denying the City of Kennewick's request to construct an at-grade crossing at Center Parkway precludes the Cities from pursuing a subsequent petition seeking the same relief.⁸⁰ According to TCRY, the prior and current petitions are "fundamentally identical" in seeking an at-grade crossing at the same location.⁸¹
- 38 The Cities differentiate their current petition from the one put forward in 2005: they followed comprehensive planning update procedures adopted in 2006, completed extensive engineering and design studies, and worked with stakeholders to eliminate two track crossings from the project.⁸² Commission Staff agrees that removal of two track crossings and the related reduction in rail switching operations at the site present a substantial change in circumstances.⁸³
- 39 In administrative proceedings, the doctrine of res judicata limits repeated submissions of applications involving the same subject matter.⁸⁴ In order to apply res judicata, repeat applications must have the same (a) subject matter, (b) cause of action, (c) persons and parties, and (d) quality of the persons for or against whom the claims

⁷⁷ Simon, TR. 67:14 – 69:22.

⁷⁸ Deskins, TR. 78:4-7; *see also* Deskins, TR. 73:4-12.

⁷⁹ Deskins, TR. 79:2 – 81:8. Mr. Deskins stated that because he was focused on specific intersection LOS ratings, the impact of delays from trains at the crossings "didn't concern me."

⁸⁰ Post-Hearing Brief of Respondent Tri-City & Olympia Railroad Co. at 3:5 – 6:3.

⁸¹ *Id.* at 5:16-17.

⁸² Petitioners' Post-Hearing Brief at 3-4.

⁸³ Post-Hearing Brief of Commission Staff at 13-14.

⁸⁴ *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995).

are made.⁸⁵ Second applications that present a substantial change in circumstances or conditions are permitted.⁸⁶

40 There is no dispute that the Center Parkway crossing is proposed for the same site and the same use previously rejected in the 2007 Order. However, the Cities have negotiated with BNSF and UPRR to remove their switching tracks from the area, reducing the number of tracks involved from four down to two. This alone is a significant change from the prior circumstances. Further, the record supporting the current petition is substantially different than that created seven years ago: the Cities presented updated traffic studies, additional detail regarding emergency response needs in the area, and much more detailed information about safety mitigation measures and warning devices to be installed at the proposed crossing. In addition to these substantial factual differences, the 2007 Order suggested that the Commission would consider a second application.⁸⁷

41 The Commission finds that the Cities' current petition presents a substantially different situation from that considered by the Commission seven years ago. The Commission determines that res judicata does not bar the Cities' current petition.

B. The Growth Management Act is Not Dispositive

42 The Cities contend that state agencies are mandated to comply with local land use plans adopted under the Growth Management Act.⁸⁸ Therefore, the Cities argue that their regional comprehensive planning process "mandates" the Center Parkway crossing in order for the Cities to achieve their stated LOS for emergency response times and traffic flow at signalized intersections.⁸⁹ According to the Cities, the GMA prohibits the Commission from evaluating public need, alternatives for opening a proposed railroad crossing, or even whether the proposed crossing will function in the matter claimed by the Cities. Taken to its logical end point, the Cities' argument

⁸⁵ *Id.* at 32, citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

⁸⁶ *Id.* at 32-33.

⁸⁷ 2007 Order at 10, ¶ 23 ("...the petitions could be denied without further discussion. However, it may provide some guidance to Kennewick for future filings to consider the second prong of the legal standard.").

⁸⁸ Petitioners' Post-Hearing Brief at 7-12. The Cities cite specifically to RCW 36.70A.103's mandate that "[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter." *Id.* at 8, n. 29.

⁸⁹ Petitioners' Post-Hearing Brief, at 9-11.

would require the Commission to approve any at-grade crossing planned for in a local jurisdiction's comprehensive planning process.⁹⁰

43 We disagree that a land use planning statute deprives the Commission of its statutory authority to regulate public safety at rail crossings. We do not dispute that the GMA requires cities such as Richland and Kennewick to plan for future growth and make efforts at intergovernmental coordination.⁹¹ However, a jurisdiction's comprehensive planning obligations under the GMA do not substitute for meeting the standards set out in RCW 81.53. The GMA and RCW 81.53 both address transportation safety issues, but from wholly different perspectives on public policy. In order to maintain the integrity of both statutes within the overall statutory scheme, the GMA must be read together and in harmony with RCW 81.53.⁹² We find that the Cities must comply with the requirements of both statutes.

44 The Commission's statutory responsibility to protect the public from the dangers inherent to all at-grade crossings is independent of the Cities' obligation to plan under the GMA. The Commission retains and will exercise its authority to determine whether the proposed crossing satisfies the requirements of RCW 81.53.

C. Standards for Commission Approval of Rail Crossings

45 RCW 81.53.020 prohibits construction of at-grade crossings without prior authorization from the Commission. The statute requires that crossings be grade-separated "when practicable" and provides that:

In determining whether a separation of grades is practicable, the commission shall 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.

⁹⁰ *Id.* at 8. In essence, the Cities argue that the GMA invalidated the Commission's ruling in *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) (*Tonasket*), at least for GMA planning jurisdictions.

⁹¹ RCW 36.70A.070(6)(a)(v) requires the transportation element of a growth management plan to include intergovernmental coordination efforts.

⁹² *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) ("In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.").

If a grade crossing is authorized, RCW 81.53.030 allows the Commission to require installation and maintenance of proper signals or other devices to ensure public safety.

46 The Commission answers three key questions when evaluating a petition to authorize construction of a new at-grade crossing:

- 1) Considering engineering requirements and cost constraints, is grade-separation practicable?
- 2) Have inherent and site-specific hazards been moderated to the extent possible?
- 3) Is there a demonstrated public need for the crossing that outweighs the risks of opening the at-grade crossing?⁹³

The Cities carry the burden of proof for each of these issues. Absent the required showing of impracticability of grade separation, moderation of risks, and a sufficient demonstration of public need, the Commission will not authorize the Cities to open a new at-grade crossing at Center Parkway.

1. Practicability of Grade Separation

47 By its nature, an at-grade crossing poses hazards for motorists, pedestrians, and railroad operators that are not present at grade-separated crossings. Washington courts have deemed at-grade crossings to be inherently dangerous.⁹⁴ In determining whether the Commission will require grade separation, RCW 81.53.020 requires an evaluation of

- 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.

⁹³ See *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) (*Tonasket*); see also *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995).

⁹⁴ See *Reines v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 195 Wn. 146, 150, 80 P.2d 406, 407 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104, 104 P.2d 764 (1940); *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 250-51 and 257, 212 P.2d 829, 831-32 and 835 (1949).

In addition to these statutory factors, Commission Staff relies on the U.S. Department of Transportation's Federal Railroad Administration Railroad-Highway Grade Crossing Handbook (FRA Handbook) when considering "other circumstances and conditions" for grade separating a roadway from a railroad right-of-way, such as predicted accident frequency and vehicle delay times.⁹⁵

48 Mr. Deskins and Mr. Montgomery testified that Center Parkway is expected to carry up to 7,000 vehicles per day by the year 2033. Mr. Peterson and Mr. Jeffers estimated that rail traffic may grow from the current high of five trains per weekday to perhaps double that amount in the foreseeable future. According to the FRA Handbook, traffic levels this low do not mandate grade separation, even in an urban setting.⁹⁶

49 Mr. Simon, Ms. Grabler, and Mr. Jeffers all testified to the infeasibility of constructing a grade-separated crossing due to roadway alignment, topography, and cost considerations. Further, Mr. Jeffers and Ms. Hunter determined that accidents at the proposed crossing would be uncommon and infrequent. Finally, the JUB Study provided assurances that lowered crossing gates associated with normal rail operations would not result in vehicle queues extending into nearby intersections.

50 The Commission finds that the amount and character of travel on the railroad and on Center Parkway do not justify grade separation. Further, there is no evidence in the record disputing the engineering infeasibility of constructing a grade-separated crossing at Center Parkway. Finally, there is no serious dispute in the record that a grade-separated crossing would be tremendously more expensive than the proposed at-grade crossing. Therefore, considering engineering requirements and cost constraints, the Commission determines that a grade-separated crossing is not practicable at Center Parkway.

2. Moderation of Risk

51 If grade separation is impracticable, the Commission evaluates whether inherent and site-specific hazards at a proposed at-grade crossing have been moderated to the extent possible. As noted above, the risks of an accident at the proposed crossing are relatively low considering current and projected train traffic and predicted levels of

⁹⁵ Exh. KH-7 and Exh. KJ-2 at 11. The FRA Handbook echoes the statute's requirement to consider the levels of train traffic, train speeds, and levels of auto traffic, and posted speed limits. The FRA Handbook also states that "[i]f a new access is proposed to cross a railroad where railroad operation requires temporarily holding trains, only grade separation should be considered." See Exh. KH-10.

⁹⁶ See Norris, TR. 321:10 – 325:5.

vehicle traffic. However, the existence of a second set of tracks and limited sight distances from some approaches to the crossing present a risk for motorists.

52. The Cities' petition includes crossing design specifications intended to mitigate the dangers of the at-grade crossing with active warning devices. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip designed to prevent drivers from going around lowered gates.

53. Commission Staff performed a diagnostic review of the proposed crossing design configuration and determined that the Cities' planned safety devices specifically address the hazards presented by the proposed Center Parkway at-grade crossing.⁹⁷ There is no evidence in the record disputing Staff on this determination.

54. We concur with Commission Staff that the petition's proposed advance and active warning devices would moderate the risks presented by this crossing to the extent possible at this site, even with motorists crossing two sets of tracks.

3. Demonstration of Public Need

55. The Commission will not approve construction of a new at-grade crossing without a demonstration of public need that outweighs the hazards inherent in the at-grade configuration. Petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.⁹⁸

56. In the City of Kennewick's prior petition to construct an at-grade crossing at this same location, the Commission determined that Kennewick failed to demonstrate "acute public need" and denied the petition.⁹⁹ The 2007 Order concluded that a city's goal to encourage economic development did not rise to the level of an acute public need, noting that economic development was already occurring along Taptal Drive even without the proposed crossing.¹⁰⁰ The 2007 Order also concluded that traffic mitigation might constitute an acute public need, but only if alternate crossings were insufficient to accommodate traffic. The traffic study presented seven years ago

⁹⁷ Exh. KH-5.

⁹⁸ See *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 ¶¶ 33-37 (Feb. 15, 2011).

⁹⁹ 2007 Order, ¶¶ 24-26.

¹⁰⁰ *Id.* ¶ 25.

showed only a *de minimis* level of traffic diversion to Center Parkway and did not prove the nearby alternate crossings insufficient to handle the entire traffic flow.¹⁰¹

57 The Cities and Staff argue that the 2007 Order relied upon an outdated and overly stringent “acute public need” standard. They contend that in recent years the Commission has approved opening other at-grade crossings using a balancing test, weighing the need for the crossing against any dangers remaining after installation of safety devices.¹⁰² The Cities and Staff cite several orders approved through the Commission’s open meeting process, none of which presented the complexities involved in this matter.¹⁰³

58 We agree with the Cities and Staff that the statute does not require a showing of “acute public need” to justify opening a new at-grade crossing. Nevertheless, no party petitioned for review of the 2007 Order and, until now, we have not had an opportunity to revisit the Center Parkway crossing. RCW 81.53 does not prohibit the Commission from approving approve new at-grade crossings, but mere convenience or a *de minimis* showing of need will not suffice. As Staff points out, we are obligated to balance public need against the hazards presented by a new crossing.¹⁰⁴ The Cities similarly concede that the Commission must determine “whether there is a

¹⁰¹ *Id.* ¶ 26.

¹⁰² Petitioners’ Post-Hearing Brief at 5-7, n. 20, and Post-Hearing Brief of Commission Staff at 9-12; *see also* Hunter, TR. 273:16 – 277:22. Staff also points out that while the FRA Handbook discourages opening new crossings, it recognizes that consideration of public necessity, convenience, safety, and economics will factor into individual decisions. According to the Handbook, “new grade crossings, particularly on mainline tracks, should not be permitted unless no other alternatives exist and, even in those instances, consideration should be given to closing one or more existing crossings.” *See* Exh. KH-10.

¹⁰³ The Cities cited open meeting dockets that were all uncontested and did not benefit from a thoroughly developed evidentiary record. The only case with any persuasive value resulted in a net closure of crossings, trading two existing passively protected private at-grade crossings in the City of Marysville for one new public crossing with active warning devices (Docket TR-111147). None of the other approved new crossings were in urban areas where over 7,000 vehicles per day were expected to cross tracks currently traveled by five or more trains per day (in one case, the Commission approved a new crossing to divert approximately 400 commercial vehicles per day away from residential roadways and across a single set of tracks traveled by up to two trains per day (Docket TR-112127); in two other cases, the Commission approved installing new industrial rail lines across very lightly traveled roadways in order to promote industrial growth (the road in Docket TR-100072 had only 150 vehicles per day and the road in Docket TR-121467 had less than 1600 vehicles per day); and in two other cases, the Commission approved new pedestrian-only crossings across lightly used tracks (Docket TR-100041 had one weekly freight train and Docket TR-110492 had no active railroading operations)).

¹⁰⁴ Post-Hearing Brief of Commission Staff at 12, ¶ 33.

demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.”¹⁰⁵

59 In this case, the Cities attempt to demonstrate public need by arguing improvements to public safety through faster emergency response times, reduced accident rates around the Columbia Center Mall, and relief of traffic congestion at nearby intersections with deficient levels of service. As explained below, the evidence in the record does not support the Cities’ arguments that opening the Center Parkway crossing will create such improvements or alleviate existing traffic problems.

a) Emergency Response Times

60 The Cities contend that the proposed crossing will improve emergency response times. However, the evidence in the record demonstrates that the Cities’ police and fire departments are generally meeting the response time objectives established in their respective comprehensive plans. Although the Cities point out individual statistics where response times have occasionally exceeded these goals,¹⁰⁶ the Cities’ emergency responders are not regularly failing to achieve their established LOS. We recognize that improving emergency medical response times by even a few seconds could significantly impact the outcome for some patients, but the Cities introduced no evidence of a public need for faster response times and did not adequately explain how the Center Parkway extension would contribute to improved public safety.

61 Even if the Cities’ emergency response time LOS levels were deficient, there is insufficient evidence in the record to demonstrate that opening a crossing at Center Parkway would solve this problem. Richland’s comprehensive planning documents do not focus on building more roadways to solve response time deficiencies. Instead, the capital facilities element of Richland’s GMA documents discuss building additional fire stations closer to areas needing better response times.¹⁰⁷

62 Chief Baynes, Chief Skinner, and Chief Hohenberg all testified that more choices and more alternatives are always better for emergency responders. However, this new access route between Gage Boulevard and Tapteal Drive may prove to be an illusory option if rail traffic increases according to even the most conservative estimates made

¹⁰⁵ Petitioners’ Post-Hearing Brief at 6, citing *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 (February 15, 2011) at ¶ 29.

¹⁰⁶ Petitioners’ Post-Hearing Brief at 10, citing to Exhs. GAN-3-X and GAN-18-X. Chief Baynes provided little, if any, context for additional response time data he provided in Exh. GAN-18-X. See Baynes, TR. 103:5 – 105:21, 121:13 – 125:6 and Norris, TR. 295:6 – 297:16.

¹⁰⁷ See Exhs. GAN-3-X and GAN-4-X.

part of the record in this case. The potentially shorter response times that might be possible to a very limited area of south Richland with this new at-grade crossing are not sufficient to demonstrate public need.

b) Reduced Accident Rates

63 The Cities also argued that a public need exists to open the Center Parkway crossing because doing so would reduce traffic accident rates at two Columbia Center Boulevard intersections. However, neither the JUB Study nor the Cities' traffic engineering witnesses provided any data or studies to support this assertion.

64 Mr. Deskins provided raw data on the number of vehicle collisions over a decade's time but analysis on how or why these accidents occurred. Mr. Montgomery offered only unconfirmed notions that reducing traffic levels would reduce accident rates. The record has no persuasive evidence connecting improved traffic safety on Columbia Center Boulevard to opening a new roadway that will regularly be blocked by rail traffic.

c) Relief of Traffic Congestion

65 Similarly, the Cities presented evidence showing that busy intersections in the vicinity of the Mall were approaching deficient LOS levels during peak travel times. Traffic waits for left turn signals at two intersections feeding into the Mall are already one level below the acceptable LOS D. We do not dispute that the Cities must find a way to resolve traffic congestion patterns in this area, but the Cities offered no persuasive evidence that opening a crossing at Center Parkway would materially contribute to this desired result:

- The JUB Study made no specific findings about how a crossing at Center Parkway would impact deficient LOS ratings at congested intersections.
- Mr. Simon was unable to explain the effect of extending Center Parkway on the LOS E for eastbound left turns at the intersection of Columbia Center Boulevard and Quinault.
- Mr. Deskins failed to conduct any LOS analysis focused on the installation of a crossing at Center Parkway and never factored train delays into any of the models he did consider.

66 The record does not conclusively link extending Center Parkway to any improvement in traffic flow at congested intersections in the immediate area. At best, the record demonstrates that opening the proposed at-grade crossing will make public travel

more convenient between the Tapteal Drive area and the Columbia Center Mall. It is certainly possible that opening a new roadway will divert traffic away from existing overcrowded intersections, but supposition alone is not sufficient to demonstrate public need. The Cities failed to demonstrate that opening the proposed Center Parkway crossing would reduce traffic congestion around the Mall or at the intersection of Gage Boulevard and Steptoe Street.

4. Balancing of Public Need Against Hazards of At-Grade Crossings

67 The Cities failed to demonstrate public need for the proposed crossing, leaving nothing to balance against the inherent hazards of an at-grade crossing. Even if public convenience were sufficient to demonstrate public need, we find that it does not outweigh the hazards of an at-grade crossing.

68 By its nature, opening a new at-grade crossing at Center Parkway would increase risk to motorists by creating another opportunity to interact with freight trains. Motorists who might deviate from Columbia Center Boulevard's grade-separated crossing in order to access the Tapteal Road area would trade safe and undelayed passage over the UPRR tracks for a potentially faster route that comes with a risk of collision. The active safety measures proposed to be installed at the crossing would mitigate, but would not eliminate, such risk.

69 The Cities' justifications for the crossing do not outweigh the risk. At most, the evidence demonstrates that, on occasion, a police, fire, or ambulance response *might* be faster if the Center Parkway crossing was available and no trains were blocking traffic. Some drivers also would find the option to use Center Parkway more appealing to enter or depart the north side of the Columbia Center Mall than Gage Boulevard, particularly during the busy holiday shopping season. Such slight benefits do not overcome the law's strong disfavor for at-grade crossings. Accordingly, the Commission should deny the Cities' petition for failure to demonstrate a public need for the proposed crossing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

70 Having discussed above in detail the evidence received in this proceeding regarding all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts and conclusions, incorporating by reference pertinent portions of the preceding detailed discussion:

71 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate railroad

crossings, and has jurisdiction over the parties and subject matter of this proceeding.

- 72 (2) The City of Richland and the City of Kennewick are governmental entities authorized by law to petition the Commission pursuant to RCW 81.53.020 for authority to construct an at-grade railroad crossing where it is not practicable to construct a grade-separated crossing and there is a public need for such a crossing that outweigh its inherent risks.
- 73 (3) Res judicata does not bar the Commission from ruling on the Cities' petition because it is sufficiently different from the City of Kennewick's prior petition.
- 74 (4) Comprehensive planning under the Growth Management Act does not relieve the Cities from complying with RCW 81.53.
- 75 (5) A grade-separated crossing at the proposed project site is not practicable because of engineering requirements and cost constraints.
- 76 (6) The risks of an accident at the proposed crossing are relatively low considering current and projected train traffic, predicted levels of vehicle traffic, and plans to install active warning devices and other safety measures.
- 77 (7) The Cities' emergency responders are meeting or exceeding the response time objectives established in the Cities' comprehensive plans.
- 78 (8) The Center Parkway extension may assist the Cities' emergency responders by providing an alternative route for responding to incidents in the vicinity of Columbia Center Mall, but only when trains are not blocking the intersection.
- 79 (9) The Cities did not produce sufficient evidence to demonstrate that the Center Parkway extension would reduce accident rates in the area or improve traffic flow at congested intersections surrounding the Columbia Center Mall.
- 80 (10) The Cities failed to demonstrate sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing.
- 81 (11) The Commission should deny the City of Richland's and City of Kennewick's petition for authority to construct an at-grade crossing at the proposed extension of Center Parkway.

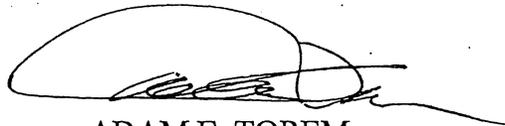
ORDER

THE COMMISSION ORDERS:

- 82 (1) The petition filed by the City of Kennewick and joined in by the City of
Richland is denied.
- 83 (2) The Commission retains jurisdiction to enforce the terms of this order.

Dated at Olympia, Washington, and effective February 25, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ADAM E. TOREM
Administrative Law Judge

NOTICE TO PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within ten (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and five (5) copies of any Petition or Answer must be filed by mail delivery to:

Attn: Steven V. King, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

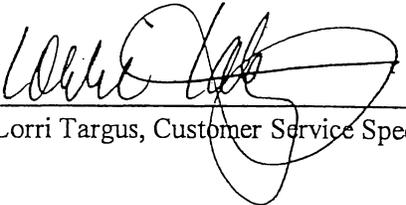
PROOF OF SERVICE

DOCKET 130499

I HEREBY CERTIFY That I, as an employee of the Washington Utilities and Transportation Commission at Olympia, Washington, have served on 2/25/2014 the parties of record in this proceeding a true copy of the following document(s):

Order 02 - Initial order denying petition to open at-grade railroad crossing.

The document(s) was/were mailed to each of the parties of record in this docket. Each envelope was addressed to the address shown in the official file, with the required first class postage, and deposited on this date in the United States mail in the City of Olympia, County of Thurston, State of Washington.



Lorri Targus, Customer Service Specialist 3

PARTIES OF RECORD AND OTHERS RECEIVING NOTICE

SERVED BY MAIL:

Ecket, Jeremy, Foster Pepper PLLC, 1111 3rd Avenue, STE, 3400, Seattle, WA, 98101
Anderson, Terrel, Union Pacific Railroad Company, 9451 Atkinson St., Roseville, CA, 95747
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Peterson, Rhett, Tri-City & Olympia Railroad, P.O. Box 1700, Richland, WA, 99352
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Endres, Kelsey, Montgomery Scarp MacDougall, PLLC, 1218 Third Avenue, STE, 2700, Seattle, WA, 98101
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NOTIFIED BY E-MAIL:

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APPENDIX

City of Kennewick v. Port of Benton, et al., Docket TR-130499, Order 03, Final Order Granting Petition
for Administrative Review (May 29, 2014)

SERVICE DATE
MAY 29 2014

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,	)	DOCKET TR-130499
)	
Petitioner,)	
	)	ORDER 03
v.)	
)	
PORT OF BENTON, TRI-CITY &	)	FINAL ORDER GRANTING
OLYMPIA RAILROAD COMPANY,	)	PETITION FOR ADMINISTRATIVE
BNSF RAILWAY COMPANY, AND	)	REVIEW
UNION PACIFIC RAILROAD,)	
)	
Respondents.)	
.....)	

BACKGROUND

1 On April 8, 2013, the City of Kennewick filed with the Washington Utilities and Transportation Commission (Commission) a petition to construct a highway-rail grade crossing at Center Parkway, Kennewick, Washington and remove an existing railroad siding. On May 31, 2013, the City of Richland petitioned to intervene in support of the petition.

2 Three railroad companies move trains on the subject track, which is owned by the Port of Benton. Burlington Northern Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UPRR) filed waivers of hearing stating their agreement to the proposed crossing. The third railroad company that operates on these tracks, Tri-City & Olympia Railroad (TCRY), answered Kennewick's petition and requested a hearing. TCRY opposes the petition.

3 Commission Staff filed a memo on May 5, 2013, recommending that the Commission set this matter for hearing. The Commission conducted a prehearing conference on June 4, 2013, and on June 7, 2013, entered Order 01-Prehearing Conference Order; Notice of Hearing. Order 01 set a procedural schedule allowing three rounds of pre-filed testimony. The cities of Kennewick and Richland (collectively "Cities") filed direct testimony and exhibits on September

3, 2013. Staff filed responsive testimony supporting the petition on October 1, 2013. TCRY filed opposing testimony on October 2, 2013. Finally, the Cities and TCRY filed rebuttal testimony and exhibits on October 23, 2013.

4 The Commission conducted evidentiary hearings on November 19-20, 2013, and a public comment hearing on November 20, 2013, in Richland, Washington before Administrative Law Judge Adam Torem. Judge Torem performed a site visit and toured the area on November 21, 2013. The parties simultaneously filed written post-hearing briefs on December 20, 2013.

5 The Commission entered its Initial Order on February 25, 2014, denying Kennewick's petition. Kennewick and Richland filed a joint Petition for Administrative Review on March 18, 2014. The Cities ask for oral argument, which we find unnecessary to resolve their Petition for Administrative Review. Denying the Cities' request for oral argument causes them no prejudice.

6 TCRY filed an answer on March 27, 2014, opposing the joint petition. Staff also filed an answer on March 27, 2014, reiterating its support for the Cities' petition for authority to construct the subject rail crossing, but addressing the Cities' alternative arguments about the impact of the Growth Management Act (GMA) and the application of chapter 81.53 RCW to code Cities. Staff disagrees with the city on the application of both the GMA and RCW 35A.11.020 to its petition.

7 On April 1, 2014, Kennewick and Richland filed a "Reply in Support of Commission Review." TCRY filed a motion to strike the reply on April 3, 2014, arguing it failed to satisfy the requirements for such a pleading under WAC 480-07-825(a) and is procedurally deficient because the Cities did not seek leave to file a reply as required under WAC 480-07-825(5)(b). On April 4, 2014, the Cities filed a response to TCRY's motion to strike. The Commission grants TCRY's motion and will not consider the Cities' reply.¹

¹ Contrary to what the Cities argue in their response to TCRY's motion, the Commission's procedural rules are not mere technicalities. Those who elect to practice before the Commission are expected to be familiar with and adhere to its procedural rules. Not only did the Cities fail to seek leave to file a reply, the reply itself does not meet the substantive requirements for such a pleading. It does not cite new matters raised by TCRY's answer and state why those matters were not reasonably anticipated or explain satisfactorily why a reply is necessary, all as required by the Commission's rule governing replies.

The Center Parkway extension would be from an existing roundabout in Kennewick, where the parkway intersects Gage Boulevard, continuing north to Tapteal Drive, a one-mile stretch of road connecting North Steptoe Street to the west, with Columbia Center Boulevard to the east, in Richland. There is a "T" intersection at both ends of this short roadway. There is an at-grade crossing on North Steptoe Street and a grade-separated crossing at Columbia Center Boulevard.

10 Tri-City and Olympia Railroad, BNSF Railway, and Union Pacific Railroad all operate trains over the so-called Hanford Reservation tracks at this location. Tri-City and Olympia Railroad uses a short, parallel spur at Richland Junction for switching and storage of rail cars, and opposes the Cities' petition, arguing the crossing would interfere with its operations. Both tracks are owned by the Benton County Port Authority. BNSF and UPRR have moved their switching operations since the Commission denied an earlier petition to open a crossing in this location and do not oppose the Cities' current petition.³

II. Review of Initial Order

11 The Initial Order analyzes Kennewick's petition using the framework in a 2011 Commission initial order approving another petition for an at-grade crossing in Benton County:

The Commission, in practice, addresses two principal questions when considering whether to authorize construction of an at-grade crossing, which, by its nature, poses risks for motorists and pedestrians not present at grade-separated crossings:

- a) Whether a grade-separated crossing is practicable considering cost and engineering requirements and constraints.

³ When the Cities petitioned to open a crossing at this same location in 2007, Tri-City and Olympia Railroad, BNSF and UPRR opposed the two petitions, which were consolidated for hearing. Staff also opposed the earlier petitions. At that time, there were four tracks and all three railroad companies conducted switching operations in the vicinity of the Richland Junction. The Commission denied the petitions in a single order. *See City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06 and Docket TR-050967, Order 02, Initial Order Denying Petition[s] (January 26, 2007). The Initial Order in these dockets became final by operation of law on February 15, 2007.

- b) Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.⁴

We agree that we should evaluate the petition to determine whether a grade-separated crossing is practicable and whether a demonstrated public need for the crossing outweighs the hazards of an at-grade crossing. We agree with most of the Initial Order's findings and conclusions on these questions, but we conclude that a broader public need than the public safety concerns the parties advocate supports the petition.

A. Grade Separation and Inherent Risk

- 12 No one contests on review the Initial Order's finding that it is physically and financially impractical to build a grade-separated crossing in this instance:

The amount and character of travel on the railroad and on Center Parkway do not justify grade separation. Further, there is no evidence in the record disputing the engineering infeasibility of constructing a grade-separated crossing at Center Parkway. Finally, there is no serious dispute in the record that a grade-separated crossing would be tremendously more expensive than the proposed at-grade crossing. Therefore, considering engineering requirements and cost constraints, the Commission determines that a grade-separated crossing is not practicable at Center Parkway.⁵

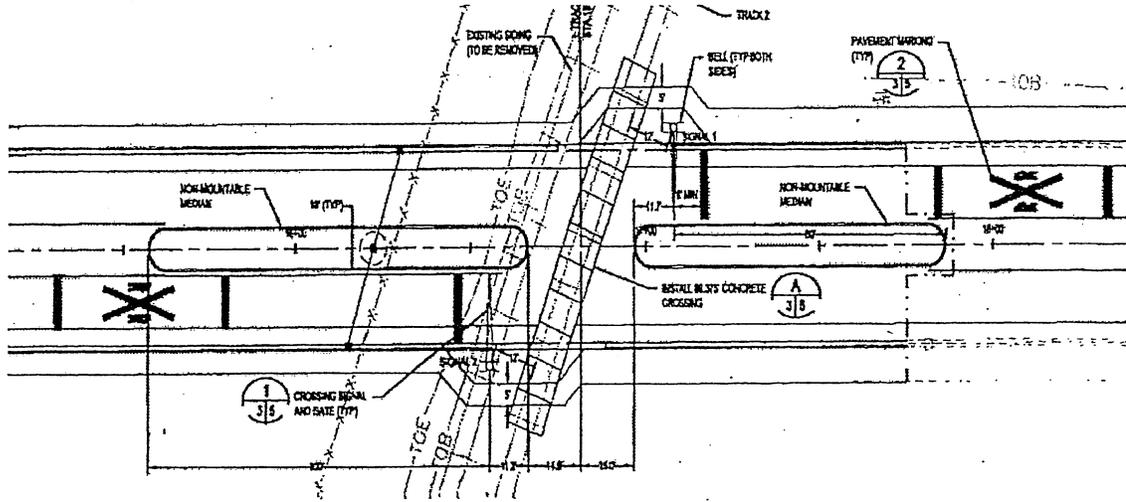
- 13 The Cities, however, propose to build an at-grade crossing designed to mitigate the inherent dangers to vehicles and pedestrians by using active warning devices and taking other measures. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip

⁴ *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, ¶ 29 (Feb. 15, 2011) (citing: *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993) and *Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995)). This Initial Order became final by operation of law on March 8, 2011.

⁵ Initial Order ¶ 50.

designed to prevent drivers from going around lowered gates, as illustrated below in Figure 2.⁶

FIGURE 2
AT-GRADE CROSSING CONFIGURATION



14

Taken together, these measures significantly reduce the risks to motorists who might, in the absence of these measures, make inopportune efforts to cross the tracks when trains are present.⁷ Even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to concrete barrier medians. These same measures reduce the risk to pedestrian and bicyclist traffic

⁶ This illustration shows the removal of the 1900 foot siding track. However, in the face of Tri-City and Olympia Railroad's opposition, Staff's analysis of the site and consideration of its proposed safety features assumes that the second track remains in operation. Ms. Hunter testifies:

The active warning devices consisting of advanced pavement markings and warning signs, gates and lights, and a traffic island that will act as a median separator, provide an adequate level of safety at the proposed crossing. In addition, the train and vehicle speeds and the volume of train and vehicle traffic at the site of the proposed crossing are fairly low, making the possibility of an accident less likely than crossings with higher speeds or increased traffic.

Exh. No. KH-1T at 23:15-20.

⁷ Mr. Jeffers, a professional engineer, calculated the predicted accident rate to be 0.145 per year or 1 accident per 6.9 years. Exh. No. KMJ-1T at 7:11-20. The USDOT Accident Prediction Formula standard for requiring a grade-separated crossing is 0.5 accident per year. Exh. No. KH-1T at 11:18-20.

by alerting prudent travelers when it is unsafe for them to cross the tracks and making it more difficult for them to pass.⁸

B. Public Safety Need

15 The Initial Order determines that the Cities failed to carry their burden to show a “public need” for the crossing that outweighs the hazards inherent in the at-grade configuration that are present despite the relatively low-level risk of an accident. To establish public need petitioners must provide evidence of public benefits, such as improvements to public safety or improved economic development opportunities.⁹

16 Petitioners challenge this conclusion, focusing almost exclusively on asserted public safety benefits, largely in the form of improved response times from two local fire stations to the point where the planned Center Parkway extension would intersect Tapteal Drive. In other words, the Cities’ principal claim of improved public safety is that emergency responders could get to a single point on a one-mile long, two-lane collector roadway with a “T” intersection at both ends more quickly than they can today. In addition, there is some evidence that completion of this project would reduce traffic on other roadways in the vicinity, relieving congestion and potentially reducing accidents. The Initial Order analyzes the evidence on this issue in detail that does not bear repeating here. 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.

17 If the feasibility of grade separation and public safety as a component of public need were our only concerns, we would end our discussion here and sustain the Initial Order. However, having studied the full record, we find reason to analyze this matter outside the narrow constraints of these two questions. We address in the next section of this Order an additional point of decision that we find determinative.

⁸ The planned road extension includes sidewalks and bike paths on both sides so it is clear some such traffic is expected. However, there is some evidence that pedestrian and bicycle traffic is expected to be light, and no evidence to the contrary. See Exh. No. KH-1T at 24:1-7.

⁹ See *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 ¶¶ 33-37 (Feb. 15, 2011).

C. Broader Public Need

18 The Cities argue that state agencies are mandated to comply with local land use plans adopted under the Growth Management Act (GMA).¹⁰ They contend that their regional comprehensive planning process “mandates” the Center Parkway crossing in order for them to achieve their stated levels of service for emergency response times and traffic flow at signalized intersections.¹¹ According to the Cities, the GMA prohibits the Commission from evaluating public need, alternatives for opening a proposed railroad crossing, or even whether the proposed crossing will function in the matter claimed by the Cities. As the Initial Order observes:

Taken to its logical end point, the Cities’ argument would require the Commission to approve any at-grade crossing planned for in a local jurisdiction’s comprehensive planning process.¹²

The Initial Order rejects the Cities’ legal argument that the GMA somehow controls our determination of their petition under RCW 81.53 for authority to construct the subject railroad crossing.

19 We agree with the Initial Order’s determination that the GMA does not relieve the Commission from its statutory obligation to regulate public safety at rail crossings, including the one proposed here. The two statutes do not conflict with each other and the integrity of both statutes within the overall statutory scheme is preserved by reading the GMA together and in harmony with RCW 81.53.¹³ The Initial Order ends its discussion of this issue without considering how this

¹⁰ Petitioners’ Post-Hearing Brief at 7-12. The Cities cite specifically to RCW 36.70A.103’s mandate that “[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter.” *Id.* at 8, n. 29.

¹¹ Petitioners’ Post-Hearing Brief, at 9-11.

¹² Initial Order ¶ 42.

¹³ *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), citing *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) (“In ascertaining legislative purpose, statutes which stand in *pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.”).

harmony should be achieved in the context of the facts presented in this case. We find it necessary to undertake this analysis on review.¹⁴

20 The proposed extension of Center Parkway has been part of Richland's and Kennewick's transportation planning for some time.¹⁵ As summarized in the introduction to the Center Parkway Extension and Railroad Crossing Traffic Study completed for the city in March 2013 by JUB Engineers, Inc.:

For several years the City of Richland has pursued the extension of Center Parkway to connect Gage Boulevard on the south to Tapteal Drive on the north. This effort has been challenging because of existing railroad lines that operate parallel to and in between Gage Boulevard and Tapteal Drive. There are multiple purposes for connecting Center Parkway which include:

- Complete a grid network of functionally classified roadways.
- Provide relief to congested arterial facilities.
- Provide improved access to commercial areas and developable land.
- Improve emergency response times.¹⁶

21 Following a detailed narrative, supported by appendices, the JUB Engineers, Inc. report summarizes the study's key findings, elaborating on the points above:

This Traffic Study has been performed to describe the efforts put forth by the City of Richland and the City of Kennewick to complete a

¹⁴ In considering petitions for administrative review, the Commission conducts de novo review of the issues decided in an initial order. *See* RCW 34.05.464(4) ("The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing").

¹⁵ The Center Parkway extension project has been included in the Cities' comprehensive planning process since 2006. The proposed at-grade Center Parkway Crossing has been identified as an essential public facility in (1) the City of Richland Comprehensive Plan, (2) the City of Kennewick Comprehensive Plan, and (3) the Regional Transportation Plan. The proposed project has received funding from the State through the Washington State Community Economic Revitalization Board, the Surface Transportation Program Regional Competitive Fund, and the Transportation Improvement Board. Petition for Admin. Rev. at 19:2-9.

¹⁶ Exh. KJ-5 at page 1 of JUB Traffic Study.

roadway network that includes the extension of Center Parkway in order to accommodate growth in the region. Four primary objectives have been discussed that document the needs and benefits of extending Center Parkway between Gage Boulevard and Tapteal Drive that include:

- Complete a grid network of functionally classified roadways -The completion of Center Parkway north of Gage Boulevard is merely one step of many to complete both a functionally classified network and a north-south component of a grid system to provide safe efficient movement of traffic into this area of the region.
- Provide relief to congested arterial facilities -Center Parkway has been planned to provide relief to both Columbia Center Boulevard as well as Steptoe Street, consistent with the philosophy of providing collector roadways parallel and in between arterial roadways.
- Provide improved access to commercial areas and developable land - 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.
- Improve emergency response times - a significant area will have improved emergency response times, some with nearly a 30% reduction.¹⁷

Economic Development

22 We determine that the Commission should consider public need for the proposed at-grade railroad crossing in the broader context of the several purposes discussed in the JUB transportation study, rather than with the narrower focus that the parties, and consequently the Initial Order, place on public safety. It is particularly important to give weight to the economic development interests considering that the Center Parkway extension would conveniently connect existing, complementary commercial developments in Richland and Kennewick,

¹⁷ *Id.* at page 14 of JUB Traffic Study.

and would promote development of 60 acres of currently vacant commercial real estate along Tapteal Drive in Richland, as shown below in Figure 3.

**FIGURE 3
DEVELOPMENT AND DEVELOPMENT POTENTIAL**



23

The potential for additional development in this area is underscored by a public comment filed in this proceeding by a landowner, Preston K. Ramsey III, writing on behalf of FBA Land Holdings. FBA Land Holdings owns two undeveloped parcels bordered on the north by Tapteal Drive and on the west by the proposed Center Parkway Extension. These are labeled "Tap I" and "Tap II" in Figure 3. Mr. Ramsey comments that:

The proposed street extension of Center Parkway across railroad tracks currently leased by TCRY literally would create a new bridge between two highly interdependent communities in terms of transportation, economics, land use as well as the traffic patterns and habits of the

approximate 25,000 people who live, work and otherwise travel through this area daily.¹⁸

24 Similarly, another public comment filed by Brian Malley, Executive Director of the Benton-Franklin Council of Governments, the Metropolitan Planning Organization for the Tri-City metropolitan area, emphasizes community expectations with respect to the proposed Center Parkway extension:

In addition to easing congestion, this proposed link provides connectivity to two adjacent retail areas that are separated only by the tracks that divide them. The Tri-City area has, and continues to, grow at impressive rates. Planning and encouraging alternate modes, such as bike/ [pedestrian]/ transit will be a crucial step toward alleviating future congestion. At this time, there simply is no option between these two retail areas that does not require the use of a car to negotiate the roadways to travel between. Additionally, a connection in this location may well contribute to the tax base, as Tapteal area businesses have suffered through marginal access for years, with no reasonable link to the adjacent retail areas to the south.¹⁹

Deference to Local Government

25 In addition to economic benefits, the Commission as a matter of policy should give some deference to the Cities' transportation and land use planning goals, as these are matters of local concern and within the jurisdictional authority of the Cities. Indeed, it is worth considering that if the City of Richland was the petitioner for this project, instead of Kennewick, it would be exempt from the Commission's jurisdiction.²⁰ RCW 81.53.240 exempts first-class cities from the

¹⁸ Public Comment Exhibit (Written comment submitted December 9, 2013).

¹⁹ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁰ The Cities note in their petition for administrative review that:

The Petitioners do not waive any jurisdictional argument regarding the Cities' exemption from this petition process. RCW 81.53.240 exempts first-class cities from the at-grade crossing petition process. The City of Richland is a first-class city, and the City of Kennewick is a code city. State law provides that code cities have the same authority as first-class cities. RCW 35A.11.020: "The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of the state, and not specifically denied to code cities by law." Nevertheless, the Petitioners believe UTC review and approval worthwhile.

at-grade crossing petition process. The City of Richland is a first-class city.²¹ This exemption has been present in the law in one form or another since 1909. It is reasonable to infer its passage into law was largely a reflection of the state Constitution giving deference to local jurisdictions on matters that are deemed best left to local control.²² Planning and designing intra-urban transportation networks that will best serve the public's needs in the jurisdictional boundaries of the state's larger Cities fall squarely into this category.²³ Although Kennewick is not legally exempt from our jurisdiction, it is consistent with legislative policies implementing Constitutional home rule that the Commission give significant weight to the evidence concerning the Cities' perspective that the Center Parkway extension is important to transportation planning and economic development in both jurisdictions.

26 There is additional public comment in the record of this proceeding from various community leaders that focuses on these points and illustrates the local

Petition for Administrative Review at 8, footnote 30.

Staff argues that because RCW 81.53.240 is a limitation on Commission jurisdiction, not a grant of authority to first-class cities, RCW 35A.11.020 does not apply. We see no need to resolve this legal argument in this case. We consider the underlying purpose of the exemption as part of the policy context in which the Commission should evaluate the evidence.

²¹ The Washington Constitution, adopted in 1889, directed the legislature to provide for the incorporation of cities and established that cities with population of 20,000 or more could frame a charter for their own government. Wash. Const., Art. XI, Sec. 10. The 1890 legislature established a classification scheme and provided that charter cities are "first class cities" with the broad powers generally associated with "home rule" concepts. Efforts toward greater local self-government powers as the state has become more urban led to amendment of the state Constitution in 1964, lowering the population threshold for charter cities to 10,000 and to legislation in 1994 that similarly lowered the population threshold for first class city designation to 10,000. See Amendment 40, Wash. Const., Art. XI, Sec. 10 and; RCW 35.01.010. In 1967, the legislature enacted a new municipal code (Ch. 119, Laws of 9167, Ex. Sess.), effective July 1, 1969, that gave cities the option of becoming a "code city" with generally the same powers as first class cities. See RCW 35A.11.020. Kennewick is such a code city.

²² Wash. Const., Art. XI, Sec. 10 (cities and towns with population greater than 20,000 could frame a charter for their own government). Amendment 40, in 1964, allowed any city with 10,000 or more inhabitants to frame a charter, subject to the state's general laws. In this sense, RCW 81.53.240, is consistent with the general scheme of government in Washington that gives broad "home rule" powers to first class cities.

²³ Richland's population is greater than 50,000 and that of Kennewick greater than 75,000. The Tri-cities metropolitan area, including Pasco and surrounding urban and suburban areas is more than 250,000.

importance of recognizing the broader public policy environment. Carl F. Adrian, president of the Tri-City Development Council, for example, comments that:

This at-grade railroad crossing on Center Parkway is a well-planned necessary component of our region's transportation system. The project will dramatically improve traffic movement between two important and growing commercial areas in Richland and Kennewick.

. . . Completion of Center Parkway between Tapteal Drive and Gage Boulevard is a long-standing element of a carefully developed transportation system plan. That planning has included careful consideration of the safety implications in the planned road and at-grade railroad crossing.²⁴

27 Comments from the Tri-City Regional Chamber of Commerce and the Port of Kennewick also support the proposed project on the bases that it is an important feature in a long-planned transportation network that will contribute to commercial development while reducing traffic congestion and promoting public safety in the project vicinity.²⁵

III. Conclusion

28 The Initial Order fairly weighs the evidence and argument presented in the post-hearing briefs, and reaches a legally sustainable result. The Cities' almost exclusive focus on improved response times for first responders on a point-to-point basis as the principal benefit demonstrating "public need" does not weigh persuasively against even the demonstrated low level of "inherent risk" at the proposed crossing. Nor are the Cities' legal arguments that their comprehensive planning processes under the Growth Management Act mandate Commission approval persuasive. However, considering evidence the parties largely ignored that shows additional public benefits in the form of enhanced economic development opportunities, and considering the broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning, we determine that the Cities' petition for administrative review

²⁴ Public Comment Exhibit (Written comment submitted November 20, 2013).

²⁵ *Id.* (Tri-City Regional Chamber of Commerce written comment submitted November 25, 2013; Port of Kennewick written comment submitted December 6, 2013).

should be granted and their underlying petition for authority to construct the proposed at-grade crossing should be approved.

FINDINGS AND CONCLUSIONS

29 We endorse certain of the findings and conclusions in the Initial Order, and restate
them below. In addition, we modify certain of the Initial Order's findings and
conclusions to make them consistent with the discussion in this Order. Finally,
we add new findings and conclusions based on our de novo review of the record.

30 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate railroad
crossings, and has jurisdiction over the parties and subject matter of this
proceeding.

31 (2) The City of Kennewick is a governmental entity authorized by law to petition
the Commission pursuant to RCW 81.53.020 for authority to construct an at-
grade railroad crossing where it is not practicable to construct a grade-
separated crossing and there is a public need for such a crossing that
outweighs its inherent risks.

32 (3) Res judicata does not bar the Commission from ruling on the Cities' petition
because it is sufficiently different from the City of Kennewick's prior petition.

33 (4) Comprehensive planning under the Growth Management Act does not relieve
the Cities from complying with RCW 81.53. The Commission, however,
considers the Cities' planning as part of the policy context in which it
evaluates a proposed at-grade rail crossing in the commercial center of the
urban area.

34 (5) A grade-separated crossing at the proposed project site is not practicable
because of engineering requirements and cost constraints.

35 (6) The risks of an accident at the proposed crossing are relatively low considering
current and projected train traffic, predicted levels of vehicle traffic, and
engineering plans that include active warning devices and other safety
measures.

- 36 (7) The Center Parkway extension may assist the Cities' emergency responders by
providing an alternative route for responding to incidents in the vicinity of
Columbia Center Mall, when trains are not blocking the intersection.
- 37 (8) The Center Parkway extension, including the proposed at-grade railroad
crossing, is a long-planned and important component of the Cities'
transportation system. The project will improve traffic movement between two
important and growing commercial areas in Richland and Kennewick, thus
promoting economic development.
- 38 (9) The record includes substantial competent evidence showing sufficient public
need to outweigh the inherent risks presented by the proposed at-grade
crossing.
- 39 (10) The Commission should grant the City of Richland's and City of
Kennewick's petition for authority to construct an at-grade crossing at the
proposed extension of Center Parkway.

ORDER

THE COMMISSION ORDERS:

- 40 (1) The Petition for Administrative Review filed by the City of Kennewick and
joined in by the City of Richland is granted.
- 41 (2) The Initial Order entered in this proceeding on February 25, 2014, is reversed
to the extent it would deny the City of Kennewick's petition to construct a
highway-rail grade crossing at Center Parkway, Kennewick, Washington. The
Commission authorizes construction of the proposed crossing.

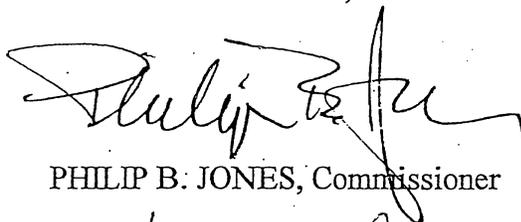
42 (3) The Commission retains jurisdiction to enforce the terms of this order.

Dated at Olympia, Washington, and effective May 29, 2014.

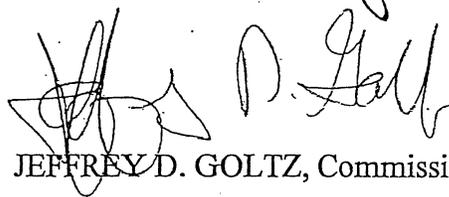
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



DAVID W. DANNER, Chairman



PHILIP B. JONES, Commissioner



JEFFREY D. GOLTZ, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

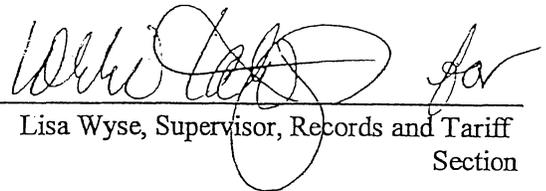
PROOF OF SERVICE

DOCKET 130499

I HEREBY CERTIFY That I, as an employee of the Washington Utilities and Transportation Commission at Olympia, Washington, have served on 5/29/2014 the parties of record in this proceeding a true copy of the following document(s):

Order 03 - Final Order granting petition for administrative review.

The document(s) was/were mailed to each of the parties of record in this docket. Each envelope was addressed to the address shown in the official file, with the required first class postage, and deposited on this date in the United States mail in the City of Olympia, County of Thurston, State of Washington.


Lisa Wyse, Supervisor, Records and Tariff
Section

PARTIES OF RECORD AND OTHERS RECEIVING NOTICE

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APPENDIX

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 (February 15, 2011)

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

BENTON COUNTY,	)	DOCKET TR-100572
)	
Petitioner,	)	ORDER 06
)	
v.)	
	)	INITIAL ORDER GRANTING
BNSF RAILWAY COMPANY,	)	BENTON COUNTY’S PETITION
	)	FOR AN AT-GRADE RAILROAD
Respondent.	)	CROSSING, SUBJECT TO
	)	CONDITIONS
)	
.....)	

1 ***Synopsis:** This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Washington Utilities and Transportation Commission (Commission) or allowed to become effective as described in the notice at the end of this Order. This Order would grant Benton County’s petition for approval of an at-grade railroad crossing in the community of Finley, subject to conditions. The approval is based on determinations that a grade-separated crossing is not practicable considering cost and engineering constraints, and that there is a demonstrated public need for the crossing outweighing its inherent risks, which the record shows to be relatively low considering vehicular and train traffic, and other relevant factors. The Commission’s approval is conditioned on Benton County taking specific actions to promote public safety at the crossing on an ongoing basis, including the installation of lighting and monitoring of traffic, which the County shall report to the Commission annually for ten years.*

SUMMARY

2 **PROCEEDINGS:** On April 9, 2010, Benton County (County) filed with the Washington Utilities and Transportation Commission (Commission) four petitions to construct a highway-rail grade crossings at Piert Road, Benton County (Dockets TR-100572 through TR-100575), and a petition for the closure of a highway-rail grade crossing at Cochran Road, Benton County (Docket TR-100576). The affected

railroad companies, BNSF Railway Company (BNSF) and Union Pacific Railroad (Union Pacific) entered appearances and reserved their rights to contest the petitions.

- 3 On June 16, 2010, the Commission entered Order 01 in Docket TR-100572 and Order 02 in TR-100573, TR-100574, TR-100575 and TR-100576, consolidating the dockets for hearing and determination. In these orders, the Commission also scheduled a prehearing conference for Wednesday, August 11, 2010. The Commission granted the parties' request for a continuance to September 27, 2010, to give them an opportunity to address questions relating to ownership of the southern two proposed railway crossings and to continue settlement negotiations.
- 4 The parties stated during the prehearing conference on September 27, 2010, that they had resolved the issues related to ownership and had reconfigured the project in such a way as to eliminate their primary points of contention in Dockets TR-100573 – TR-100576. They accordingly proposed to seek severance of those dockets and leave to withdraw the associated petitions, which the County did on October 14, 2010. In Order 04 in Docket TR-100572 and Order 05 in the consolidated dockets, entered on October 15, 2010, the Commission severed Dockets TR-100573, TR-100574, TR-100575 and TR-100576 from Docket TR-100572. The Commission also granted leave to Petitioner Benton County to withdraw its petitions in Dockets TR-100573, TR-100574, TR-100575 and TR-100576, without prejudice.
- 5 Docket TR-100572 remains contested at this time. The Commission conducted an evidentiary hearing in this proceeding on December 13, 2010, before Administrative Law Judge Dennis J. Moss at the Commission's headquarters in Olympia, Washington.
- 6 **PARTY REPRESENTATIVES:** Jonathan J. Young, Senior Deputy Prosecuting Attorney and Reid Hay, Deputy Prosecuting Attorney, Benton County Prosecuting Attorney's Office, Kennewick, Washington, represent Benton County. Bradley Scarp and Kelsey E. Endres, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represent BNSF. Fronda Woods, Assistant Attorney General, Olympia, Washington, represents the Commission's Regulatory Staff (Commission Staff or Staff).¹

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

- 7 **COMMISSION DETERMINATION:** The Commission determines in this Initial Order that Benton County's petition should be granted, subject to conditions. The evidence demonstrates that it would not be practicable to build a grade-separated crossing due to cost and engineering constraints. The record shows that the risks of an accident at the crossing are relatively low considering light vehicular and train traffic, flat topography and good lines of sight, and plans for passive warning devices and other safety measures, including ongoing monitoring. The relative low risk is outweighed by the demonstrated public need for the crossing, which is part of a project that will increase public safety by diverting traffic from residential areas and school zones, and improve economic opportunities in Benton County by improving access to approximately 300 acres of underdeveloped industrial property.
- 8 The Commission determines it should condition its approval of the proposed crossing by requiring Benton County to install lighting at the site. In addition, Benton County will be required to monitor vehicular and train traffic at the crossing and report annually to the Commission the levels and types of use for a period of ten years.

MEMORANDUM

I. Background and Procedural History

- 9 Benton County proposes by its petition in this proceeding to construct a new at-grade crossing at the intersection of a planned extension of Piert Road in Benton County and tracks owned by, and providing access to, Agrium U.S. Inc's Kennewick fertilizer Plant in the community of Finley. The project also involves the closing of an existing at-grade crossing on nearby Game Farm Road, currently the means by which traffic accesses the Agrium facility.² The tracks that would cross the Piert Road Extension are known as the Agrium Spur, operated by BNSF Railway Company, which contests the county's petition as a matter of corporate policy.³ Commission Staff, the only

² TR. 46:10 – 47:10 (Regan).

³ Exhibit MM-1T (McIntyre) at 2 (question 6). In a related matter, Union Pacific Rail Road (UPRR) has agreed not to oppose the County in constructing an at-grade public crossing with passive warning devices where the Piert Road extension will cross the UPRR tracks. *See* Exhibit KH-1T (Hunter) at 5:12 – 6:5. Considering the petition here and the four other petitions originally filed by Benton County in connection with this public works improvement project in dockets TR-100573, TR-100574, TR-100575 and TR-100576, which were severed from this proceeding by Order 05 and authorized for refiling as uncontested petitions, four private and one

other party to this proceeding, recommends that the County's petition be granted, with four additional safety measures.⁴

10 Mr. Bowie, employed by the Benton County Public Works Department as the Benton County Engineer, testifies that "the Piert Road extension project is the final phase of a project that was first investigated as part of a 1995 report on public needs prepared for the Benton County Commissioners."⁵ According to Mr. Bowie, two engineering reports were prepared, allowing the Commission to consider various options for development projects.⁶ The County Commission, after holding public hearings, adopted resolutions directing county staff to move forward with the Piert Road extension project.⁷

11 Mr. Thorpe, who works in the Engineering and Construction Section of the Public Works Department as a Project Engineer, testifies that:

The purpose of the road extension is to provide a more direct route for trucks entering and exiting the Finley industrial area on the way to I-82 via State Route 397. It also has the benefit of opening up a large amount of land in the Finley industrial area that is presently difficult to access, and allows for better use and development of that land.⁸

Elaborating on the County's goal to redirect truck traffic, Mr. Thorpe explains that trucks passing from the Finley industrial area on route to I-82 via State Route 397 (SR-397) presently have no option but to navigate through a residential area and past a middle school and high school.⁹ This truck traffic includes chemical trucks leaving the Agrium facility, some of which may contain hazardous materials. Mr. Thorpe testifies that:

public at-grade crossing will be closed. At the same time four public at-grade crossings, including the one contested here, would be opened over various rail spurs, including the Agrium Spur, that provide access to the 300 acre industrial area.

⁴ Exhibit KH-1T (Hunter) at 3:20-21.

⁵ Exhibit MB-1T (Bowie) at 3:2-5.

⁶ *Id.* at 3:6-9.

⁷ *Id.*

⁸ Exhibit BT-1T (Thorpe) at 2:23 – 3:2.

⁹ *Id.* at 2:23 – 3:2.

The completion of the Piert Road extension project, including the petitioned crossing, will provide a more direct route for truck traffic and thus mitigate the problems and dangers of trucks passing through residential areas and school zones.¹⁰

- 12 Mr. Fyall, who works in the Office of the Benton County Commissioners managing special projects, testifies that in addition to the safety and quality of life factors discussed by Mr. Thorpe, the extension of Piert Road “represents a major piece of the overall multi-modal transportation matrix in the Finley area of eastern Benton County.”¹¹ He explains that:

The low-lying, near-shore areas of Finley have long been viewed as a potential industrial, shipping, and manufacturing asset for the region; but realizing that potential has proven elusive in large part due to the lack of fluid, efficient overland transportation options into the area. As a result, recruiting the types of targeted operations into the appropriately zoned areas has been difficult.¹²

- 13 Mr. Fyall testifies further that the Piert Road extension project has taken on increased significance in this regard with the completion of SR 397, which sometimes is referred to colloquially as the "Finley Intertie". Mr. Fyall states that the Finley Intertie highway was first envisaged in the 1960s, but only completed in recent years. SR 397 provides access into and out of Finley via a southwestern route to I-82. According to Mr. Fyall, Piert Road, if extended as planned, can serve as a primary local access road for industry in south Finley, and connect into the Intertie.

- 14 Mr. Bowie testifies that an important factor for Benton County is that it secured a \$1.935 million grant from the Washington State Transportation Improvement Board in 2005 to go towards the Piert Road extension.¹³ In Mr. Bowie’s opinion, this represents recognition at the state level that there is a need for the Piert Road project. However, Mr. Bowie testifies: “If the Piert Road project is not completed the

¹⁰ Exhibit BT-1T (Thorpe) at 3:13-18.

¹¹ Exhibit AF-1T (Fyall) at 2:18-20.

¹² *Id.* at 2:20-28.

¹³ Exhibit MB-1T (Bowie) at 3:2-12.

Transportation Improvement Board grant will be lost and prior expenditures billed back to the county.”¹⁴

- 15 Mr. Bowie is the County’s principal witness concerning the safety of the proposed at-grade crossing. Indeed, he approved the crossing design for the County and prepared its petition that is the subject of this proceeding.¹⁵ Mr. Bowie testifies that the Piert Road extension is planned to run north to south, crossing an existing private industrial rail spur (*i.e.*, the Agrium Spur) at grade. He describes the area of the crossing as being “a flat open area with very good geometrics and a very low exposure to accidents.”¹⁶ He states in addition that “a separated grade crossing would impracticable.”¹⁷
- 16 Focusing first on safety, Mr. Bowie testifies that the primary factors to consider are the volume of traffic along the highway and along the railway, speeds of highway and railway traffic at the crossing point, the geometry and topography of the crossing area, and the sight distances when approaching the crossing.
- 17 Mr. Bowie testifies that approximately 400 vehicles per day and 1 or 2 BNSF trains per week will pass over the proposed crossing.¹⁸ Vehicles on Piert Road are subject to a speed limit of 35 miles per Hour. Mr. Bowie states that while the rail spur has an authorized speed of 10 miles per hour, “trains at the location of the crossing are observed to travel at an estimated 2 to 5 miles per hour.”¹⁹ Ms. McIntyre, testifying for BNSF, does not dispute Mr. Bowie’s estimate of train speeds, but she contends that: “It must always be expected that a train will be traveling as fast as the federal speed limit allows.”²⁰
- 18 Ms. McIntyre disputes Mr. Bowie concerning the number of trains that use the spur. She states the number of trains is five per week (“one Road Switcher train to (and

¹⁴ *Id.* at 7:17-22.

¹⁵ *Id.* at 2:24-26.

¹⁶ *Id.* at 3:15-20 (citing Exhibit MB-2, a detailed map of the project site, with photographs).

¹⁷ *Id.* at 4:1-2.

¹⁸ Each daily train trip to the Agrium facility is a round trip thus representing two passages over the proposed crossing. TR. 34:2-13 (Angelos).

¹⁹ *Id.* at 4:23-27.

²⁰ Exhibit MM-1T (McIntyre) at 3 (question 7).

from) the Agrium facility per day, Monday through Friday”), not 1 or 2 per week.²¹ Mr. Angelos, offers identical testimony for BNSF.²²

- 19 In rebuttal to Ms. McIntyre and Mr. Angelos, Benton County called on Mr. Josh Regan, who manages the fertilizer plant served by the spur and that would be accessed by trucks using the proposed crossing. He also manages another Agrium operation in the same area. Mr. Regan testifies, based on detailed company records, that: “An average of three trains per week arrive and depart our Plant along that spur.”²³
- 20 At hearing, Mr. Angelos said that he based his assertion in his prefiled testimony that there are five trains per week—one each business day—on the service that is *scheduled*, not the service that actually occurs. He acknowledged that the service BNSF actually provides is sporadic and based on the demands of the customer.²⁴
- 21 Mr. Regan agrees that train traffic on the spur is sporadic, varying from one to four or five trains per week. Nevertheless, he states that the average is three trains per week, as shown by his company’s records.²⁵ Asked about anticipated future use of the Agrium spur, Mr. Regan testifies: “In my position we do forecasting and strategic planning up to five years. At this point in time there would be no indication of any growth or diminishing traffic.”²⁶
- 22 Ms. McIntyre also testifies that BNSF has concerns that the County has failed to consider that there may be an increased traffic volume on Piert Road if nearby industrial development increases.²⁷ Mr. Bowie, however, testifies in rebuttal that the traffic demand model on which the County relies takes growth into account.²⁸ He states in addition that the County proposes to conduct “ongoing monitoring of the

²¹ *Id.* at 2 (question 4).

²² Exhibit WA-1T (Angelos) at 1 (question 3).

²³ Exhibit JR-1T (Regan) at 2:21-23. See also *Id.* at 3:11-12; 3:23-25.

²⁴ TR. 31:14 – 32:7.

²⁵ TR. 41:17-19.

²⁶ TR. 41:25 – 42:5 (Regan).

²⁷ Exhibit MM-1T (McIntyre) at 2 (question 7).

²⁸ Exhibit MB-8T (Bowie) at 2:4-6.

crossing so that a diagnostic team can meet and revisit the adequacy of the crossing if warranted by future conditions.”²⁹

- 23 Concerning the geography and topography of the crossing area and the sight distances from the crossing, which he describes as “very favorable,” Mr. Bowie provided detailed testimony as follows:

The proposed roadway alignment is located approximately 300 feet west of the industrial rail entrance for the Agrium plant, providing a buffer area for both train and truck traffic to freely move between the two facilities. It is not anticipated that any blockages would occur on the crossing as a result of railroad switching operations as any switching would occur within the industrial site or this buffer area. The sight distance for a vehicle approaching the petitioned crossing ranges from 400 feet to nearly 2000 [feet].

Utilizing Railroad Highway Grade Crossing Handbook procedures for identifying necessary sight distances at a crossing, the County has calculated the sight distance along the tracks to allow the vehicle to cross and be clear of the tracks before the train (dt) to be 237 ft. when coupled with the (dh) value of 272 ft. The procedure ensures that no obstruction is within the approach sight triangle for any vehicle approaching from any direction. The roadway is in a 2000 foot radius horizontal curve, and has been designed with a moderate vertical curve with approaching gradient is from .55% to -. 1%. The rail spur has a slight horizontal curvature on an approach grade of 1.9%. Benton County performed a diagnostic regarding sight distances in accordance with The Railroad-Highway Grade Crossing Handbook, Revised Second Edition.

All criteria [were] met for safe approach crossing sight distances as identified in chapter III subsection "c" of the referenced Handbook. The proposed crossing as identified in the petition and submitted in drawings conformed to pavement markings and signage as identified in Figure 8B-2 and 8B-6 of The Manual on Uniform Traffic Control Devices ("MUTCD"). Passive traffic control systems planned include signage as recommended in the MUTCD for Highway-Rail Grade Crossings (Railroad crossing sign, Advance warning sign, Do Not Stop

²⁹ Exhibit 8T (Bowie) at 2:8-11.

On Tracks sign) and pavement markings (Railroad crossing marking and no passing markings) on all approaches. Again, the posted speed limit will be 35 MPH for the new road.³⁰

Mr. Bowie testifies further that “active warning devices are not called for given the features of the proposed crossing.”³¹ He substantiates this testimony with a detailed discussion of the quantitative measures and methods for conducting overall evaluations of crossing safety used by the United States Department of Transportation and its Washington counterpart.³² Here, according to Mr. Bowie, the various standard measures indicate a very low likelihood for a collision between a train and a vehicle at the proposed crossing, suggesting that passive warning devices, such as those planned, are adequate. As to the future, Benton County plans include active monitoring at the crossing to determine, over time, whether conditions have changed so as to warrant additional safety measures.³³

²⁴ Ms. Hunter testifies that Staff participated in a diagnostic review of the proposed crossing with representatives of BNSF and the County.³⁴ Although she questions some of the data upon which Mr. Bowie relied, Ms. Hunter generally agrees with him that the characteristics of the proposed crossing, including traffic flow, amount of train usage, geography and topography, and other factors relevant to assessing safety, support a conclusion that the risk of an accident at the proposed crossing is quite low.³⁵ She also agrees with Mr. Bowie that passive warning devices would be

³⁰ *Id.* at 5:1 – 6:15 (internal references to Exhibits MB-3 and MB-4 removed).

³¹ *Id.* at 8:26-27.

³² *Id.* at 8:27 – 11:14.

³³ *Id.* at 4:16-17; 11:10-14.

³⁴ Exhibit KH-1T (Hunter) at 6:12-14. Ms. Hunter explained that:

A diagnostic review is when a team of experienced and knowledgeable individuals from interested organizations meet on-site at an existing or proposed crossing to evaluate its operational and physical characteristics, and to determine whether measures can be taken to maintain or improve safety at the crossing. Generally, the team consists of the road authority, UTC staff, and the railroad, though other organizations may also be involved. The team considers a number of factors, including the crossing configuration and physical characteristics, vehicle and train traffic patterns and operations at the crossing, the crossing approach zones, and traffic control devices such as pavement markings and signs or signals. *Id.* at 6:16 – 7:2.

³⁵ *Id.* at 12:9 - 25:18.

appropriate and adequate at the site.³⁶ However, Ms. Hunter presents Staff's recommendation for four additional safety measures in addition to those the County proposes. Staff specifically recommends:

- Additional signage.
- Smooth surface treatments at the crossing.
- Additional lighting.
- Monitoring.

25 Mr. Bowie testifies that the County agrees with all of Staff's recommendations, except its proposal that lighting be installed at the crossing.³⁷ Mr. Bowies states that "Benton County does not presently maintain or operate streetlights."³⁸ In Mr. Bowie's opinion, it would present a significant burden for the County to be required to install and maintain such lights at the proposed crossing.³⁹

Ms. Hunter testifies, however, to her understanding that:

The majority of the BNSF crossings will occur at night, between the hours of 9:00 p.m. and 12:00 a.m. Additionally, train speeds are low—only 10 miles per hour. A motorist might not see a slowly-moving train in the dark. According to page 141 of the "Railroad-Highway Grade Crossing Handbook," "Illumination at a crossing may be effective in reducing nighttime collisions." The handbook also lists a number of conditions under which illumination should be considered, including nighttime train operations and low train speeds.⁴⁰

26 Mr. Bowie focuses on criteria set forth in the U.S. DOT's Manual on Uniform Traffic Control Devices⁴¹ and contends "the specific circumstances of the proposed

³⁶ *Id.*

³⁷ Exhibit MB-8T (Bowie) at 4:1 – 5:19.

³⁸ *Id.* at 4:13-17.

³⁹ *Id.*

⁴⁰ Exhibit KH-1T at 28:11-19; Exhibit KH-4 (excerpts from the U.S. DOT/FHWA Railroad-Highway Grade Crossing Handbook, August 2007 ed.).

⁴¹ Exhibit MB-10.

crossing . . . do not call for additional lighting.”⁴² He states that the Manual suggests that:

Additional lighting should be considered where there is substantial railway traffic at night, where the crossing is blocked for extended periods of time, or where the crash history indicates that road users experience difficulty seeing trains, equipment, or traffic control devices during hours of darkness. The proposed crossing is not anticipated to have any of those difficulties.⁴³

However, what Mr. Bowie characterizes as “criteria” actually are no more than several examples of when illumination may be installed at a railroad crossing. They do not establish an exclusive set of circumstances that might indicate a need for lighting at a railroad crossing. Indeed, while, the Railroad-Highway Grade Crossing Handbook on which Ms. Hunter relies includes the examples to which Mr. Bowie refers as conditions under which illumination may be effective, it also identifies the more relevant conditions to which Ms. Hunter refers in her testimony, and six additional conditions that may suggest the need for lighting. The Handbook also states that “Luminaires may provide a low-cost alternative to active traffic control devices on industrial or mine tracks where switching operations are carried out at night.”⁴⁴ In a post-hearing response to a bench request, Mr. Bowie states that the capital costs of installing four streetlights at the crossing would be approximately \$40,000, with an annual maintenance expense of approximately \$500.⁴⁵

27 On the question of whether a grade-separated crossing is feasible, Mr. Bowie testifies that it is not, because of cost and engineering considerations. According to Mr. Bowie, Benton County’s consulting engineers on this project have estimated the cost of a separated crossing would more than double the cost of the project, from about \$3 million to \$6.8 million.⁴⁶ Even were a grade-separated crossing feasible from a cost perspective, Mr. Bowie testified that it would not be feasible from an engineering

⁴² Exhibit MB-8T (Bowie) at 4:22-27.

⁴³ *Id.* at 4:28 – 5:7.

⁴⁴ Exhibit KH-4 at 15.

⁴⁵ Exhibit BR-1.

⁴⁶ *Id.* at 7:26 – 8:3.

perspective because the necessary configuration would seriously impede the ability of trucks to access the Agrium facility served by the rail spur.⁴⁷

- 28 Ms. Hunter, for Staff, testifies that she reviewed the report cited in Mr. Bowie's testimony, which is Exhibit MB-5, a "Grade Separation Evaluation Report" prepared by Travis Marden of J-U-B Engineers, Inc.⁴⁸ She states that she agrees with the opinion expressed in the report that, because of the proximity of the UPRR and BNSF tracks at this location, a grade-separated design would need to span both sets of tracks.⁴⁹ Ms. Hunter also agrees with Mr. Marden's opinion that an over-crossing would interfere with vehicle access to the Agrium plant and adjacent agricultural lands.⁵⁰ For this reason, Ms. Hunter says she agrees with Mr. Bowie's opinion that a grade-separated crossing would be impracticable at this location.⁵¹

II. Discussion and Determinations

- 29 RCW 81.53.020 requires that crossings be grade-separated "when practicable" and provides that:

In determining whether a separation of grades is practicable, the commission shall 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.⁵²

⁴⁷ *Id.* at 8:3-10.

⁴⁸ Exhibit KH-1T (Hunter) at 9:18-20.

⁴⁹ *Id.* at 10:2-4.

⁵⁰ *Id.* at 10:4-6.

⁵¹ *Id.* at 10:6-7.

⁵² Although the Commission does not ignore BNSF's corporate policy of opposing all proposed at-grade crossings, RCW 81.53.020 contemplates, at least impliedly, that there are circumstances when it is appropriate for the Commission to approve an at-grade crossing proposal. BNSF's corporate policy does not appear to be a circumstance or condition "naturally involved in such an inquiry."

The Commission, in practice, addresses two principal questions when considering whether to authorize construction of an at-grade crossing, which, by its nature, poses risks for motorists and pedestrians not present at grade-separated crossings:

- A. Whether a grade-separated crossing is practicable considering cost and engineering requirements and constraints.
- B. Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.⁵³

A. Practicability

30 Mr. Bowie and Ms. Hunter both testify that it is not feasible from an engineering perspective to build a grade-separated crossing at Piert Road that will provide access to the Agrium facility. Mr. Bowie's testimony establishes in addition that, even if technically feasible, it would not be financially practical to construct a grade-separated crossing, which would more than double the cost of the project. Counsel for the County represented in oral argument that funds are not available to the County to finance such a project.⁵⁴

31 There is no evidence in the record disputing either the financial or the engineering infeasibility of constructing a grade-separated crossing on the Piert Road extension that would provide access to the Agrium industrial facility. The Commission determines a grade-separated crossing is not practicable considering cost and engineering requirements and constraints.

B. Public Need

32 Malcolm Bowie describes in his testimony the "acute public need" for the proposed crossing.⁵⁵ Mr. Thorp addresses in more detail the public benefits that would result from the proposed extension of Piert Road. Adam Fyall further describes the public benefits that would result if the project is completed as planned. These testimonies,

⁵³ *In re Town of Tonasket v. Burlington Northern Railroad Company*, Docket TR-921371 (December 1993); *See also Burlington Northern Railroad Company v. City of Ferndale*, Docket TR-940330 (March 1995).

⁵⁴ TR. 98:12-15 (Hay).

⁵⁵ Exhibit MB-1T (Bowie) at 6:22.

all discussed in the preceding section of this Order, are undisputed in regard to the question of public need.

33 The record shows two principal public benefits that would result from the proposed project:

- An overall improvement in public safety.
- Improved economic development opportunities.

34 The proposed extension of Piert Road will provide a more direct route for trucks entering and exiting the Finley industrial area on the way to I-82 via SR-397. As Mr. Thorp testifies, trucks currently travelling from the Finley industrial area to I-82 via SR-397 must pass through a residential area and past a middle school and high school. This includes chemical trucks leaving the Agrium fertilizer facility. Completion of the Piert Road extension project, including the petitioned crossing, will provide a more direct route for this truck traffic thus mitigating the risks of trucks passing through residential areas and school zones.⁵⁶

35 When the potential elimination of these existing risks to public safety are measured against the risks of an accident at the proposed crossing, which the record shows to be quite low, it appears there would be at least some improvement in public safety for the residents of Benton County and those traveling in the Finley area if the project is completed. While the record does not include quantitative measures of the relative risks, it is a matter of common sense to recognize that it is a good idea to divert truck traffic away from residential areas and school zones to a route through a lightly traveled industrial area with favorable topography and geography, and good sight distances for a relatively low risk at-grade rail crossing.

36 In addition to producing an overall improvement in public safety for the community, the second advantage of the Piert Road Extension is that it would open up approximately 300 acres of land in the Finley industrial area that is currently difficult to access. This would promote development and job creation in the area.⁵⁷

⁵⁶ Exhibit BT-1T at 3:8-18; Exhibit BT-2 (excerpts from Final Combined SEPA Supplemental Environmental Impact Statement [and] NEPA Revised Environmental Assessment - I-82 to SR 397 Intertie Project, Benton County, Washington).

⁵⁷ Exhibit BT-1T at 3:24-4:1; Exhibit BT-3 (excerpts from Draft Report I-82/SR 397 Intertie Project); *see also* Exhibit AF-1T (Fyall) at 2:13 – 3:9.

- 37 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.
- 38 While it follows from the preceding two determinations that the Commission should approve construction of an at-grade crossing on the proposed Piert Road Extension, the Commission's inquiry is not concluded. It is also necessary to address the specific safety measures proposed for the crossing.
- 39 BNSF, as previously stated, would prefer no at-grade crossing at all. Apparently recognizing, however, that the evidence supports approval in this case under the Commission Staff's analysis, the railroad states through counsel its preference for active warnings and controls and for ongoing monitoring.⁵⁸ BNSF is particularly interested in continued scrutiny of traffic levels and makeup (*e.g.*, consideration of any hazardous material that may be transported over the crossing) so that any changed circumstances requiring enhanced protection at the crossing will be recognized and addressed.
- 40 Staff also supports ongoing monitoring at the site. Benton County's witness, Mr. Bowie, discusses in his initial testimony the County's intention to conduct such monitoring. Mr. Bowie testifies that "actual traffic counts will be monitored annually."⁵⁹ He testifies in addition that:

Benton County is proposing ongoing monitoring of the petitioned passive crossing. Accordingly, if at some future time conditions warrant it, a diagnostic team will meet to revisit the adequacy of the crossing.⁶⁰

In his rebuttal testimony, Mr. Bowie refers to his earlier discussion of the County's commitment to ongoing monitoring and to Ms. Hunter's testimony for Staff, which also recommends monitoring the crossing and specifically sets forth how that

⁵⁸ TR. 102:2 – 103:2 (Endres).

⁵⁹ Exhibit MB-1T (Bowie) at 4:16-18.

⁶⁰ *Id.* at 11:10-14.

monitoring should be conducted. Mr. Bowie testifies that he is “in complete agreement with Ms. Hunter's recommendations for monitoring.”⁶¹ Ms. Hunter testifies in this connection that:

At the October 18, 2010, diagnostic review (see Exhibit KH-5), we discussed requiring the County, because of the high probability of industrial development in the area, to monitor the crossing after construction for four specific elements: (1) the number of trains over the crossing daily; (2) the number of vehicles over the crossing daily; (3) the number of accidents at the crossing annually; and (4) the number of incidents at the crossing annually. An incident is an occurrence where a train and vehicle do not collide, but where the train crew reports a near hit.⁶²

She states further that information concerning two of the four elements, the number of accidents and the number of incidents, are readily available to UTC staff. She recommends that the County be required to monitor activity at the crossing for the other two elements, the number of trains and number of vehicles over the crossing daily. In addition, Ms. Hunter recommends that Benton County “be required to submit a brief report to the UTC once each year, due on the same calendar day as the effective date of the order in this docket, commencing in the same year as the new crossing is operational, for a period of ten years.”⁶³

41 Ms. Hunter’s recommendations are well taken and the Commission determines it should condition approval of Benton County’s petition accordingly. The Commission recognizes, too, BNSF’s concerns regarding the composition of the vehicular traffic (*e.g.*, trucks, cars, buses) and the nature of cargo at the crossing (*i.e.*, hazardous versus nonhazardous). The County’s monitoring should include records of the composition of the traffic and the nature of the cargo transported at the site.

42 Benton County is otherwise in agreement with Staff concerning signage and other safety measures that Staff recommends, except for Staff’s recommendation that the County be required to install lighting. The matter essentially boils down to whether lighting should be required now as a condition of approval, or required later if

⁶¹ Exhibit MB-8T (Bowie) at 2:13-19.

⁶² Exhibit KH-1T (Hunter) at 29:10-17.

⁶³ *Id.* at 29:19 – 30:3.

accident history at the crossing indicates a need for additional illumination. Consistent with the general consideration of competing concerns that are part of the Commission's evaluation of petitions for at-grade crossings, it is appropriate to weigh the cost of the proposed measure against the potential benefit. According to the County's response to the Commission's Bench Request No. 1, the installation cost of four lights that would be required to illuminate both this crossing and the nearby crossing over UPRR's tracks is about \$40,000 with an annual maintenance expense of about \$500. In the context of a \$3 million project cost, this seems a relatively small additional amount. More important, the potential benefit of heightened safety at the crossing, even if it prevents only a single accident, most likely would outweigh this cost, perhaps by a considerable amount if the accident involved personal injury in addition to property damage. It is significant in this context, too, that while Staff proposed this measure in its response testimony, the County did not raise cost as a factor supporting its opposition to the measure in its rebuttal testimony. The fact that the County does not currently operate or maintain any streetlights does not, by itself, support the County's argument that the Commission should not to impose the requirement as a condition of approving an at-grade crossing.

- 43 Although the Commission's determinations in this proceeding necessarily are limited to the single crossing at issue, which would require the installation of only two lights according to Ms. Hunter's testimony, it would be prudent for the County to install the four lights mentioned in response to Bench Request No. 1. Here, the Commission determines it should condition its approval of Benton County's petition by requiring the installation of lights at the subject crossing. The Commission, however, may similarly condition its approval of any renewed petition by the County concerning the nearby UPRR crossing earlier proposed in Docket TR-100573.

FINDINGS OF FACT AND CONCLUSION OF LAW

- 44 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts and conclusions, incorporating by reference pertinent portions of the preceding detailed discussion:

- 45 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate railroad crossings.
- 46 (2) Benton County is a government entity authorized by law to petition the Commission pursuant to RCW 81.53.020 for authority to construct an at-grade railroad crossing where it is not practicable to construct a grade-separated crossing and there is a public need for such a crossing that outweighs its inherent risks.
- 47 (3) A grade-separated crossing at the proposed project site is not practicable because of cost and engineering constraints.
- 48 (4) The risks of an accident at the proposed crossing are relatively low considering light vehicular and train traffic, flat topography and good lines of sight, and plans for passive warning devices and other safety measures, including ongoing monitoring.
- 49 (5) The inherent risk at the proposed crossing is outweighed by the demonstrated public need for the crossing, which is part of a project that will increase public safety by diverting traffic from residential areas and school zones, and improve economic opportunities in Benton County by improving access to approximately 300 acres of underdeveloped industrial property.
- 50 (6) The Commission should approve Benton County's petition for authority to construct an at-grade crossing at the intersection of the Agrium Spur and the Piert Road Extension, subject to condition that the County install the signage and other safety features to which the County and Staff agree, as discussed in the body of this Order and the evidence of record and, in addition, adequate lighting as proposed by Staff.
- 51 (7) The Commission's approval also should be conditioned by requiring Benton County to monitor vehicular and train traffic at the crossing in terms of the numbers and composition of each, including the nature of the cargo transported at the site, for a period of ten years, with annual reports to the Commission within ten days of the anniversary date of this Order or on such other date as Benton County and Staff agree.

ORDER

THE COMMISSION ORDERS THAT:

- 52 (1) Benton County's petition to construct an at-grade railroad crossing at the intersection of the Agrium Spur and the Piert Road Extension, as identified in the County's petition and discussed in this Order, is granted, subject to conditions.
- 53 (2) The Commission's grant of authority is conditioned by requiring that Benton County install and maintain in good working order street lighting of a standard or customized design that is subject to prior Staff review and approval. If Benton County and Staff cannot agree to a design, Benton County may petition the Commission to reopen the record in this proceeding for a determination concerning what constitutes an acceptable design.
- 54 (3) The Commission's grant of authority is conditioned by requiring Benton County to monitor and document vehicular and train traffic at the crossing in terms of the numbers and composition of each, including the nature of the cargo transported at the site, for a period of ten years, with Benton County providing this documentation in annual reports filed with the Commission within ten days of the anniversary date of this Order or on such other date as Benton County and Staff agree. Benton County is required to consult with Staff concerning the details of the monitoring program and the contents of the annual report.

Dated at Olympia, Washington, and effective February 15, 2011.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition to Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An Original and eight (8) copies of any Petition or Answer must be filed by mail delivery to:

Attn: David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, Washington 98504-7250

APPENDIX

RCW 81.53 *et seq.* (LexisNexis annotated)

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| <p>Sec.</p> <p>aid of federal funds — Apportionment of maintenance cost between railroad and state.</p> <p>81.53.100. Cost when railroad crosses highway.</p> <p>81.53.110. Cost when highway crosses railroad.</p> <p>81.53.120. Cost when railroad crosses railroad.</p> <p>81.53.130. Apportionment of cost.</p> <p>81.53.140. Time for performance.</p> <p>81.53.150. Practice and procedure.</p> <p>81.53.160. Service of process.</p> <p>81.53.170. Judicial review.</p> <p>81.53.180. Eminent domain.</p> <p>81.53.190. Abatement of illegal crossings.</p> <p>81.53.200. Mandamus to compel performance.</p> <p>81.53.210. Penalty.</p> <p>81.53.220. Obstructions in highways.</p> <p>81.53.230. No new right of action conferred.</p> <p>81.53.240. Scope of chapter.</p> <p>81.53.250. Employment of experts.</p> <p>81.53.261. Crossing signals, warning devices — Petition — Hearing — Order — Costs apportionment — Records not evidence for actions — Appeal.</p> <p>81.53.271. Crossing signals, warning devices — Petition contents — Apportionment of installation and maintenance costs.</p> | <p>Sec.</p> <p>81.53.275. Crossing signals, warning devices — Apportionment when funds not available from grade crossing protective fund.</p> <p>81.53.281. Crossing signals, warning devices — Grade crossing protective fund — Created — Transfer of funds — Allocation of costs — Procedure — Federal funding.</p> <p>81.53.291. Crossing signals, warning devices — Operational scope — Election by first-class cities — Procedure.</p> <p>81.53.295. Crossing signals, warning devices, etc. — Federal funds used to pay installation costs — Grade crossing protective fund — State and local authorities to pay remaining installation costs — Railroad to pay maintenance costs.</p> <p>81.53.400. Traffic control devices during construction, repair, etc. of crossing or overpass — Required.</p> <p>81.53.410. Traffic control devices during construction, repair, etc. of crossing or overpass — Standards and conditions.</p> <p>81.53.420. Traffic control devices during construction, repair, etc. of crossing or overpass — Rules.</p> <p>81.53.900. Effective date — 1975 1st ex.s. c 189.</p> |
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Cross References.

Counties, signs, signals, etc.: RCW 36.86.040.
 Railroad intersections, crossings, etc.: State Constitution Art. 12 § 13.

Traffic devices required by utilities and transportation commission: RCW 47.36.050.

81.53.010. Definitions.

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

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

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

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

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

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

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

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

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

JUDICIAL DECISIONS

Highway.

Right to public use determines public highway, rather than extent of actual use. State ex rel. Oregon-

Washington R.R. & Nav. Co. v. Walla Walla County, 5 Wn.2d 95, 104 P.2d 764 (1940).

81.53.020. Grade separation required where practicable.

All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: PROVIDED, That this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall 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. [1961 c 14 § 81.53.020. Prior: 1913 c 30 § 2; RRS § 10512. Formerly RCW 81.52.090.]

JUDICIAL DECISIONS

ANALYSIS

Apportionment of cost
 Authority of commission
 —Change or elimination of crossing
 Dangerousness
 Denial of crossing
 Nature of crossing
 —Determination
 Review on appeal

Apportionment of cost.

Expense of installing safety crossing device should be apportioned between the two companies agreeing thereon. State ex rel. P.S. & W.H. Ry. v. Northern Pac. Ry., 94 Wash. 10, 161 P. 850 (1916), aff'd, 97 Wn. 701, 166 P. 793 (1917), 250 U.S. 332, 39 S. Ct. 474, 63 L. Ed. 1013 (1919).

Authority of commission.

—Change or elimination of crossing.

Commission on its own motion may file petition to change or eliminate grade crossing. State ex rel. Hayford v. Public Serv. Comm'n, 98 Wash. 648, 168 P. 169 (1917).

Dangerousness.

Statute law relating to grade crossings is based on theory that all grade crossings are dangerous. Reines v. Chicago, M., S.P. & Pac. Ry., 195 Wash. 146, 80 P.2d 406 (1938); DOT v. Snohomish County, 35 Wn.2d 247, 212 P.2d 829 (1949).

Denial of crossing.

Under prior law, commission could not deny crossing. State ex rel. Toppenish v. Public Serv. Comm'n, 114 Wash. 301, 194 P. 982 (1921).

Nature of crossing.

—Determination.

Commission has authority to determine nature of crossing where city has decided there shall be a crossing. State ex rel. Toppenish v. Public Serv. Comm'n, 114 Wash. 301, 194 P. 982 (1921).

Review on appeal.

Where order of department is based upon competent evidence, order allowing crossing at grade will not be disturbed on review. State ex rel. Oregon-Washington R.R. & Nav. Co. v. Walla Walla County, 5 Wn.2d 95, 104 P.2d 764 (1940).

OPINIONS OF THE ATTORNEY GENERAL

Highways of unimproved streets.

Grade crossing on proposed highways of unimproved streets. AGO 1917-18, p. 192 (1918).

81.53.030. Petition for crossing — Hearing — Order.

Whenever a railroad company desires to cross a highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade. Whenever the legislative authority of a county, or the municipal authorities of a city, or the state officers authorized to lay out and construct state roads, or the state parks and recreation commission, 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 at least ten days' notice to the railroad company and the county or city affected thereby, of the time and place of the investigation, to the end that all parties interested may be present and heard. If the highway involved is a state road or parkway, the secretary of transportation or the state parks and recreation commission shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If it finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, 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, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. In respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under a commission order authorizing it, the commission may in any event require the railroad company to install and maintain, at or near each crossing, on both sides of it, a sign known as the sawbuck crossing sign with the lettering "Railroad Crossing" inscribed thereon with a suitable inscription indicating the number of tracks. The sign shall be of standard design conforming to specifications furnished by the Washington state department of transportation. [1984 c 7 § 373; 1961 c 14 § 81.53.030. Prior: 1959 c 283 § 1; 1955 c 310 § 3; prior: 1937 c 22 § 1, part; 1913 c 30 § 3, part; RRS § 10513, part. Formerly RCW 81.52.100.]

Severability — 1984 c 7: See note following RCW 47.01.141.

JUDICIAL DECISIONS**ANALYSIS**

Acquisition of right of crossing
 Apportionment of cost
 Condemnation
 —Availability of another route
 —Permittee
 Consolidation of applications
 Cost of crossing
 Finding of impracticability
 Hearing
 —Prior to condemnation
 Order
 —Interlocking device not compelled
 Regulation of place and manner of crossing
 Standard of review

Acquisition of right of crossing.

Railroad must acquire right of crossing by purchase or condemnation. State ex rel. Oregon-Washington R.R. & Nav. Co. v. Superior Court, 155 Wash. 655, 286 P. 39 (1930).

Apportionment of cost.

Commission may apportion cost of crossing although statute in force at time older road constructed required costs to be borne by junior road. State ex rel. Puget Sound & W.H.R.R. v. Northern Pac. R.R., 97

Wash. 701, 166 P. 793 (1917), aff'd, 250 U.S. 332, 89 S. Ct. 474, 63 L. Ed. 1013 (1919); State ex rel. P.S. & W.H. Ry. v. Northern Pac. Ry., 94 Wash. 10, 161 P. 850 (1916), aff'd, 97 Wn. 701, 166 P. 793 (1917), 250 U.S. 332, 39 S. Ct. 474, 63 L. Ed. 1013 (1919).

Condemnation.**—Availability of another route.**

Railroad may not condemn lands of existing railroad for crossing purposes, where another feasible route exists. State ex rel. P. & S. Ry. v. Superior Court, 45 Wash. 270, 88 P. 201 (1907).

—Permittee.

Railroad may condemn lands of another for crossing purposes where necessity exists and detriment does not result to existing road. State ex rel. Columbia Valley R.R. v. Superior Court, 45 Wash. 316, 88 P. 332 (1907).

Consolidation of applications.

Two applications concerning grade crossing may be consolidated for hearing. State ex rel. Oregon-Washington R. & Nav. Co. v. Department of Pub. Works, 135 Wash. 644, 238 P. 621 (1925).

Cost of crossing.

Crossing other than at grade may be impracticable

where cost is prohibitive. State ex rel. Spokane Int'l Ry. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924).

Finding of impracticability.

If department finds an over or under crossing impracticable, it has no alternative other than to prescribe terms under which crossing at grade shall be made. State ex rel. Spokane Int'l Ry. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924).

Hearing.

—Prior to condemnation.

Under this section, department may hear and determine petition to permit toll logging road to cross another, prior to obtaining such right by condemnation. State ex rel. Oregon-Washington R.R. & Nav. Co. v. Superior Court, 155 Wash. 665, 286 P. 39 (1930).

Order.

—Interlocking device not compelled.

Department not compelled to order installation of an interlocking device. State ex rel. Spokane Int'l Ry. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924).

Regulation of place and manner of crossing.

Department may regulate place and manner of crossing. State ex rel. Oregon-Washington R.R. & Nav. Co. v. Superior Court, 155 Wash. 655, 286 P. 39 (1930).

Standard of review.

Review of commission order apportioning costs of construction not reviewable in absence of abuse of discretion. State ex rel. Tacoma E. R.R. v. Northern Pac. Ry., 104 Wash. 405, 176 P. 539 (1918).

81.53.040. Supplemental hearing — Change of route.

If the commission finds that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing and hold a supplemental hearing thereon. At least ten days' notice of the time and place of the supplemental hearing shall be given to all landowners that may be affected by the proposed change in location of the highways. At the supplemental hearing the commission shall inquire into the propriety and necessity of changing and deflecting the highway as proposed. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing, the commission shall enter its findings in writing, and shall determine the location of the crossing which may be constructed, and whether it shall be an under-crossing, over-crossing or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an over-crossing, under-crossing, or safer grade crossing. [1961 c 14 § 81.53.040. Prior: 1955 c 310 § 4; prior: 1937 c 22 § 1, part; 1913 c 30 § 3, part; RRS § 10513, part. Formerly RCW 81.52.110.]

JUDICIAL DECISIONS

Local changes permitted.

Notwithstanding authority of highway department, department of public works may make local changes in highway in connection with application for grade

crossing. State ex rel. Oregon-Washington R. & Nav. Co. v. Department of Pub. Works, 135 Wash. 644, 238 P. 621 (1925).

81.53.050. Requirements of order on change of route.

If the commission finds and determines that a change in route of an existing highway, or vacation of a portion thereof, is necessary or advisable, it shall further find and determine what private property or property rights it is necessary to take, damage, or injuriously affect for the purpose of constructing the highway along a new route, and what private property or property rights, will be affected by the proposed vacation of a portion of an existing highway. The property and property rights found necessary to be taken, damaged, or affected shall be described in the findings with reasonable accuracy. In any action brought to acquire the right to take or damage any such property or property rights, the findings of the commission shall be conclusive as to the necessity therefor. A copy of the findings shall be served upon all parties to the cause. [1961 c 14 § 81.53.050. Prior: 1955 c 310 § 5; 1937 c 22 § 1, part; 1913 c 30 § 3, part; RRS § 10513, part. Formerly RCW 81.52.120.]

81.53.060. Petition for alteration of crossing — Closure of grade crossing without hearing.

The mayor and city council, or other governing body of any city or town, or the legislative authority of any county within which there exists any under-crossing, over-crossing, or grade crossing, or where any street or highway is proposed to be located or established across any railroad, or any railroad company whose road is crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires the establishment of an under-crossing or over-crossing, or an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing over-crossing, under-crossing, or grade crossing, or a change in the location of an existing highway or crossing, the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable, to change the crossing from grade or to close and discontinue the crossing, the opening of an additional crossing for the partial diversion of travel, and praying that this relief may be ordered. If the existing or proposed crossing is on a state road, highway, or parkway, the petition may be filed by the secretary of transportation or the state parks and recreation commission. Upon the petition being filed, the commission shall fix a time and place for hearing the petition and shall give not less than twenty days' notice to the petitioner, the railroad company, and the municipality or county in which the crossing is situated. If the highway involved is a state highway or parkway, like notice shall be given to the secretary of transportation or the state parks and recreation commission. If the change petitioned for requires that private lands, property, or property rights be taken, damaged, or injuriously affected to open up a new route for the highway, or requires that any portion of any existing highway be vacated and abandoned, twenty days' notice of the hearing shall be given to the owner or owners of the private lands, property, and property rights which it is necessary to take, damage, or injuriously affect, and to the owner or owners of the private lands, property, or property rights that will be affected by the proposed vacation and abandonment of the existing highway. The commission shall also cause notice of the hearing to be published once in a newspaper of general circulation in the community where the crossing is situated, which publication shall appear at least two days before the date of hearing. At the time and place fixed in the notice, all persons and parties interested are entitled to be heard and introduce evidence. In the case of a petition for closure of a grade crossing the commission may order the grade crossing closed without hearing where: (1) Notice of the filing of the petition is posted at, or as near as practical to, the crossing; (2) notice of the filing of the petition is published once in a newspaper of general circulation in the community or area where the crossing is situated, which publication shall appear within the same week that the notice referred to in subsection (1) of this section is posted; and (3) no objections are received by the commission within twenty days from the date of the publication of the notice. [1984 c 7 § 374; 1969 ex.s. c 210 § 8; 1961 c 14 § 81.53.060. Prior: 1937 c 22 § 2, part; 1921 c 138 § 1, part; 1913 c 30 § 4, part; RRS § 10514, part. Formerly RCW 81.52.130.]

Severability — 1984 c 7: See note following RCW 47.01.141.

JUDICIAL DECISIONS

ANALYSIS

Authority of commission
—In general
—Initial application
Closure upheld
—Absence of accidents

Authority of commission.

—In general.
Commission may file petition on its own motion for change or elimination of grade crossing. State ex rel.

Hayford v. Public Serv. Comm'n, 98 Wash. 648, 168 P. 169 (1917).

—Initial application.

This section does not permit commission to disallow grade crossing on original application. State ex rel. Toppenish v. Public Serv. Comm'n, 114 Wash. 301, 194 P. 982 (1921).

Closure upheld.

—Absence of accidents.

Absence of accidents does not require reversal of

department order closing crossing. DOT v. Snohomish County, 35 Wn.2d 247, 212 P.2d 829 (1949).

81.53.070. Hearing.

At the conclusion of the hearing the commission shall make and file its written findings of fact concerning the matters inquired into in like manner as provided for findings of fact upon petition for new crossings. The commission shall also enter its order based upon said findings of fact, which shall specify whether the highway shall continue at grade or whether it shall be changed to cross over or under the railroad in its existing location or at some other point, and whether an over-crossing or under-crossing shall be established at the proposed location of any street or highway or at some other point, or whether the style and nature of construction of an existing crossing shall be changed, or whether said highway shall be closed and travel thereon diverted to another channel, or any other change that the commission may find advisable or necessary: PROVIDED, That in an emergency where a highway is relocated to avoid a grade crossing, or a new crossing is constructed in the vicinity of an existing crossing in the interest of public safety, the commission may order such existing crossing closed without notice or hearing as specified herein. In case the order made requires that private lands, property, or property rights be taken, damaged or injuriously affected, the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided.

Any petition herein authorized may be filed by the commission on its own motion, and proceedings thereon shall be the same as herein provided for the hearing and determination of a petition filed by a railroad company. [1961 c 14 § 81.53.070. Prior: 1937 c 22 § 2, part; 1921 c 138 § 1, part; 1913 c 30 § 4, part; RRS § 10514, part. Formerly RCW 81.52.140.]

81.53.080. Restrictions on structures, railway equipment, in proximity of crossings — Minimum clearance for under-crossings.

After February 24, 1937, no building, loading platform, or other structure which will tend to obstruct the vision of travelers on a highway or parkway, of approaching railway traffic, shall be erected or placed on railroad or public highway rights-of-way within a distance of one hundred feet of any grade crossing located outside the corporate limits of any city or town unless authorized by the commission, and no trains, railway cars or equipment shall be spotted less than one hundred feet from any grade crossing within or without the corporate limits of any city or town except to serve station facilities and existing facilities of industries.

The commission shall have the power to specify the minimum vertical and horizontal clearance of under-crossings constructed, repaired or reconstructed after February 24, 1937, except as to primary state highways. [1969 ex.s. c 210 § 9; 1961 c 14 § 81.53.080. Prior: 1937 c 22 § 2, part; 1921 c 138 § 1, part; 1913 c 30 § 4, part; RRS § 10514, part. Formerly RCW 81.52.150.]

81.53.090. Duty to maintain crossings.

When a highway crosses a railroad by an over-crossing or under-crossing, the framework and abutments of the over-crossing or under-crossing, as the case may be, shall be maintained and kept in repair by the railroad company, and the roadway thereover or thereunder and approaches thereto shall be maintained and kept in repair by the county or municipality in which the same are situated, or if the highway is a state road or parkway, the roadway over or under the railroad shall be maintained and kept in repair as provided by law for the maintenance and repair of state roads and parkways.

The railings of over-crossings shall be considered a part of the roadway. Whenever a highway intersects a railroad at common grade, the roadway approaches within one foot of the outside of either rail shall be maintained and kept in repair by highway authority, and the planking or other materials between the rails and for one foot on the outside thereof shall be installed and maintained by the railroad company. At crossings involving more than one track, maintenance by the railroad company shall include that portion of

the crossing between and for one foot on the outside of each outside rail. The minimum length of such planking or other materials shall be twenty feet on installation or repairs made after February 24, 1937. [1961 c 14 § 81.53.090. Prior: 1937 c 22 § 3; 1913 c 30 § 5; RRS § 10515. Formerly RCW 81.52.160.]

JUDICIAL DECISIONS

Maintenance of railing. railing on highway overpass. Pridmore v. Northern Railroad not responsible for failure to maintain Pac. Ry., 109 Wash. 305, 186 P. 862 (1920).

81.53.091. Underpasses, overpasses constructed with aid of federal funds — Apportionment of maintenance cost between railroad and state.

See RCW 47.28.150.

81.53.100. Cost when railroad crosses highway.

Whenever, under the provisions of this chapter, new railroads are constructed across existing highways, or highway changes are made either for the purpose of avoiding grade crossings on such new railroads, or for the purpose of crossing at a safer and more accessible point than otherwise available, the entire expense of crossing above or below the grade of the existing highway, or changing the route thereof, for the purpose mentioned in this section, shall be paid by the railroad company. [1961 c 14 § 81.53.100. Prior: 1937 c 22 § 4A; 1925 ex.s. c 73 § 1A; 1921 c 138 § 2A; 1913 c 30 § 6A; RRS § 10516A. Formerly RCW 81.52.170.]

OPINIONS OF THE ATTORNEY GENERAL

<p>ANALYSIS</p> <p>Costs of railroad Payment</p> <p>Costs of railroad. Contribution by public service commission to cost of</p>	<p>railroad under crossing. AGO 1913-14, p. 513 (1914).</p> <p>Payment. Manner of paying cost of crossing. AGO 1913-14, p. 190 (1914).</p>
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81.53.110. Cost when highway crosses railroad.

Whenever, under the provisions of this chapter, a new highway is constructed across a railroad, or an existing grade crossing is eliminated or changed (or the style or nature of construction of an existing crossing is changed), the entire expense of constructing a new grade crossing, an overcrossing, under-crossing, or safer grade crossing, or changing the nature and style of construction of an existing crossing, including the expense of constructing approaches to such crossing and the expense of securing rights-of-way for such approaches, as the case may be, shall be apportioned by the commission between the railroad, municipality or county affected, or if the highway is a state road or parkway, between the railroad and the state, in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement. If the highway involved is a state road or parkway, the amount not apportioned to the railroad company shall be paid as provided by law for constructing such state road or parkway. [1961 c 14 § 81.53.110. Prior: 1937 c 22 § 4B; 1925 ex.s. c 73 § 1B; 1921 c 138 § 2B; 1913 c 30 § 6B; RRS § 10516B. Formerly RCW 81.52.180.]

81.53.120. Cost when railroad crosses railroad.

Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an over-crossing, under-crossing, or grade crossing required or permitted by this chapter or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county or to the state, and the expense of constructing and maintaining such signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and the employees

of the railroad company, as the commission may require to be constructed and maintained, shall be apportioned between said railroad companies by the commission in such manner as justice may require, regard being had for all facts relating to the establishment, reason for, and construction of said improvement, unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given. [1961 c 14 § 81.53.120. Prior: 1937 c 22 § 4C; 1925 ex.s. c 73 § 1C; 1921 c 138 § 2C; 1913 c 30 § 6C; RRS § 10516C. Formerly RCW 81.52.190.]

JUDICIAL DECISIONS

ANALYSIS

Apportionment
 —In general
 —Factors
 —Widths of rights of way
 Assessment of entire cost
 Bearing entire cost
 Right to crossing
 —Method of acquisition
 Safety devices
 Sharing of costs
 —Agreement

Apportionment.

—In general.

Apportionment of cost between two railroads is constitutional, although, when senior road constructed, all cost was to be borne by junior road. *Northern Pac. Ry. v. Puget Sound & W.H. Ry.*, 250 U.S. 332, 39 S. Ct. 474, 63 L. Ed. 1013 (1919).

—Factors.

Commission order apportioning costs should be based upon the resulting convenience and inconvenience to the roads concerned. *State ex rel. Tacoma E. R.R. v. Northern Pac. Ry.*, 104 Wash. 405, 176 P. 539 (1918).

—Widths of rights of way.

Apportionment based upon consideration of widths of relative rights of way may be sufficient without consideration of number of trains using crossing. *State ex rel. City of Seattle v. Northern Pac. Ry.*, 166 Wash. 437, 7 P.2d 29 (1932).

81.53.130. Apportionment of cost.

In the construction of new railroads across existing highways, the railroads shall do or cause to be done all the work of constructing the crossings and road changes that may be required, and shall acquire and furnish whatever property or easements may be necessary, and shall pay, as provided in RCW 81.53.100 through 81.53.120, the entire expense of such work including all compensation or damages for property or property rights taken, damaged or injuriously affected. In all other cases the construction work may be apportioned by the commission between the parties who may be required to contribute to the cost thereof as the parties may agree, or as the commission may consider advisable. All work within the limits of railroad rights-of-way shall in every case be done by the railroad company owning or operating the same. The cost of acquiring additional lands, rights or easements to provide for the change of existing crossings shall, unless the parties otherwise agree, in the first instance be paid by the municipality or county within which the crossing is located; or in the case of a state road or parkway, shall be paid in

Assessment of entire cost.

Entire cost cannot be assessed to the county. *State ex rel. Oregon-Washington R. & Nav. Co. v. Department of Pub. Works*, 135 Wash. 644, 238 P. 621 (1925).

Bearing entire cost.

Commission may not charge entire cost of crossing against railroad desiring such crossing in the absence of some equity in favor of the older road. *State ex rel. P.S. & W.H. Ry. v. Northern Pac. Ry.*, 94 Wash. 10, 161 P. 850 (1916), *aff'd*, 97 Wn. 701, 166 P. 793 (1917), 250 U.S. 332, 39 S. Ct. 474, 63 L. Ed. 1013 (1919).

Right to crossing.

—Method of acquisition.

Order granting right to construct logging road crossing "forthwith" is not objectionable although company must first acquire right by purchase or condemnation. *State ex rel. Oregon-Washington R.R. & Nav. Co. v. Superior Court*, 155 Wash. 665, 286 P. 39 (1930).

Safety devices.

Railroad may be required to bear expense of construction and maintenance of safety devices. *State ex rel. P.S. & W.H. Ry. v. Northern Pac. Ry.*, 94 Wash. 10, 161 P. 850 (1916), *aff'd*, 97 Wn. 701, 166 P. 793 (1917), 250 U.S. 332, 39 S. Ct. 474, 63 L. Ed. 1013 (1919).

Sharing of costs.

—Agreement.

Under agreement with city to pay share of costs of construction over company "right-of-way" based upon the width thereof, widths of joint rights-of-way may be considered. *City of Seattle v. Northern Pac. Ry.*, 12 Wn.2d 247, 121 P.2d 382 (1942).

the manner provided by law for paying the cost of acquiring lands, rights or easements for the construction of state roads or parkways. The expense accruing on account of property taken or damaged shall be divided and paid in the manner provided for dividing and paying other costs of construction. Upon the completion of the work and its approval by the commission, an accounting shall be had, and if it shall appear that any party has expended more than its proportion of the total cost, a settlement shall be forthwith made. If the parties shall be unable to agree upon a settlement, the commission shall arbitrate, adjust and settle the account after notice to the parties. In the event of failure and refusal of any party to pay its proportion of the expense, the sum with interest from the date of the settlement may be recovered in a civil action by the party entitled thereto. In cases where the commission has settled the account, the finding of the commission as to the amount due shall be conclusive in any civil action brought to recover the same if such finding has not been reviewed or appealed from as herein provided, and the time for review or appeal has expired. If any party shall seek review of any finding or order of the commission apportioning the cost between the parties liable therefor, the superior court, the court of appeals, or the supreme court, as the case may be, shall cause judgment to be entered in such review proceedings for such sum or sums as may be found lawfully or justly due by one party to another. [1988 c 202 § 65; 1971 c 81 § 144; 1961 c 14 § 81.53.130. Prior: 1937 c 22 § 5; 1913 c 30 § 7; RRS § 10517. Formerly RCW 81.52.200.]

Severability — 1988 c 202: See note following RCW 2.24.050.

JUDICIAL DECISIONS

ANALYSIS

Apportionment not necessary
Future contingent crossing apparatus

Apportionment not necessary.

In apportioning 90 per cent of cost to toll logging road and one per cent to joint users of land, apportion-

ment of the one per cent need not be made. State ex rel. Oregon-Washington R.R. & Nav. Co. v. Superior Court, 155 Wash. 665, 286 P. 39 (1930).

Future contingent crossing apparatus.

It is not proper to apportion costs of future contingent crossing apparatus. State ex rel. N. Coast Ry. v. Northern Pac. Ry., 49 Wash. 78, 94 P. 907 (1908).

OPINIONS OF THE ATTORNEY GENERAL

Right to contract.

Right of state highway board to contract with rail-

road for apportionment of expense of under-crossing project. AGO 1913-14, p. 517 (1914).

81.53.140. Time for performance.

The commission, in any order requiring work to be done, shall have power to fix the time within which the same shall be performed and completed: PROVIDED, That if any party having a duty to perform within a fixed time under any order of the commission shall make it appear to the commission that the order cannot reasonably be complied with within the time fixed by reason either of facts arising after the entry of the order or of facts existing prior to the entry thereof that were not presented, and with reasonable diligence could not have been sooner presented to the commission, such party shall be entitled to a reasonable extension of time within which to perform the work. An order of the commission refusing to grant an extension of time may be reviewed as provided for the review of other orders of the commission. [1961 c 14 § 81.53.140. Prior: 1913 c 30 § 10; RRS § 10520. Formerly RCW 81.52.210.]

81.53.150. Practice and procedure.

Modes of procedure under this chapter, unless otherwise provided in this chapter, shall be as provided in other provisions of this title. The commission is hereby given power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings under this chapter. [1961 c 14 § 81.53.150. Prior: 1913 c 30 § 11; RRS § 10521. Formerly RCW 81.52.220.]

81.53.160. Service of process.

All notices required to be served by this chapter shall be in writing, and shall briefly state the nature of the matter to be inquired into and investigated. Notices may be served in the manner provided by law for the service of summons in civil cases, or by registered United States mail. When service is made by registered mail, the receipt of the receiving post office shall be sufficient proof of service. When, under the provisions of this chapter, it is necessary to serve notice of hearings before the commission on owners of private lands, property, or property rights, and such owners cannot be found, service may be made by publication in the manner provided by law for the publication of summons in civil actions, except that publication need be made but once each week for three consecutive weeks, and the hearing may be held at any time after the expiration of thirty days from the date of the first publication of the notice. [1961 c 14 § 81.53.160. Prior: 1913 c 30 § 12; RRS § 10522. Formerly RCW 81.52.230.]

81.53.170. Judicial review.

Upon the petition of any party to a proceeding before the commission, any finding or findings, or order or orders of the commission, made under color of authority of this chapter, except as otherwise provided, may be reviewed in the superior court of the county wherein the crossing is situated, and the reasonableness and lawfulness of such finding or findings, order or orders inquired into and determined, as provided in this title for the review of the commission's orders generally. Appellate review of the judgment of the superior court may be sought in like manner as provided in said utilities and transportation commission law for review by the supreme court or the court of appeals. [1988 c 202 § 66; 1971 c 81 § 145; 1961 c 14 § 81.53.170. Prior: 1937 c 22 § 6; 1913 c 30 § 13; RRS § 10523. Formerly RCW 81.52.240.]

Severability — 1988 c 202: See note following RCW 2.24.050.

JUDICIAL DECISIONS**ANALYSIS**

Filing of bond
Review on appeal
—Standard
—Weight of findings

Filing of bond.

This section does not require cost bond to be filed with petition for review. *DOT v. Snohomish County*, 35 Wn.2d 247, 212 P.2d 829 (1949).

Review on appeal.**—Standard.**

Order of department relative to grade crossing will

be upheld where not arbitrary. *State ex rel. Oregon-Washington R.R. & Nav. Co. v. Walla Walla County*, 5 Wn.2d 95, 104 P.2d 764 (1940); *DOT v. Snohomish County*, 35 Wn.2d 247, 212 P.2d 829 (1949).

Order of commission will not be disturbed in absence of showing of unreasonableness or unlawfulness. *State ex rel. Hayford v. Public Serv. Comm'n*, 98 Wash. 648, 168 P. 169 (1917).

—Weight of findings.

Findings of superior court on reviewing commission order need not be given same weight as in other cases on review, as superior court heard case only on the record. *DOT v. Snohomish County*, 35 Wn.2d 247, 212 P.2d 829 (1949).

81.53.180. Eminent domain.

Whenever to carry out any work undertaken under this chapter it is necessary to take, damage, or injuriously affect any private lands, property, or property rights, the right so to take, damage, or injuriously affect the same may be acquired by condemnation as hereinafter provided:

(1) In cases where new railroads are constructed and laid out by railroad company authorized to exercise the power of eminent domain, the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by the railroad company by a condemnation proceedings brought in its own name and prosecuted as provided by law for the exercise of the power of eminent domain by railroad companies, and the right of eminent domain is hereby conferred on railroad companies

for the purpose of carrying out the requirements of this chapter or the requirements of any order of the commission.

(2) In cases where it is necessary to take, damage, or injuriously affect private lands, property, or property rights to permit the opening of a new highway or highway crossing across a railroad, the right to take, damage, or injuriously affect such lands, property, or property rights shall be acquired by the municipality or county petitioning for such new crossing by a condemnation proceeding brought in the name of such municipality or county as provided by law for the exercise of the power of eminent domain by such municipality or county. If the highway involved be a state highway, then the right to take, damage, or injuriously affect private lands, property, or property rights shall be acquired by a condemnation proceeding prosecuted under the laws relative to the exercise of the power of eminent domain in aid of such state road.

(3) In cases where the commission orders changes in existing crossings to secure an under-crossing, over-crossing, or safer grade crossing, and it is necessary to take, damage, or injuriously affect private lands, property, or property rights to execute the work, the right to take, damage, or injuriously affect such lands, property, or property rights shall be acquired in a condemnation proceeding prosecuted in the name of the state of Washington by the attorney general under the laws relating to the exercise of the power of eminent domain by cities of the first class for street and highway purposes: PROVIDED, That in the cases mentioned in this subdivision the full value of any lands taken shall be awarded, together with damages, if any accruing to the remainder of the land not taken by reason of the severance of the part taken, but in computing the damages to the remainder, if any, the jury shall offset against such damages, if any, the special benefits, if any, accruing to such remainder by reason of the proposed improvement. The right of eminent domain for the purposes mentioned in this subdivision is hereby granted. [1961 c 14 § 81.53.180. Prior: 1913 c 30 § 15; RRS § 10525. Formerly RCW 81.52.250.]

81.53.190. Abatement of illegal crossings.

If an under-crossing, over-crossing, or grade crossing is constructed, maintained, or operated, or is about to be constructed, operated, or maintained, in violation of the provisions of this chapter, or in violation of any order of the commission, such construction, operation, or maintenance may be enjoined, or may be abated, as provided by law for the abatement of nuisances. Suits to enjoin or abate may be brought by the attorney general, or by the prosecuting attorney of the county in which the unauthorized crossing is located. [1961 c 14 § 81.53.190. Prior: 1913 c 30 § 16; RRS § 10526. Formerly RCW 81.52.260.]

81.53.200. Mandamus to compel performance.

If any railroad company, county, municipality, or officers thereof, or other person, shall fail, neglect, or refuse to perform or discharge any duty required of it or them under this chapter or any order of the commission, the performance of such duty may be compelled by mandamus, or other appropriate proceeding, prosecuted by the attorney general upon request of the commission. [1961 c 14 § 81.53.200. Prior: 1913 c 30 § 17; RRS § 10527. Formerly RCW 81.52.270.]

81.53.210. Penalty.

If any railroad company shall fail or neglect to obey, comply with, or carry out the requirements of this chapter, or any order of the commission made under it, such company shall be liable to a penalty not to exceed five thousand dollars, such penalty to be recovered in a civil action brought in the name of the state of Washington by the attorney general. All penalties recovered shall be paid into the state treasury. [1961 c 14 § 81.53.210. Prior: 1913 c 30 § 18; RRS § 10528. Formerly RCW 81.52.280.]

81.53.220. Obstructions in highways.

Whenever, to carry out any work ordered under RCW 81.53.010 through 81.53.281 and 81.54.010, it is necessary to erect and maintain posts, piers, or abutments in a highway,

the right and authority to erect and maintain the same is hereby granted: PROVIDED, That, in case of a state highway the same shall be placed only at such points on such state highway as may be approved by the state secretary of transportation and fixed after such approval by order of the commission. [1983 c 3 § 210; 1961 c 14 § 81.53.220. Prior: 1925 ex.s. c 179 § 2; 1913 c 30 § 19; RRS § 10529. Formerly RCW 81.52.290.]

81.53.230. No new right of action conferred.

Nothing contained in this chapter shall be construed as conferring a right of action for the abandonment or vacation of any existing highway or portion thereof in cases where no right of action exists independent of this chapter. [1961 c 14 § 81.53.230. Prior: 1913 c 30 § 20; RRS § 10530.]

81.53.240. Scope of chapter.

Except to the extent necessary to permit participation by first-class cities in the grade crossing protective fund, when an election to participate is made as provided in RCW 81.53.261 through 81.53.291, chapter 81.53 RCW is not operative within the limits of first-class cities, and does not apply to street railway lines operating on or across any street, alley, or other public place within the limits of any city, except that a streetcar line outside of cities of the first class shall not cross a railroad at grade without express authority from the commission. The commission may not change the location of a state highway without the approval of the secretary of transportation, or the location of any crossing thereon adopted or approved by the department of transportation, or grant a railroad authority to cross a state highway at grade without the consent of the secretary of transportation. [1984 c 7 § 375; 1969 c 134 § 8; 1961 c 14 § 81.53.240. Prior: (i) 1953 c 95 § 15; 1925 ex.s. c 179 § 3; 1913 c 30 § 21; RRS § 10531. (ii) 1959 c 283 § 7. Formerly RCW 81.52.300 and 81.52.380.]

Severability — 1984 c 7: See note following RCW 47.01.141.

81.53.250. Employment of experts.

The commission may employ temporarily such experts, engineers, and inspectors as may be necessary to supervise changes in existing crossings undertaken under this chapter; the expense thereof shall be paid by the railroad upon the request and certificate of the commission, said expense to be included in the cost of the particular change of grade on account of which it is incurred, and apportioned as provided in this chapter.

The commission may also employ such engineers and other persons as permanent employees as may be necessary to properly administer this chapter. [1961 c 14 § 81.53.250. Prior: 1937 c 22 § 7; 1913 c 30 § 14; RRS § 10524. Formerly RCW 81.52.330.]

81.53.261. Crossing signals, warning devices — Petition — Hearing — Order — Costs apportionment — Records not evidence for actions — Appeal.

Whenever the secretary of transportation or the governing body of any city, town, or county, or any railroad company whose road is crossed by any highway, shall deem that the public safety requires signals or other warning devices, other than sawbuck signs, at any crossing of a railroad at common grade by any state, city, town, or county highway, road, street, alley, avenue, boulevard, parkway, or other public place actually open and in use or to be opened and used for travel by the public, he or it shall file with the utilities and transportation commission a petition in writing, alleging that the public safety requires the installation of specified signals or other warning devices at such crossing or specified changes in the method and manner of existing crossing warning devices. Upon receiving such petition, the commission shall promptly set the matter for hearing, giving at least twenty days notice to the railroad company or companies and the county or municipality affected thereby, or the secretary of transportation in the case of a state

81.53.281. Crossing signals, warning devices — Grade crossing protective fund — Created — Transfer of funds — Allocation of costs — Procedure — Federal funding.

There is hereby created in the state treasury a "grade crossing protective fund" to carry out the provisions of RCW 81.53.261, 81.53.271, 81.53.281, 81.53.291, and 81.53.295; for grants and/or subsidies to public, private, and nonprofit entities for rail safety projects authorized or ordered by the commission; and for personnel and associated costs related to supervising and administering rail safety grants and/or subsidies. The commission shall transfer from the public service revolving fund's miscellaneous fees and penalties accounts moneys appropriated for these purposes as needed. At the time the commission makes each allocation of cost to said grade crossing protective fund, it shall certify that such cost shall be payable out of said fund. When federal-aid highway funds are involved, the department of transportation shall, upon entry of an order by the commission requiring the installation or upgrading of a grade crossing protective device, submit to the commission an estimate for the cost of the proposed installation and related work. Upon receipt of the estimate the commission shall pay to the department of transportation the percentage of the estimate specified in RCW 81.53.295, as now or hereafter amended, to be used as the grade crossing protective fund portion of the cost of the installation and related work.

The commission may adopt rules for the allocation of money from the grade crossing protective fund. [2003 c 190 § 3; 1998 c 245 § 166; 1987 c 257 § 1; 1985 c 405 § 509; 1982 c 94 § 3; 1975 1st ex.s. c 189 § 2; 1973 c 115 § 4; 1969 c 134 § 3.]

Findings — 2003 c 190: See note following RCW 81.53.271.

Application — 1982 c 94: See note following RCW 81.53.261.

Severability — 1985 c 405: See note following RCW 9.46.100.

81.53.291. Crossing signals, warning devices — Operational scope — Election by first-class cities — Procedure.

RCW 81.53.261 through 81.53.291 shall be operative within the limits of all cities, towns and counties, except cities of the first class. Cities of the first class may elect as to each particular crossing whether RCW 81.53.261 through 81.53.291 shall apply. Such election shall be made by the filing by such city of a petition as provided for in RCW 81.53.261 with the utilities and transportation commission, or by a statement filed with the commission accepting jurisdiction, when such petition is filed by others. [1969 c 134 § 4.]

81.53.295. Crossing signals, warning devices, etc. — Federal funds used to pay installation costs — Grade crossing protective fund — State and local authorities to pay remaining installation costs — Railroad to pay maintenance costs.

Whenever federal-aid highway funds are available and are used to pay a portion of the cost of installing a grade crossing protective device, and related work, at a railroad crossing of any state highway, city or town street, or county road at the then prevailing federal-aid matching rate, the grade crossing protective fund shall pay ten percent of the remaining cost of such installation and related work. The state or local authority having jurisdiction of such highway, street, or road shall pay the balance of the remaining cost of such installation and related work. The railroad whose road is crossed by the highway, street, or road shall thereafter pay the entire cost of maintaining the device. [1982 c 94 § 4; 1975 1st ex.s. c 189 § 3.]

Application — 1982 c 94: See note following RCW 81.53.261.

81.53.400. Traffic control devices during construction, repair, etc. of crossing or overpass — Required.

Whenever any railroad company engages in the construction, maintenance, or repair of a crossing or overpass, the company shall install and maintain traffic control devices adequate to protect the public and railroad employees, subject to the requirements of RCW 81.53.410 and 81.53.420. [1977 ex.s. c 168 § 1.]

81.53.410. Traffic control devices during construction, repair, etc. of crossing or overpass — Standards and conditions.

All traffic control devices used under RCW 81.53.400 shall be subject to the following conditions:

(1) Any traffic control devices shall be used at a repair or construction site only so long as the devices are needed or applicable. Any devices that are no longer needed or applicable shall be removed or inactivated so as to prevent confusion;

(2) All barricades, signs, and similar devices shall be constructed and installed in a workmanlike manner;

(3) Bushes, weeds, or any other material or object shall not be allowed to obscure any traffic control devices;

(4) All signs, barricades, and other control devices intended for use during hours of darkness shall be adequately illuminated or reflectorized, with precautions taken to protect motorists from glare; and

(5) Flagpersons shall be provided where necessary to adequately protect the public and railroad employees. The flagpersons shall be responsible and competent and possess at least average intelligence, vision, and hearing. They shall be neat in appearance and courteous to the public. [1977 ex.s. c 168 § 2.]

81.53.420. Traffic control devices during construction, repair, etc. of crossing or overpass — Rules.

The utilities and transportation commission shall adopt rules to implement the provisions of RCW 81.53.400 and 81.53.410 pursuant to chapter 34.05 RCW. The commission shall invite the participation of all interested parties in any hearings or proceedings taken under this section, including any parties who request notice of any proceedings.

Any rules adopted under this section and any devices employed under RCW 81.53.410 shall conform to the national standards established by the current manual, including any future revisions, on the Uniform Traffic Control Devices as approved by the American National Standards Institute as adopted by the federal highway administrator of the United States department of transportation.

Rules adopted by the commission shall specifically prescribe the duties, procedures, and equipment to be used by the flagpersons required by RCW 81.53.410.

RCW 81.53.400 through 81.53.420 and rules adopted thereunder shall be enforced by the commission under the provisions of chapter 81.04 RCW: PROVIDED, That rules adopted by the commission shall recognize that cities with a population in excess of four hundred thousand are responsible for specific public thoroughfares and have the specific responsibility and authority for determining the practices relating to safeguarding the public during construction, repair, and maintenance activities. [1977 ex.s. c 168 § 3.]

81.53.900. Effective date — 1975 1st ex.s. c 189.

This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975. [1975 1st ex.s. c 189 § 4.]