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Court of Appeals
Division III
State of Washington

Case No. 330311

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

TRI-CITY RAILWAY COMPANY, LLC, a Washington corporation,
Appellant,

v.

STATE OF WASHINGTON, UTILITIES AND TRANSPORTATION
COMMISSION, CITY OF RICHLAND and CITY OF KENNEWICK,
respondents.

**RESPONSE BRIEF OF THE CITY OF RICHLAND
AND THE CITY OF KENNEWICK**

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GLOSSARY

ALJ:	Administrative Law Judge
APA:	The Washington Administrative Procedures Act at Chapter 34.05 RCW
Appellant:	TCRY
BNSF:	Burlington Northern Santa Fe Railroad Company
Cities:	The City of Richland and City of Kennewick
Crossing:	The Center Parkway extension between Kennewick and Richland, to Tapteal Drive in Richland (see attached Appendix A)
GMA:	The Washington Growth Management Act at Chapter 36.70A RCW
Kennewick:	The City of Kennewick
Orders:	Order 03 and 04 in UTC Docket TR-130499
Order 03:	Order 03 in UTC Docket TR-130499 (May 29, 2014)
Order 04:	Order 04 in UTC Docket TR-130499 (June 24, 2014)
Petition:	The Cities petition for the at-grade Crossing, under UTC Docket TR-130499
Richland:	The City of Richland
TCRY:	Tri-City Railroad Company, LLC
UPRR:	Union Pacific Railroad Company
UTC (or Commission):	The Washington Utilities and Transportation Commission

1. INTRODUCTION

The Center Parkway connection between Kennewick and Richland is

- Jointly sponsored by Kennewick and Richland;
- Funded by the State through the Community Economic Revitalization Board, the Surface Transportation Program Regional Competitive Fund and the Transportation Improvement Board;
- A part of each City's comprehensive plan;
- A final link in a regional grid under the Benton-Franklin Council of Governments Regional Transportation Plan;
- Approved by the property owner, the Port of Benton;
- Endorsed by the Port of Kennewick;
- Unopposed by the class A rail carriers serving the area, the Union Pacific Railroad and the Burlington Northern Santa Fe Railroad;
- Supported by the Benton-Franklin Council of Governments and the Tri-City Development Council; and
- Unanimously approved by the Washington Utilities and Transportation Commission.

The Legislature delegated to the UTC approval of certain rail crossings, and set standards for the UTC's consideration. RCW 81.53.020 and .030. In this APA proceeding, this Court will find no basis in law for overturning the UTC's unanimous orders approving the Center Parkway Crossing of the Port of Benton rail line and siding. The Port of Benton's lessee, TCRY, is the only interest opposing the Crossing. TCRY argues from former or unapproved UTC rulings, and not from the WUTC decisions subject to this review. As did the Benton County Superior Court, this Court on review will find no basis under the APA to overturn the UTC. This appeal should be rejected, and the UTC affirmed.

2. RESPONSE TO APPELLANTS' ASSIGNMENTS OF ERROR AND ISSUES

The UTC did not err in issuing its Orders, and authorizing the Cities to construct the Crossing. The Cities restate the assignments of error asserted by TCRY, and the issues relating to those assignments, as follows:

2.1. Chapter 81.53 RCW grants the UTC certain authority to approve or deny at-grade crossing petitions. RCW 81.53.020 directs the UTC to consider "all other circumstances" involved in at-grade petitions. Consistent with its statutory authority, the UTC has for more than 30 years consistently applied a fact-specific test to evaluate at-grade crossing

petitions.¹ Uncontested evidence establishes UTC consideration of “improved access to services and developable land” when considering at-grade crossing petitions.² Consistent with UTC’s statutory authority, UTC found facts sufficient to support the Cities’ at-grade crossing petition.³ Were the Orders of the UTC considering, in part, economic development, arbitrary and capricious or otherwise contrary to law under RCW 34.05.070? [Appellant issues II A and II B].

2.2. The UTC has the authority to consider “all other circumstances” involved in at-grade crossing petitions. RCW 81.53.020. The GMA further supports the UTC’s consideration of the Cities’ and regional planning in evaluating the petition.⁴ Were the Orders of the UTC considering, in part, government plans and policies, arbitrary and capricious or otherwise contrary to law under RCW 34.05.070? [Appellant issues II A and II B].

2.3. Order 03 finds evidence of the Crossing’s four primary “public need” objectives: (1) complete a grid network to provide safe and

¹ *Whatcom County v. Burlington Northern R.R. Co.*, Docket Nos. TR-1725 and TR 1726, p. 4 (1985).

² Testimony of Kathy Hunter, UTC Deputy Assistant Director, Transportation Safety. CP 1233:6-10. *Also 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 (2011).

³ CP 643-644 (Order 03, Findings and Conclusions).

⁴ RCW 36.70A.103.

efficient movement of traffic; (2) provide relief to congested arterial facilities; (3) provide improved access to commercial areas and developable land; and (4) improve emergency response times.⁵ Order 03 further finds that public comments (as authorized by UTC hearing procedures) “underscore” or “illustrate” the evidence admitted during UTC’s two-day hearing.⁶ WAC 480-07-490(5); WAC 480-07-498. Was there substantial evidence supporting the Commission’s Orders in Docket TR-130499? [Appellant issue II C]

3. RESTATEMENT OF THE CASE

3.1 The Center Parkway Project.

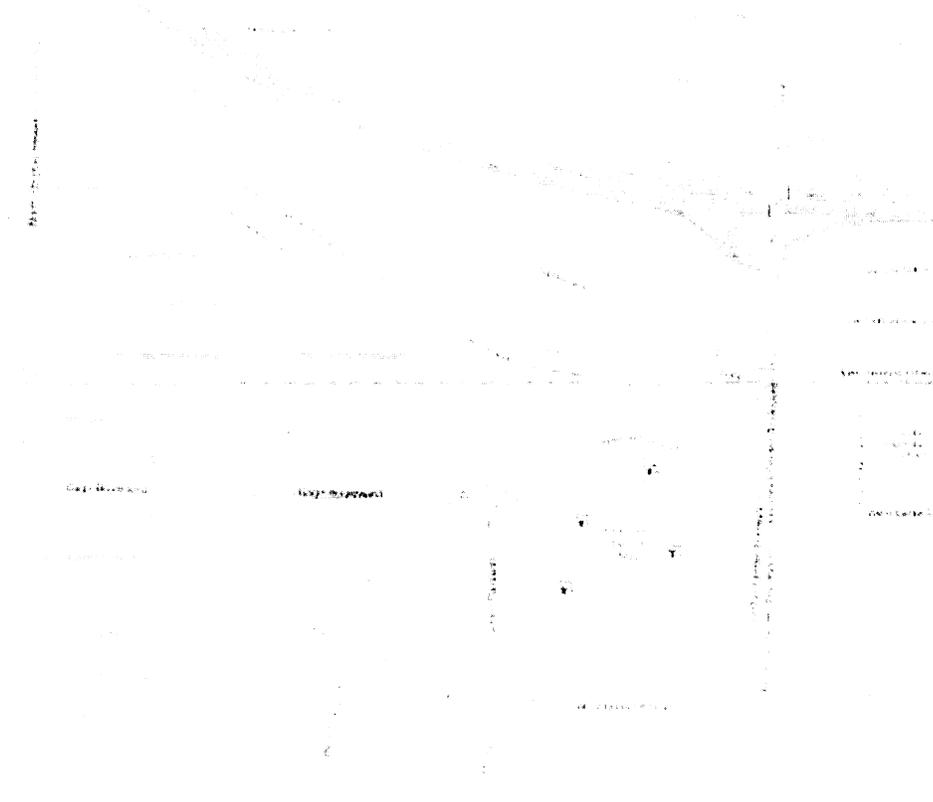
In April 2013, the Cities jointly petitioned the UTC to approve construction of the Center Parkway Crossing. The Crossing is an essential capital improvement identified in the Richland Comprehensive Plan, the Kennewick Comprehensive Plan, and the Regional Transportation Plan.⁷ Recognizing the regional significance of this project, the Crossing has received funding from the State through the Washington State Community Economic Revitalization Board, the Surface Transportation Program

⁵ CP 637-638 (Order 03, ¶¶ 20-21).

⁶ See e.g., CP 639 (“The potential for additional development in this area is underscored by a public comment filed in this proceeding ...”). CP 641 (“There is additional public comment in the record of this proceeding from various community leaders that focuses on these points and illustrates the local importance of recognizing the broader public policy environment.”)

⁷ CP 862; CP 1736-1737; CP 909.

Regional Competitive Fund, and the Transportation Improvement Board.⁸ Center Parkway currently ends at a roundabout to the west of the Columbia Center Mall in Kennewick, as identified in the following image:⁹



The Crossing will extend Center Parkway northward, across the Port of Benton tracks, and into the City of Richland, intersecting Tapteal Drive,

⁸ CP 756 (“Whereas Kennewick has secured \$2,016,000 in Rural Economic Vitality funding ... and \$364,241 through the Surface Transportation Program Regional Competitive Fund.”).

⁹ Image available at CP 631.

thereby completing a grid network of regional significance. See also graphic from Order 03 at Appendix A to this Brief, at CP 639.

3.2 The Cities' Crossing Petition Before the UTC and This Court.

Unlike the previous petition filed in 2005 (decided in 2007 without Commission consideration), the planning process for this Petition followed the 2006 comprehensive planning update process. Through this process, the Cities engaged the public and other governmental agencies to further study the proposed crossing and analyze potential transportation alternatives.¹⁰ Following this process, the Cities engaged consultants to further study and design the proposed crossing.¹¹

The consultants designed the crossing to exceed relevant state and federal safety and engineering standards. The DEA consultants included Susan Grabler and Kevin Jeffers, P.E., together with a combined 59 years' experience in railroad safety.¹² A separate study documented the public need for the Crossing.¹³

¹⁰ CP 824-826.

¹¹ CP 754:6-8.

¹² CP 1513; CP 1522.

¹³ CP 90-127.

**3.3 Supported by Substantial Evidence, Order 03
Unanimously Approved the Cities' Crossing Petition.**

Order 03 was unanimously issued by the Commission. The Commission overturned the ALJ's initial decision that the Crossing would provide no public benefit.¹⁴ Order 03 presented the Commission with its first opportunity to conduct a de novo review of the record. In its Order 03, the Commissioners concluded that "the record includes substantial competent evidence showing sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing."¹⁵

This Court will conclude the same. Order 03 is supported by substantial evidence. The evidence demonstrates that a separated grade crossing is not warranted, and that the public need for the Crossing outweighs any risks of the Crossing. The Cities note certain of that evidence as follows.

3.3.1 Grade Separation Is Not Warranted.

It is undisputed that the Crossing does not require grade separation. Order 03 properly concluded that "no one contests on review the Initial Order's finding that it is physically and financially impractical to build a

¹⁴ CP 449 (Order 02, ¶ 67).

¹⁵ CP 644 (Order 03, ¶ 38).

grade-separated crossing in this instance.”¹⁶ Evidence supporting this finding is located in testimony¹⁷ and in a Grade Separation Evaluation.¹⁸

3.3.2 The Safety Measures of the Crossing Over Two Tracks.

Order 03 found that the Crossing presents only a speculative risk - one potential incident every 53.5 years¹⁹ - in part because the Crossing design includes modern features that exceed typical engineering standards for such an intersection. TCRY does not contest UTC’s calculation of risk for the proposed crossing. The safety features include signage, flashing lights, audible bells, automatic gates, and a raised median designed to prevent drivers from going around lowered gates.²⁰ The substantial evidence supports the UTC’s conclusion that “even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to concrete barrier medians;”²¹ and, the safety measures “significantly reduce” the risk of the Crossing.²²

¹⁶ CP 633 (Order 03, ¶ 12); TCRY does not contest UTC’s calculation of risk for the proposed crossing at one incident every 53.5 years. CP 2021:21.

¹⁷ CP 1529-1530; CP 2005-2007.

¹⁸ CP 1577.

¹⁹ CP 2021:21-22.

²⁰ The Crossing’s safety features are summarized in Order 03 ¶ 13 at CP 633-634.

²¹ CP 634 (Order 03 ¶ 14).

²² CP 634-635 (Order 03 ¶ 14); CP 1521-1532.

The record contains no evidence that TCRY raised any objection to UTC's incident calculation or the Crossing's safety features.²³

3.3.3 The Public Need for the Crossing.

The public need for the Crossing outweighs the speculative risk of the Crossing.²⁴ The UTC found that the Crossing completes a grid network for the efficient movement of traffic and economic development:

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 Kennewick and Richland, thus promoting economic development.²⁵

The Cities' studies²⁶ and other substantial evidence²⁷ support this finding.

Further, the UTC found that the Crossing provides an alternative route for emergency responders:

The Center Parkway extension may assist the Cities' emergency responders by providing an alternative route for responding to incidents in the vicinity of the Columbia Center Mall, when trains are not blocking the intersection.²⁸

²³ Transcript at CP 1238-1247; CP 1704-1716 (TCRY's expert not questioning the safety measures of the Crossing).

²⁴ CP 644 (Order 03 ¶ 38).

²⁵ CP 644 (Order 03 ¶ 37).

²⁶ CP 96-97.

²⁷ See e.g. the Cities' pre-filed testimony, CP 831:14-832:2; 1698:22-25; and 1699:6-7.

²⁸ CP 644 (Order 03 ¶ 36).

Again, the substantial evidence in the record supports the conclusion.²⁹ The UTC findings were “underscored” by illustrative public comments, as explicitly authorized by WAC 480-07-490(5) and WAC 480-07-498.³⁰

3.4 UTC Orders Based on DeNovo Review of the Evidence.

In response to TCRY’s motion for reconsideration, the UTC clearly articulated that Order 03 was based upon the entire record.³¹ As succinctly summarized by the UTC,

“What TCRY ignores is that our Order on review examines the question of public need in terms of economic development as an important factor in addition to public safety. ... In addition, while the ALJ’s role does not necessarily require consideration of broader policy implications of the Commission’s adjudicative orders, the Commissioner’s role requires this inquiry.”³²

The UTC approval of the Crossing was supported by substantial evidence demonstrating that the cumulative public need for the Crossing outweighs any speculative risk.

²⁹ CP 97; also see CP 1696-1702; CP 1169:7-1171:1; CP 1879-1902; CP 1059:15. (Richland’s Fire Chief Baynes’ testimony that the crossing would improve emergency response times by “approximately a minute”.)

³⁰ CP 641-642.

³¹ CP 704-705, 707 (Order 04 ¶¶ 7, 10-11).

³² CP 707 (Order 04 ¶ 11).

3.5 TCRY Had Numerous Opportunities to Review and Brief the Evidence Supporting Access to Developable Land.

The UTC found substantial evidence supporting its Orders, including the JUB Study.³³ TCRY ignores that it had numerous opportunities to review and brief the UTC on the JUB Study and the weight of testimony supporting the JUB Study's conclusions. The Cities attached the JUB Study to its Petition.³⁴ Before the hearing, TCRY's expert witness reviewed and opined on the JUB Study.³⁵ The JUB Study was admitted,³⁶ and TCRY cross-examined its author.³⁷ Yet, TCRY chose not to cross-examine the author on the Crossing's importance to the transportation system and economic development. In addition, at the hearing, UTC Staff testified that "public need" includes "improved access to services and developable land ..."³⁸ The Cities' briefing consistently cited these transportation and economic development benefits of the Crossing.³⁹ Previous UTC orders cited in the Cities' briefing identified

³³ CP 638 (Order 03).

³⁴ CP 77 – 129.

³⁵ CP 1704-1716 (attention to 1706 at line 8).

³⁶ CP 1555.

³⁷ TCRY's cross-examination of Spencer Montgomery. CP 1165-1189.

³⁸ CP 1233:6-10.

³⁹ Cities' Post-Hearing Brief, CP 424 (including sections titled "Center Parkway Crossing Required to Provide Infrastructure to Support Community and Economic Development" and "Center Parkway Crossing Required to Complete

that economic development serves a public need.⁴⁰ Yet, TCRY did not brief or contest before the UTC the evidence of transportation system and economic development. TCRY cannot now be heard to complain about the substantial evidence supporting the Commission's Orders.

3.6 The UTC and The Benton County Superior Court Have Rejected TCRY's Arguments.

More than two years have passed since the Cities filed its Crossing petition, and TCRY has failed in its motion for reconsideration to UTC and in its APA appeal before the Benton County Superior Court.⁴¹ The UTC, the agency charged with fact-finding, concluded that TCRY's arguments for reconsideration were misleading and incorrect.⁴² TCRY repeats those arguments before this Court.

This Court, as did the Superior Court, will conclude the TCRY assertions attempt to mislead the Court, and are without merit.

the Roadway Network"); Cities' Petition for Administrative Review, CP 500; and Cities Response to TCRY's Petition for Rehearing and Stay of Order CP 692-693.

⁴⁰ 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 (2011).

⁴¹ CP 702-710; CP 2207-2209 (Benton County Superior Court Order Affirming the Washington Utilities and Transportation Commission's Orders in Docket TR-130499).

⁴² CP 707 (Order 04, ¶ 10).

4. SUMMARY OF ARGUMENT

For over 30 years the UTC has applied a fact-specific balancing test to evaluate at-grade crossing petitions. The UTC's balancing test is authorized by statute and the agency's inherent authority as delegated by the Legislature. TCRY's argument fails to overcome the deference afforded to UTC's application of Chapter 81.53 RCW.

After applying its established balancing test, the UTC properly approved the Crossing because the need for the Crossing outweighs its speculative risk. The evidence supporting the UTC Orders must be viewed in the light most favorable to UTC and the Cities. TCRY has failed to satisfy its burden in this APA appeal because substantial evidence supports the UTC Orders that approve the Crossing.

5. ARGUMENT

5.1 Standard of Review.

5.1.1 The UTC's Evaluation of Evidence is Not Considered on Appeal.

Appeals under RCW 34.05.570(3)(e) are reviewed for substantial evidence. "Substantial evidence" means evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *See, e.g., Thurston County v. Cooper Pt. Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). The substantial evidence standard is deferential. Here, the Court

is required to review the evidence in the light most favorable to the Cities, because the Cities prevailed in the highest forum that exercised fact-finding authority, the Commission. *Ongom v. State Dept. of Health*, 124 Wn. App. 935, 949, 104 P.3d 29 (2005). The courts may not substitute its view of facts for that of the agency. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997), *review denied*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

Administrative tribunals have the discretion to evaluate the evidence presented; this evaluation will not be reconsidered on appeal. *See Black Ball Freight Serv., Inc. v. State Utils. & Transp. Comm'n*, 74 Wn.2d 871, 874, 447 P.2d 597 (1968); RCW 34.04.100; *also see Inland Empire v. Utilities & Trans.*, 112 Wn.2d 278, 287-288, 770 P.2d 624 (1989) (UTC accepting certain testimony and rejecting other).

5.1.2 APA Standard of Review.

Claims under RCW 34.05.070(3)(a) - (d) are questions of law for constitutional, procedural, statutory, and jurisdictional issues. Generally, the court reviews questions of law de novo. *Quadrant v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Nevertheless, courts afford deference to an agency's legal interpretations where there is statutory ambiguity or where agency expertise is useful in the interpretative task. *City of Redmond v. Cent. Puget Sound Growth*

Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 958 P.2d 1091 (1998). The courts may also give weight to an agency's interpretation in prior adjudicated cases. *Martini v. Emp. Sec. Dept.*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). In the UTC context, the Supreme Court holds:

... even the possibility of such untoward ramifications underscores the wisdom of the salutary principle declared by this court in *Farm Supply Distribs., Inc. V. State Utils. & Transp. Comm'n*, 83 Wn.2d 446, 448, 518 P.2d 1237 (1974), that

Courts should not interfere with or substitute their judgment for a decision of the commission when the commission has acted properly within the sphere of its purpose, expertise and competence.

Powers v. Utilities & Trasp. Comm'n, 104 Wn.2d, 798, 826 711 P.2d 319 (1985) (the Court's emphasis).

Judicial review is limited to the Commission Order 03 and Order 04.⁴³ RCW 34.05.464(4) gives the Commission all power it would have had, had it presided over the hearing in the first instance. *PERC v. City of Vancouver*, 107 Wn. App. 694, 33 P.3d 74 (2001). Thus, when a court is reviewing an agency order, "it is the commissioner's findings that are relevant for review," not the ALJ's findings. *See e.g., Barker v. Empl. Sec. Dept.* 127 Wn. App. 1005, 112 P.3d 536 (2005).

⁴³ The Commission's de novo review is not bound by the ALJ's fact-finding.

5.2 UTC Authority to Regulate At-Grade Crossings.

5.2.1 **Statutory Factors, Including “Other Circumstances, Within UTC Authority.”**

Chapter 81.53 RCW grants the UTC the authority to regulate railway crossings. State law prohibits certain at-grade railroad crossings unless the UTC first approves a petition for the crossing.⁴⁴ RCW 81.53.020 and .030 authorize approval of at-grade railroad crossings when a grade-separated crossing is not practicable. To determine whether a separated grade crossing is practicable, the UTC must consider a non-exclusive list of statutory factors, including: (1) amount and character of travel on the railroad and on the highway; (2) the grade and alignment of the railroad and the highway; (3) the cost of separating grades; (4) the topography of the county; and (5) all **other circumstances** naturally involved in such an inquiry. RCW 81.53.020.⁴⁵ The statute does not

⁴⁴ The Cities 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 Cities believe judicial review and approval worthwhile.

⁴⁵ RCW 81.53.020 states: 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

define the term, “other circumstances,” thereby delegating to the UTC the determination of the “other circumstances,” so long as such a determination is consistent with the governing statute.

5.2.2 UTC “Gap Filling” Authority.

In addition to its statutory authority, the UTC also has authority to “fill in the gaps” to effectuate the at-grade crossing statutes. *Hama Hama Co. v. Shorelines Hearings Bd.* 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Thus, the UTC has the powers expressly granted by statute to consider “other circumstances”, and UTC has the powers implied by Chapter 81.53 RCW. *Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010) quoting *Tuerk v. Dept's of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (“[I]mplied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature.”). Here, the Legislature intended for the UTC to analyze and approve or deny at-grade crossing petitions. The UTC appropriately relied upon its statutory and implied authority to accomplish that directive.

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.** (Emphasis supplied.)

5.2.3 UTC Applies Evidentiary Balancing In Considering At-Grade Crossings.

Within this framework, for at least 30 years the UTC has applied an evidentiary balancing test to analyze at-grade crossing petitions.⁴⁶

Order 03 summarizes the practice 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.⁴⁷

At the evidentiary hearing, UTC's own evidence showed the UTC relies upon a balancing test to evaluate at-grade crossing petitions, and the UTC continued to rely upon a balancing test for this petition.⁴⁸

The UTC's balancing is fact specific, and the UTC's orders will vary depending upon the unique facts presented in each petition. *Benton*

⁴⁶ Order 03 cites *Benton County v. BNSF Railway*, Docket No. TR-100572, Order 06 at 13 (2011) and two other UTC orders. CP 633, f.n. 4. In addition to these three orders, Order 03 could have cited any number of UTC orders, including *Whatcom County v. Burlington Northern R.R. Co.*, Docket Nos. TR-1725 and TR 1726, p. 4 (1985)

⁴⁷ CP 632-633 (Order 03 ¶ 11).

⁴⁸ CP 1227:3-12.

County v. BNSF Railway does not create any precedent that requires the Cities to improve public safety through, for example, eliminating other crossings.⁴⁹ No legal authority exists to support TCRY's position, which if adopted, would contravene the UTC's unquestioned statutory authority to consider "all other circumstances" when evaluating at-grade crossing petitions. TCRY's argument fails to overcome the deference afforded to the UTC's interpretation and application of Chapter 81.53 RCW.⁵⁰

5.3 TCRY Does Not Contest Controlling UTC Findings And Conclusions.

TCRY does not contest Order 03's conclusion that a grade-separated crossing is not practicable ("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 ...").⁵¹ TCRY does not contest the Commission's finding that the Cities' modern safety design mitigates the risk of the at-grade crossing.⁵² TCRY does not contest that

⁴⁹ *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 (2011).

⁵⁰ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 958 P.2d 1091 (1998).

⁵¹ CP 633 (Order 03 ¶ 12).

⁵² CP 633-634, 643 (Order 03, ¶¶ 13-14, 35). The modern safety design of the Crossing properly mitigates the safety issues that were present in the 1938 case cited by TCRY. *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wn. 146, 150, 80 P.2d 406 (1938). The crossing in *Reines* did not include any of the safety features designed for this Crossing.

the Crossing's safety features include advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip (designed to prevent drivers from going around lowered gates).⁵³ TCRY does not contest the UTC's calculation that the Crossing would result in a speculative risk of 0.018707 collisions per year, or one accident every 53.5 years.⁵⁴ Under UTC's consistent application of RCW 81.53.020 and .030, substantial evidence supports the UTC approval of Crossing with demonstrated public need for the Crossing that outweighs the Crossing's speculative risk.

5.4 Substantial Evidence Supports Order 03.

5.4.1 General.

The UTC concluded that substantial evidence supports the order granting authority to the Cities' petition to construct the Crossing ("the record includes substantial competent evidence showing sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing.").⁵⁵ In support of this conclusion, Order 03 finds (1) that the Crossing is a long-planned and important component of the Cities'

⁵³ CP 633-634 (Order 03 ¶ 13).

⁵⁴ Pre-filed testimony of Kathy Hunter, UTC Deputy Assistant Director, Transportation Safety. CP 2020:-2022:3.

⁵⁵ CP 644 (Order 03, ¶ 38).

transportation system that will promote economic development,⁵⁶ and (2) that the Crossing will assist 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.⁵⁷ Order 03 also finds that the Commission may consider the planning and policy context of the proposed petition.⁵⁸ These findings and resulting conclusions are proven and supported by substantial admitted evidence, which TCRY had an opportunity to review before the hearing, critique with pre-filed testimony, challenge with testimony at the hearing, cross-examine during the hearing, and brief after the hearing. TCRY failed to satisfy its burden when viewing the evidence in the light most favorable to the Cities. *Ongom v. State Dept. of Health*, 124 Wn. App. 935, 949, 104 P.3d 29, 36 (2005).

5.4.2 UTC Finds Cities' Studies Support Crossing Decision.

Order 03 cites one of the Cities' studies as evidence that the public need outweighs the Crossing's speculative risk from the Crossing's four primary "public need" objectives:⁵⁹ (1) complete a grid network to

⁵⁶ CP 644 (Order 03, ¶ 37).

⁵⁷ CP 644 (Order 03, ¶ 36). TCRY does not contest this finding.

⁵⁸ CP 643 (Order 03, ¶ 33).

⁵⁹ TCRY does not contest UTC's calculation of risk for the proposed crossing at one incident every 53.5 years. CP 2021 (p. 26:21). The Crossing presents only a speculative risk, in part because the Cities' crossing design includes safety

provide safe and efficient movement of traffic; (2) provide relief to congested arterial facilities; (3) provide improved access to commercial areas and developable land; and (4) improve emergency response times.⁶⁰

Then, the Commission explicitly concluded that its Order 03 is based upon that evidence:

“We determine that the Commission should consider public need for the proposed at-grade railroad crossing in the broader context of several purposes discussed in the JUB transportation study ...”⁶¹

By itself, the JUB Study provides substantial evidence for the Commission’s decision that the Crossing will provide a public need. The UTC therefore complied with its statutory direction under RCW 34.05.570(3)(e).⁶²

features **exceeding** typical engineering standards for such an intersection. Order 03 ¶ 14 (“even imprudent drivers will be effectively barred from crossing the tracks when the gates are closed next to the concrete barriers medians. These same measures reduce the risk to pedestrians and bicyclist traffic ...”). CP 634.

⁶⁰ Order 03, ¶ 21, citing the JUB Study. 637-638; 1571.

⁶¹ CP 637 (Order 03, ¶ 20).

⁶² That Study also provided substantial evidence supporting Order 03’s finding that the Crossing will promote economic development. JUB Study, CP 1563, 1571.

5.4.3 Substantial Evidence Supports the UTC Finding That The Crossing Is A Long-Planned And Important Component Of The Cities' and Region's Transportation System.

The Cities' and region's planning and policy foundation further supports Order 03, at paragraph 20.⁶³ For example, the Center Parkway Crossing has been identified as an essential capital improvement in the City of Richland Comprehensive Plan, the City of Kennewick Comprehensive Plan, and the Regional Transportation Plan.⁶⁴ Recognizing the regional significance of this project, the Crossing 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.⁶⁵ The uncontested evidence before the UTC confirmed the Crossing's planning policy and context.⁶⁶

⁶³ CP 637 (Order 03, ¶ 20).

⁶⁴ City of Richland Comprehensive Plan – Transportation Element (“Center Parkway from Tapteal to Gage: Construct 3-lane road”). CP 862; City of Kennewick Comprehensive Plan – Infrastructure. CP 1736-1737; Benton-Franklin Council of Governments 2011-2032 Regional Transportation Plan at H-3 (“Center Parkway Extension – Gage to Tapteal”). CP 909.

⁶⁵ CP 756 (“Whereas Kennewick has secured \$2,016,000 in Rural Economic Vitality funding ... and \$364,241 through the Surface Transportation Program Regional Competitive Fund.”).

⁶⁶ See e.g., the pre-filed testimony of Rick Simon, the City of Richland Development Services Manager (providing the foundation for the planning documents discussed herein). CP 824-832. Also see the examination and cross-examination of Rick Simon. CP 1009-1018.

The record before the UTC confirms the legislative policy context supporting the UTC's approval of the Crossing. GMA requires state agencies, such as the UTC, to comply with local comprehensive plans of local governments under the GMA.⁶⁷ Under the Cities' and Region's comprehensive plans, the Crossing is a necessary capital facility.

While Order 03 concluded that comprehensive planning does not relieve Kennewick from complying with RCW 81.53.020, the Commission still considers the Cities' planning as a part of the policy context in which it evaluates the Petition.⁶⁸ Or, as described by the Commission, "Order 03 simply recognizes that the Commission should consider and give some weight to the Cities' transportation and urban development planning when evaluating the issue of public need."⁶⁹ This conclusion is compliant with GMA, and well within the Commission's authority to consider "all other circumstances naturally involved" in the at-grade petition inquiry.⁷⁰

⁶⁷ RCW 36.70A.103 ("State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this section except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.333."). The Cities consistently briefed this law. *See e.g.*, Cities Post-Hearing Brief (including a section titled "The Growth Management Act Requires That State Agencies Comply with Local Comprehensive Plans"). CP 410.

⁶⁸ CP 643 (Order 03, ¶ 33).

⁶⁹ CP 708 (Order 04, ¶ 12).

⁷⁰ RCW 81.53.020.

The Commission's approval of the Crossing does not turn on the purported weight afforded to the Cities' policy and planning context. Evidence proves, and the Commission's own Order expressly states, that the cumulative public need evidence outweighs the speculative risk of the Crossing:

While we agree with the Initial Order that the public safety benefits demonstrated by the evidence are too slight on their own to support a determination of public need that outweighs the inherent risk, **when coupled with evidence of economic development benefits the balance shifts.**⁷¹

Thus, the UTC would have approved the Cities' petition without any deference to the Cities. The UTC's paragraph 33 in Order 03 (regarding weight afforded to the Cities' policy and planning context) is foundation for the conclusion that the GMA may not preempt the Commission's authority and that code cities may remain subject the UTC's petition process set forth in RCW 81.53.020. There is no basis here for overturning the UTC's Order 03.

5.4.4 Public Comments Underscore The Substantial Evidence.

WAC 480-07-498 expressly authorizes the Commission to treat public comment "as an illustrative exhibit that expresses public sentiment." Order 03 follows this procedure. Order 03 states that "There

⁷¹ CP 707-708 (Order 04, ¶ 11). But, see Order 04, and CP 96-97 (identifying the public need for the crossing).

is additional public comment in the record of this proceeding from various community leaders that focuses on these points [*i.e.*, the broader public policy context] and **illustrates** the local importance of recognizing the broader public policy argument.”⁷² Order 03 also provides, “the potential for additional economic development in this area is **underscored** by a public comment filed in this proceeding.” The public comment ended prior to the due date for post-hearing briefs. TCRY did not contest any comments, as is authorized by the Commission’s procedural rules.

Continuing a pattern of misstating the record, TCRY recklessly alleges that “the Commission based its reversal of the Initial Order upon five written public comments.”⁷³ TCRY made the same misleading argument in its petition for reconsideration to the Commission, and the Commission concluded that TCRY’s argument was misleading and incorrect.⁷⁴ The Benton County Superior Court also disagreed with this argument.⁷⁵ No fact in the record supports TCRY’s argument because Order 03 is supported by substantial evidence, which is “underscored” by “illustrative” public comments. The Court will reject TCRY’s unsubstantiated allegations.

⁷² CP 641-642. (Order 03, ¶ 26).

⁷³ Brief of Appellants, p. 39.

⁷⁴ CP 707. (Order 04, ¶ 10).

⁷⁵ CP 2207-2209 (Benton County Superior Court Order Affirming the Washington Utilities and Transportation Commission’s Orders in Docket TR-130499).

5.4.5 Substantial Evidence Supports the UTC Finding That The Crossing Will Assist Emergency Responders When Trains Are Not Blocking The Intersection.

Extensive evidence supports UTC's finding that the Crossing will assist emergency responders when trains are not blocking the Crossing. The crossing will improve emergency response times from Kennewick Fire Station 3 and Richland Fire Station 72.⁷⁶ The record before the UTC includes extensive documentation and analysis, pre-filed testimony, and testimony at the evidentiary hearing.⁷⁷

The evidence demonstrates that the proposed crossing is a viable route for first responders because it will be closed less than one percent (1%) of the day to accommodate train traffic,⁷⁸ based on the existing and projected track usage data submitted by BNSF, UPRR, and TCRY.⁷⁹

Reviewing the evidence in the light most favorable to the Cities, substantial evidence supports the UTC's ultimate conclusion that "the record includes substantial and competent evidence showing sufficient public need to outweigh the inherent risks presented by the proposed at-

⁷⁶ CP 97.

⁷⁷ CP 1879-1902; CP 1696-1702; CP 1169:7-1171:1. CP 1059:15. (Richland's Fire Chief Baynes' testimony that the crossing would improve emergency response times by "approximately a minute".)

⁷⁸ CP 1183:5-6; CP 1700:5-6.

⁷⁹ CP 1183:17-1184:20.

grade crossing.”⁸⁰ In addition to the Crossing’s safety improvements, the public need for (1) completing an important component of the region’s transportation system, (2) economic development, and (3) providing an alternative route for emergency responders, outweighs the speculative risk of the Crossing.

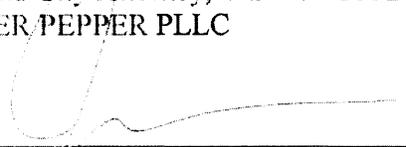
6. CONCLUSION

There is no legal basis to overturn the UTC’s approval of the Crossing. The UTC properly approved the Crossing because substantial evidence proves that the Crossing’s safety features and cumulative need for the Crossing outweighs its speculative risk. This Court should affirm the UTC’s Orders so that the Cities can proceed with this long-planned and important capital improvement in the Tri-Cities.

⁸⁰ CP 644 (Order 03, ¶ 38).

RESPECTFULLY SUBMITTED this 29th day of May, 2015.

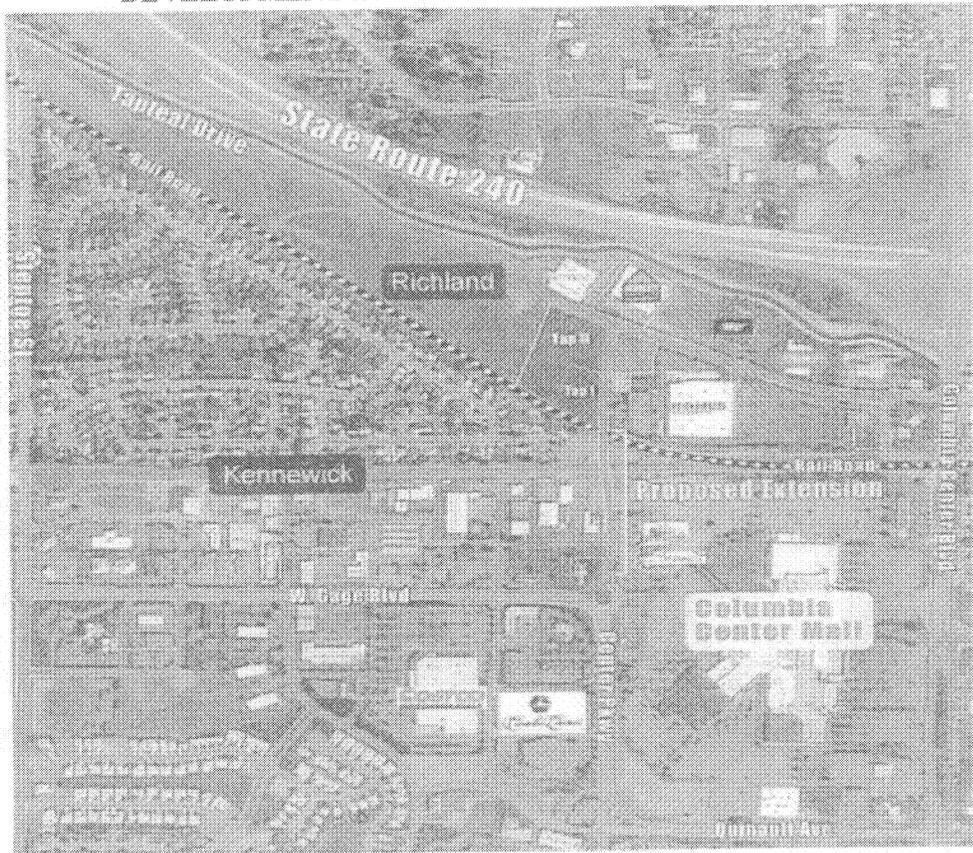
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Appendix A

**FIGURE 3
DEVELOPMENT AND DEVELOPMENT POTENTIAL**



From Order 03 at page 11. CP 639.

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

TRI-CITY RAILROAD
COMPANY,

Appellant,

v.

STATE OF WASHINGTON
UTILITIES AND
TRANSPORTATION,

Respondent.

No. 330311

DECLARATION OF
SERVICE

I, Brenda Bole, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on May 29, 2015, I caused a true and correct copy of the following documents:

1. Response Brief of the City of Richland and the City of Kennewick; and

2. Declaration of Service,
to be served as follows:

William John Schroeder William Christopher Schroeder Gregory C. Hesler Paine Hamblen LLP 717 West Sprague Avenue, Suite 1200 Spokane, WA 99201 William.schroeder@paineamblen.com greg.hesler@paineamblen.com	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FACSIMILE) <input checked="" type="checkbox"/> E-MAIL
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DECLARATION OF SERVICE - 1

Mr. Julian Hua Beattie Attorney General's Office P. O. Box 40128 Olympia, WA 98504-0128 Email: jbeattie@utc.wa.gov	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FACSIMILE) <input checked="" type="checkbox"/> E-MAIL
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of May, 2015, at Seattle, Washington.



Brenda Bole