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NO. 33031-1-III

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

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

v.

WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION, a Washington state agency, CITY OF KENNEWICK,  
and CITY OF RICHLAND.

Respondents.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

For many years, the cities of Kennewick and Richland have desired to connect a Kennewick street known as Center Parkway with a Richland street known as Tapteal Drive. The Kennewick comprehensive plan, the Richland comprehensive plan, and the Benton-Franklin Council of Governments' regional transportation plan all identify the project as an essential capital improvement. The cities have carefully studied the project, have obtained funding, and have secured widespread community support. Now, having received permission from the Washington Utilities and Transportation Commission (Commission) to install a railroad crossing along the proposed route, they are eager to see their plans take shape.

The Center Parkway extension will cross two sets of freight tracks leased by the appellant, Tri-City Railroad Company (TCRY). Public need for the crossing is high. South of the tracks is a major shopping mall. North of the tracks, near Tapteal Drive, are a Holiday Inn, assorted retail businesses, and two unoccupied lots awaiting commercial development. The proposed crossing will link these commercial districts, fostering economic growth, reducing traffic congestion, and providing an additional route for emergency responders. Government and business interests have aligned in support of the project, leaving TCRY alone in its opposition.

The proposed crossing, though inherently dangerous due to its “grade” (ground level) configuration, has sophisticated safety features that will make it the “Cadillac” of crossings. The crossing will feature advanced signage, an audible bell, flashing lights, automatic gates, and raised concrete medians that will prevent even the most careless drivers from bypassing the gates when lowered. Accidents at the crossing will be relatively rare.

Under state law, cities must construct grade-separated crossings (i.e., a bridge or a tunnel) whenever “practicable.” RCW 81.53.020. But when cost and engineering constraints make grade separation impracticable, as was the case here, RCW 81.53.030 gives the Commission broad discretion to approve a “grade” (ground level) crossing. The Commission must “enter a written order in the cause, either granting or denying the right to construct a grade crossing at the point in question.” RCW 81.53.030.

In 2013, Kennewick asked the Commission to approve the Center Parkway grade crossing. Its petition triggered the Commission’s duty under RCW 81.53.030 to “grant or deny” the request. Faced with a broad delegation of authority, but given no specific statutory criteria, the Commission “filled the gap” by devising an appropriate balancing test. It considered: “Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.” CP 570.

After carefully examining the record, the Commission unanimously determined that public need for the crossing outweighed the relatively low risk of harm. Because the Commission's adoption of a balancing test was a proper exercise in "gap-filling," and because its finding of sufficient public need was amply supported by the record, this Court should affirm.<sup>1</sup>

## II. RESTATEMENT OF THE ISSUES

TCRY seeks judicial review under the Administrative Procedure Act, chapter 34.05.570 RCW. Its opening brief raises the following issues, which the Commission restates as follows:

1. Whether the Commission engaged in an unlawful procedure or decision-making process or failed to follow a prescribed procedure (RCW 34.05.570(3)(c)), or erroneously interpreted or applied the law (RCW 34.05.570(3)(d)), when it exercised its broad discretion under RCW 81.53.030 to consider, among other appropriate factors, anticipated economic benefits and deference to local planning when evaluating public need for the proposed crossing.

2. Whether the Commission engaged in an unlawful procedure or decision-making process or failed to follow a prescribed procedure

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<sup>1</sup> The Cities of Kennewick and Richland are aligned with the Commission and have filed their own brief supporting the Commission's final order. Although the Commission and the Cities agree on the result, the Cities employ a slightly different legal analysis. The Commission asks this Court to treat the Cities' analysis as an alternative argument in support of the Commission's final order.

(RCW 34.05.570(c)) when it cited public comments in its final order, even though it relied on those comments merely to illustrate or emphasize facts established by existing record evidence, as required by WAC 480-07-498.

3. Whether, if (and only if) TCRY prevails on Issue 2, the Commission's final order should be set aside as lacking a sufficient evidentiary basis (RCW 34.05.570(3)(e)).

The Commission contends TCRY has failed to establish a basis for relief under each of the narrow APA provisions cited above.

### **III. FACTS**

In 2013, Kennewick petitioned the Commission to approve construction of a new grade (ground level) railroad crossing near the Kennewick-Richland border.<sup>2</sup> CP 77. The crossing is essential to the cities' longstanding and ongoing effort to connect Kennewick's Center Parkway with Richland's Tapteal Drive. CP 92, 113, 631-32, 1523, 1697. The Kennewick comprehensive plan, the Richland comprehensive plan, and the Benton-Franklin Council of Governments' regional transportation plan all identify the crossing as an essential capital improvement. CP 637, 862, 909.

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<sup>2</sup> Richland supports the project and intervened on Kennewick's behalf. CP 201, 960. The cities have signed an inter-local agreement and will jointly maintain the roadway. CP 109.

Accidents at the crossing will be relatively rare. CP 643. No grade crossing is perfectly safe, but safety and warning devices can significantly mitigate the risk of harm. Here, the crossing will feature advanced signage, an audible bell, flashing lights, automatic gates, and raised concrete medians. CP 633-34. The Commission found that such devices will “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.” CP 644. A railroad safety engineer testified that the “railroad signal technology proposed to be used at Center Parkway will be the most current automatic warning system available today.” CP 1518.

The crossing will promote economic growth by connecting a Holiday Inn and assorted retail businesses located just north of the tracks with a major regional shopping mall located just south of the tracks. CP 93, 97, 105, 639, 1055-56, 1342, 1405. It will also promote development of nearly 60 acres of unoccupied commercial land located just across from the Holiday Inn. CP 105, 638-39, 832. According to an expert analysis known as the “JUB study,” the unoccupied lots have “desirable visibility” and will greatly benefit from improved access. CP 105. Overall, Kennewick anticipates that the crossing will provide “a critical access link between shopping, hotels and restaurants.” CP 1405.

The crossing will also enhance public safety by creating an additional route for emergency vehicles. CP 97, 105, 644, 812, 944, 1505, 1700. Response times will improve only modestly. CP 635. But as Kennewick's fire chief testified, "An improvement of mere seconds may significantly impact the outcome for critical events related to a medical emergency or fire." CP 944.

In November 2013, an administrative law judge (ALJ) employed by the Commission held an evidentiary hearing to determine, among other issues, whether there was "a demonstrated public need for the crossing that outweighs the risks of opening the at-grade crossing." CP 443. Three parties attended the hearing: (1) Kennewick, joined by intervenor Richland; (2) TCRY; and (3) the Commission's staff. CP 631. In formal adjudicative proceedings, the Commission's staff acts as an independent party. In this case, the Commission's staff supported Kennewick's petition. CP 630.

After the evidentiary hearing, the ALJ held a public comment hearing. CP 630, 1390. Three members of the public testified in support of the proposed crossing. CP 1394-96. Nobody opposed it. CP 1397.

In February 2014, the ALJ entered an initial order denying Kennewick's petition. CP 428. The ALJ concluded that Kennewick "failed to demonstrate sufficient public need to outweigh the inherent risks presented by the proposed at-grade crossing." CP 450.

The cities jointly petitioned for administrative review. CP 458. After reviewing the extensive agency record, the Commissioners unanimously reversed the ALJ's order and granted Kennewick's petition. CP 629-45. The Commissioners concluded that the record contained broader evidence of public need than had been found by the ALJ:

[C]onsidering 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 642-43. This determination, coupled with a finding that the crossing poses a "relatively low" risk of harm, tipped the balance in favor of Kennewick's petition. CP 643.

TCRY petitioned for reconsideration, arguing that the Commission improperly considered economic and public policy interests—"two new factors"—to "sweep aside the determination of the ALJ." CP 658. The Commission responded that the "concept of broader public need reflects both the Commission's overarching obligation to exercise its jurisdictional duties in the public interest and, in the case at hand, to look beyond public safety to other aspects of public need as demonstrated in the record of this proceeding." CP 706. The Commission denied reconsideration. CP 710.

TCRY petitioned for judicial review in the Benton County Superior Court. CP 1. The superior court judge affirmed the Commission's final order, ruling from the bench. CP 2208.

This appeal followed.

#### IV. STANDARD OF REVIEW

The typical standards of review apply. This Court reviews challenged findings of fact for substantial evidence and evaluates legal questions under the "error of law" standard. *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011); *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). This Court accords "substantial weight" to the Commission's interpretation of statutes within its expertise and to the Commission's interpretation of its own rules. *Verizon Nw.*, 164 Wn.2d at 915. The appellant, TCRY, has the burden of proof on all issues. RCW 34.05.570(1)(a). TCRY is not entitled to relief unless it proves that it has been "substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

TCRY spends a significant portion of its brief analyzing the initial order entered below by the administrative law judge. That order is not before this Court. *See Smith v. Employment Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010) (appellate court reviews the decision of the agency head, not the underlying decision of the administrative law judge).

## V. ANALYSIS

The three-member Washington Utilities and Transportation Commission properly exercised its discretion when it unanimously approved Kennewick's petition to install a new grade crossing near the Kennewick-Richland border. Because the Commission properly weighed public need for the crossing against the risk of an accident, and because the record contained ample evidence of sufficient public need, this Court should affirm the Commission's final order.

### A. **The Commission Properly Evaluated Public Need For The Crossing By Considering, Among Other Appropriate Factors, Anticipated Economic Benefits And Deference To Local Land Use Planning**

The crucial statute is RCW 81.53.030. Under this statute, a local authority that wishes to install a new grade crossing must "file a written petition with the Commission setting forth the reasons why the crossing cannot be made either above or below grade." RCW 81.53.030.

The Commission resolves the petition in two steps. First, it determines whether grade separation (i.e., a bridge or tunnel) is "practicable." RCW 81.53.030. If it is, the inquiry ends because the law favors grade separation. *See* RCW 81.53.020. But if grade separation is impracticable due to cost or engineering constraints (as was the case here), the Commission must choose whether to "grant or deny" the petition.

RCW 81.53.030. The duty is mandatory—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.” *Id.* But the legislature supplied no specific criteria to guide the Commission’s decision-making process.

Faced with a broad delegation of decisional authority, the Commission properly “filled the gap” by devising an appropriate balancing test. It considered: “Whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.” CP 633. After devising this test, the Commission carefully examined the record and determined that: (1) evidence of anticipated economic benefits was relevant to “public need” and (2) it was “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.” CP 641. Were these sensible determinations valid exercises in “gap-filling?” Without doubt, yes.

**1. The Commission’s Evaluation Of Public Need Was A Proper Exercise In “Gap-Filling”**

The law on agency “gap-filling” is well settled. Agencies may not engage in “lawmaking,” but they may “fill in the gaps” where necessary to the effectuation of a general statutory scheme.” *Hama Hama Co. v.*

*Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). The agency likewise may “‘fill in the gaps’ via statutory construction—as long as the agency does not purport to ‘amend’ the statute.” *Id.* at 448. The agency’s construction of the statute “often provides a valuable aid to the courts and should be given great weight.” *Dep’t of Labor and Indus. v. Rowley*, 185 Wn. App. 154, 165, 340 P.3d 929 (2014).

On this issue, TCRY argues that agencies “may exercise only those powers conferred by statute.” Br. of Appellant at 24. That is an incomplete statement of the law. “‘Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.’” *Brown v. Vail*, 169 Wn.2d 318, 330, 237 P.3d 263 (2010) (quoting *Tuerk v. Dep’t 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.” *Id.* (quoting *Tuerk*, 123 Wn.2d at 125). Here, because the legislature charged the Commission with a duty but set forth no specific criteria, the Commission properly “filled the gap.”

The Commission’s evaluation of “public need” passes muster because it effected the general statutory scheme using criteria that were apt to the circumstances. “Public need” differs based on localized concerns, so the Commission properly asked what needs were present in the community

at issue here. The Commission's consideration of anticipated economic benefits was reasonable because the record shows the crossing will improve access to nearly 60 acres of developable land and foster a "synergy" between commercial districts that are currently separated by the tracks. CP 105; *see also* CP 93, 97, 105, 832, 1245, 1402-03, 1405.

The Commission's deference to the cities' planning goals was likewise reasonable. As the Commission observed in its final order, such deference was consistent with the legal doctrine known as "home rule," which generally favors local control over land use decisions that have a local impact. CP 641; *see generally*, Hugh Spitzer, "*Home Rule*" vs. *Dillon's Rule*" *For Washington Cities*, 38 Seattle U. L. Rev. 809 (2015); *see also* RCW 36.70A.3201 (Growth Management Act's legislative finding that counties and cities have a "broad range of discretion" to develop local land use plans, subject to a "framework" of state goals and requirements). Here, the cities have long believed that the proposed crossing is necessary from a local planning standpoint. CP 92, 113, 637, 830-31, 1010, 1036, 1402, 1523, 1699. Certainly, that belief is relevant to "public need."

## **2. No Controlling Authority Supports TCRY's Unduly Restrictive Interpretation Of Public Need**

Although the proposed crossing indisputably has material economic and political dimensions, TCRY contends that the Commission was

required to focus on a single factor: whether the crossing will “improv[e] public safety by, e.g., closing other at-grade crossings, or diverting trucks carrying hazardous chemicals away from residential zones and schools.” Br. of Appellant at 4. No authority supports this unduly restrictive approach.

As authority for its narrow view, TCRY purports to rely on “the Commission’s own precedent.” Br. of Appellant at 3. Tellingly, it never precisely identifies this “precedent.”

Apparently, TCRY believes the following documents are “precedent,” which the Commission was bound to follow in this case:

- *City of Kennewick v. Union Pacific Railroad*, Commission Docket TR-040664, Order 06, Initial Order Denying Petition (Jan. 26, 2007) (consolidated with Order 02 in Docket TR-050967). Br. of Appellant at 8, 28-29, and Appendix.
- *Benton County v. BNSF Railway Company*, Commission Docket TR-100572, Order 06, Initial Order Granting Benton County’s Petition for an At-Grade Railroad Crossing, Subject to Conditions (Feb. 15, 2011). Br. of Appellant at 31-35 and Appendix.

TCRY’s reliance is misplaced for at least four reasons.

First, both documents are initial orders issued in prior cases by administrative law judges. The orders became final “by operation of law,” meaning they became final once the deadline for administrative review

passed. The Commission's procedural rules clearly state that "[a]n initial order that becomes final by operation of law does not reflect a decision by the commissioners *and has no precedential value.*" WAC 480-07-825(7)(c). TCRY has cited as "precedent" documents that have no precedential value.

Second, the documents exist outside the record on appeal. Although the Commission referred to both documents in its final order (*see* CP 632 n.3 and 633 n.4), it did not incorporate the documents by reference. RAP 10.3(a)(8) provides that "an appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." Under RAP 10.4(c), a party may include within an appendix a "statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like," but only if an issue in the appeal "requires study" of the item. *See, e.g., Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 306, 322 P.3d 1229 (2013). TCRY failed to seek permission from this Court before attaching the documents in question, and the documents are not the type permitted under RAP 10.4(c). The Commission will not move to strike the documents, but will respectfully request that this Court consider them for what they are: non-precedential administrative law judge orders.

Third, even if the panel determines that the documents are both precedential and properly before the Court, the documents do not establish

that the Commission “engaged in [an] unlawful procedure or decision-making process,” “failed to follow a prescribed procedure,” or “erroneously interpreted or applied the law.” RCW 34.05.570(3)(c) and (d). Even if the documents are “precedential,” they are neither “the law” nor a “prescribed procedure.” Our Supreme Court has noted that “stare decisis plays only a limited role in the administrative agency context.” *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 173 n.9, 256 P.3d 1193 (2011) (quoting *Vergeyle v. Dep’t of Emp’t Sec.*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981)). Agencies “should strive for equality of treatment,” but clearly they are not bound by prior decisions to the extent that any deviation from the decision constitutes unlawful action under the APA. *Id.*

Finally, should the panel decide to give the documents full consideration, the documents actually support the Commission.

The first document is a 2007 administrative law judge order denying Kennewick’s petition to install a grade crossing at the same location now proposed. Although the location was the same, the underlying circumstances were quite different. In 2007, there were four tracks, and three railroads opposed the petition. Now, there are only two tracks, and only TCRY opposes the petition. CP 629-31; *see* CP 110, 993, 1231. As a result of reduced complexity, the crossing is now dramatically safer.

In any event, TCRY cites the 2007 order for the proposition that “public safety is the primary concern in the evaluation of a petition to cross existing railroad tracks with a new public highway.” Br. of Appellant at 28. The order says no such thing. Actually, it expressly endorses the idea, embraced by the Commission here, that a crossing’s anticipated impact on “economic development”—including facilitation of “new commercial and retail development along Tapteal Drive”—can be relevant to public need.<sup>3</sup>

The second document is a 2011 administrative law judge order granting a grade crossing petition filed by Benton County. TCRY cites the order for the proposition that the Commission’s consideration of economic factors must be “secondary” to its consideration of “public safety.” Br. of Appellant at 34. Again, the order says no such thing. On the issue of public need, the ALJ actually considered, without qualification, “*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.”<sup>4</sup> The ALJ also described both factors as “*principal* public benefits.”<sup>5</sup> The order gives no hint that economic factors are “secondary.”

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<sup>3</sup> See Br. of Appellant, Appendix, Consolidated Dockets TR-040664 and TR-050967, Consolidated Orders 02 and 06 at ¶¶ 23-25.

<sup>4</sup> See Br. of Appellant, Appendix, Docket TR-100572, Order 06 at ¶ 37 (emphasis added).

<sup>5</sup> See Br. of Appellant, Appendix, Docket TR-100572, Order 06 at ¶ 33.

TCRY simply cannot prove its claim that the Commission “failed to follow its established precedent.” Br. of Appellant at 4. To the extent the documents cited as “precedent” can even be considered as such, it is clear that the Commission properly applied that precedent here.

TCRY’s remaining arguments also fail. TCRY suggests that RCW 81.53.040 may provide guidance, but that statute simply does not apply. As stated above, the crucial statute is RCW 81.53.030. Under RCW 81.53.040, the Commission may hold a “supplemental hearing” to determine whether “by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided.” RCW 81.53.040. Here, no party requested a supplemental hearing and none was held.

TCRY lastly resorts to a 1949 case it concedes is not directly on point. Br. of Appellant at 27. In *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 212 P.2d 829 (1949), the transportation department of the state public service commission authorized the Great Northern Railway Company to close a grade crossing in what was then referred to as the community of Mukilteo. *Dep’t of Transp.*, 35 Wn.2d at 252. The department ordered the closure under what is now codified (as amended) at RCW 81.53.060. *Id.* at 250 (citing Rem. Rev. Stat. § 10514). It found that

the crossing was “exceedingly dangerous” and unnecessary, considering the recent installation of a nearby overpass. *Id.* at 254.

The department believed it had “no jurisdiction to consider damage to property as such” when evaluating “the convenience and the necessity of those using the crossing.” *Id.* at 254-55. TCRY suggests that this belief, which was never discussed by the court, establishes some sort of binding precedent barring consideration of economic interests when the Commission evaluates public need for a new crossing. Br. of Appellant at 27. Even if the department’s views can bind the Commission 65 years later, the quoted language at most establishes that the Commission may not consider an individual’s alleged monetary damages when evaluating a crossing *closure*. As the department observed, “[o]ther remedies may be provided by law to compensate owners for damage to property, if any.” *Dep’t of Transp.*, 35 Wn.2d at 255. This case involves no such concern.

Ultimately, if *Department of Transportation* stands for anything, it is the proposition that the state agency charged with administration and enforcement of the railroad crossing statutes is in the best position to evaluate “the convenience and the necessity” of those using a crossing. *Id.* at 254. In its opinion, the court acknowledged that the legislature “delegated very wide powers to the public service commission with regard to railroad

and highway crossings.” *Id.* at 250. The court concludes that it will not interfere with the agency’s decision absent “grave cause.” *Id.* at 257.

Deference is equally appropriate here. The crucial statute supplies no specific criteria for evaluation of grade crossing petitions, so the Commission devised an appropriate balancing test weighing public need against the risk of harm. “Public need” depends on the circumstances of each case. Here, the Commission appropriately considered evidence that the proposed crossing will promote economic development and fulfill local planning goals. That exercise of discretion was well within the Commission’s “very wide powers” with regard to at-grade railroad and highway crossings. *Dep’t of Transp.*, 35 Wn.2d at 250.

**B. The Commission Engaged In A Lawful Procedure When It Relied On Public Comments Solely As “Illustrative Exhibits” Within The Meaning Of WAC 480-07-498**

TCRY contends the Commission failed to follow a prescribed procedure when it considered five properly-docketed public comments during its review of the initial order. It claims the Commission: (1) wrongly treated the comments as substantive, as opposed to illustrative, evidence; and (2) wrongly considered the comments without providing an opportunity for cross-examination. Br. of Appellant at 37-38. Both arguments fail.

**1. The Commission Properly Treated Public Comments As “Illustrative Exhibits” Within The Meaning Of WAC 480-07-498**

Under the Commission’s procedural rules, a public comment filed during an adjudication “will be treated as an illustrative exhibit that expresses public sentiment received concerning the pending matter.” WAC 480-07-498. The Commission received several public comments in this case and discussed five of them in its final order. CP 639-42, 2127-35. TCRY now claims that the Commission wrongly treated those comments as “admissible, substantive evidence,” as opposed to “illustrative exhibits” within the meaning of WAC 480-07-498. Br. of Appellant at 37.

The record disproves TCRY’s claim. It shows that the Commission used the comments at issue not as substantive evidence but merely as “illustrative exhibits” that emphasized existing record evidence.

The first comment, submitted by landowner Preston K. Ramsey III, predicted that the proposed Center Parkway crossing will “create a new bridge between two highly interdependent communities [Kennewick and Richland].” CP 639-40, 2135. The Commission cited this comment not for its substantive veracity but merely because it “*underscored*” existing record evidence demonstrating the project’s potential impact on local economic development. CP 639 (emphasis added). The evidentiary record, in the form of a report known as the “JUB study,” already established that the proposed

crossing will “[p]rovide improved access to commercial areas and developable land” and foster “synergy” between neighboring commercial districts. CP 105. The public comment merely “underscored” the study.

The second comment, submitted by land use planner Brian Malley, predicted that the proposed crossing will ease congestion, link adjacent retail areas, and contribute to the tax base. CP 640, 2129. Again, the Commission cited this comment not for its factual content but merely because it “*emphasize[d] community expectations* with respect to the proposed Center Parkway extension.” CP 640 (emphasis added). The comment merely underscored the JUB study’s finding that the proposed crossing will “[p]rovide relief to congested arterial facilities” and “[p]rovide improved access to commercial areas and developable land.” CP 105.

The third comment, submitted by the Tri-City Development Council, opined that the proposed crossing is a “well-planned necessary component” of the regional transportation system and that it will “dramatically improve traffic movement.” CP 642, 2130. The Commission again relied on this comment not to establish evidentiary facts—the JUB study already established that the crossing will increase road connectivity and decrease congestion (CP 97, 105)—but merely because the comment “*illustrate[d] the local importance of recognizing the broader public policy environment.*” CP 641-42 (emphasis added).

The fourth and fifth comments, submitted respectively by the Tri-City Chamber of Commerce and the Port of Kennewick (CP 642, 2131-33), likewise emphasized facts already established by the JUB study—namely, that the proposed crossing will facilitate commercial development while reducing congestion and promoting public safety through improved emergency response times (e.g., faster police response to locations near the crossing). CP 96-97, 105. The Commission again cited the comments not as substantive evidence but solely to illustrate the “bases” on which two interested parties supported the project. CP 642.

The record clearly shows that the Commission treated the comments discussed above as “illustrative exhibits” within the meaning of WAC 480-07-498. TCRY cannot establish that the Commission failed to follow a prescribed procedure.

## **2. TCRY Had No Right Of Cross-examination**

TCRY next complains it lacked an opportunity to “cross-examine” the individuals and organizations that submitted the public comments discussed above. This claim fails because TCRY had no right of cross-examination. Even if it did, it failed to preserve the issue for review.

TCRY relies on one of the Commission’s procedural rules, WAC 480-07-490(5), to argue that it had a right of cross-examination. That rule states in relevant part, “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). By the rule’s plain terms, the “opportunity for cross-examination” arises only when the Commission accepts documentary evidence as “proof of the matters asserted.” *Id.* In such situations, the Commission will make an express finding that evidence has been accepted as “proof of the matters asserted.”

As discussed above, the Commission cited five public comments in its final order. It cited the comments not as “proof of the matters asserted” but merely to emphasize facts already established by the evidentiary record. TCRY’s reliance on WAC 480-07-490(5) is consequently misplaced.

TCRY’s reliance on *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994), is likewise misplaced. In *Weyerhaeuser*, the court held that county employees who authored certain reports were “witnesses” for purposes of a local ordinance that granted interested parties a right of cross-examination at certain public hearings. *Weyerhaeuser*, 124 Wn.2d at 34. The court made clear that its holding rested entirely on the language of the ordinance, and that concerns over due process and the appearance of fairness played no role in the decision. *Id.* at 31-32. Because the ordinance has no application here, *Weyerhaeuser* provides no guidance.

**3. Alternatively, TCRY Waived Its Right Of Cross-examination**

Even if TCRY had a right of cross-examination, it waived any claim of error by failing to assert its right in a timely manner.

The Commission's procedural rules provide that evidence offered during an adjudicative proceeding "is subject to appropriate and timely objection." WAC 480-07-490(7). The rule makes clear, "Parties that have objections must state them." *Id.* It then warns in unambiguous terms that "[f]ailure to object constitutes a waiver of the right to object." *Id.* Here, TCRY had multiple opportunities to "cross-examine the submitters of the public comments relied upon by the Commission." Br. of Appellant at 38. Yet it remained silent—until now.

The record shows that the Commission's administrative law judge convened a public comment hearing on November 20, 2013. CP 1390. Landowner Preston K. Ramsey III, land use planner Brian Malley, and Tri-Cities Visitors and Convention Bureau vice president Kim Shugart spoke in support of the crossing. CP 1394-96. TCRY raised no objection and made no attempt to cross-examine the speakers.

During the public comment hearing, the ALJ informed those present that the Commission would accept "written comments" until close of business on December 10, 2013. CP 1393. TCRY again raised no objection.

The Commission received several written comments, all of which supported the crossing. CP 2127-28. On December 11, 2013, the Commission placed all comments in the public docket. CP 2126. TCRY again made no attempt to cross-examine the comment authors. On December 20, 2013, TCRY filed a post-hearing brief opposing the proposed crossing. CP 366. It again raised no objection to the comments and asserted no right of cross-examination. After the ALJ entered an initial order rejecting the crossing (CP 428), Kennewick and Richland jointly petitioned for administrative review. CP 458. TCRY answered the petition and, again, failed to assert its imagined right of cross-examination. CP 548.

On May 29, 2014, the Commission entered its final order reversing the ALJ and granting Kennewick's petition. CP 629. TCRY petitioned for reconsideration on June 9, 2014. For the first time, nearly six months after the Commission docketed the public comments, TCRY hinted at the issue of cross-examination. It vaguely claimed that it lacked occasion to "cross examine the witnesses asserting [contrary] evidence" (CP 657), and that Kennewick—not the Commission—shielded evidence of public need from the "'engine of truth' of cross examination." CP 674.

Assuming for the sake of argument that TCRY's broad pronouncements on reconsideration were a coherent request for cross-examination, the request was nevertheless untimely. To grant the request,

the Commission would have been obligated to reopen the evidentiary record. It could not have done so except on its own motion. Commission rule provides that parties must petition to reopen the record “before entry of the final order.” WAC 480-07-830(1). Under this rule, parties cannot request cross-examination for the first time on reconsideration.

What happened below can be summarized as follows. TCRY stood by silently while the Commission accepted public comments. When the Commission ruled in favor of Kennewick, citing the comments as illustrative exhibits, TCRY suddenly claimed a right of cross-examination. By this point, cross-examination was no longer an option.

In the final analysis, TCRY waived its asserted right to cross-examination. Under the Commission’s procedural rules, its “[f]ailure to object constitutes a waiver of the right to object.” WAC 480-07-490(7).

Waiver also applies under the APA. “Judicial review of a final decision of an administrative agency is limited by the provisions of the APA.” *Lang v. Dep’t of Health*, 138 Wn. App. 235, 250, 156 P.3d 919 (2007). Generally, the APA prohibits consideration of issues raised for the first time on review. RCW 34.05.554. Our Supreme Court has stated, “In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record.” *King Cnty. v. Boundary Review Bd. for King Cnty.*, 122 Wn.2d

648, 670, 860 P.2d 1024 (1993). Here, TCRY raised the issue of cross-examination (if at all) for the first time in its petition for reconsideration. CP 649. It cited no authority. The record thus contains no more than a “hint or a slight reference to the issue.” *Id.* Under these circumstances, the APA’s waiver rule provides an additional reason to reject TCRY’s claim of error.

#### **4. TCRY Has Not Shown Substantial Prejudice**

There remains yet another reason to reject TCRY’s claim. To obtain relief under the APA, TCRY must show it has been “substantially prejudiced by the action complained of.” RCW 34.05.570(2). It fails to make that showing here.

TCRY’s brief before this Court utterly fails to explain how the Commission’s final order would have differed had the Commission provided an opportunity for cross-examination. This omission leaves the impression that the alleged error is merely technical—that is, without any real consequence. The APA provides no remedy for errors that are merely technical. TCRY must show substantial prejudice. RCW 34.05.570(2).

#### **C. TCRY’s Narrow Substantial Evidence Challenge Fails Because It Relies On The False Premise That The Commission Reversed The Initial Order Solely Based On Public Comments**

TCRY lastly argues that substantial evidence did not support the Commission’s ruling, since “the basis for the reversal of the Initial Order was public comment.” Br. of Appellant at 38-39. As already discussed, that

premise is false. The Commission cited public comments merely to illustrate or emphasize facts already established by existing record evidence—principally, the JUB study. Because TCRY’s assignment of error rests entirely on a false premise, the challenge necessarily fails.

The challenge fails even if this Court interprets the assignment of error as a general attack on the sufficiency of the evidence supporting the Commission’s final order. As discussed below, substantial record evidence established that public need for the proposed crossing outweighs the risk of harm attributable to its grade configuration.

As this Court knows, substantial evidence need not be irrefutable. To the contrary, evidence is “substantial” so long as it is sufficient, when viewed in light of the whole record, to persuade a fair-minded person of the truth or correctness of the challenged agency ruling. RCW 34.05.570(3)(e); *Hardee v. Dep’t of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011). The reviewing court must not reweigh the evidence. *Univ. of Wash. Med. Ctr. v. Dep’t of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

The record shows that the proposed crossing, though inherently dangerous, will be relatively safe. TCRY assigns no error to the Commission’s finding that Kennewick intends to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip. CP 633-34. A railroad safety engineer testified that the “railroad signal

technology proposed to be used at Center Parkway will be the most current automatic warning system available today.” CP 1518. All things considered, the engineer said, the crossing will be safe:

[T]he addition of medians on the approaches to the crossing to keep motorists from driving around the gates, the existing train speed of 35-MPH or less and the average of six trains per day, along with the most current warning devices, should be sufficient to create a safe at-grade highway-railroad crossing.

CP 1515; *see also* CP 1528-29 (similar testimony from additional expert witness). TCRY assigns no error to the Commission’s finding that “[t]he risks of an accident 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.” CP 643.

The record also amply demonstrates significant public need for the proposed crossing. As discussed below, anticipated benefits include reduced traffic congestion, improved public safety, enhanced economic development opportunities, and fulfillment of longstanding planning goals.

The record shows that the crossing will likely reduce traffic congestion. The JUB study, discussed above, found that the crossing may “[p]rovide relief to congested arterial facilities.” CP 92. Kennewick’s traffic engineer agreed that completion of the Center Parkway extension “is one very important way to help reduce the burden on congested principal arterial roads.” CP 1403. He explained, “It is the equivalent of 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 . . . ." *Id.* Richland's development services manager similarly testified that traffic congestion occurs at a nearby intersection "with relatively limited traffic volumes." CP 831. He believed "the addition of the Center Parkway connection would provide significant relief to this congestion." CP 831-32.

The record shows that the crossing will likely improve public safety. Kennewick's police chief testified that the crossing "will allow public safety vehicles the opportunity to respond to emergencies in the immediate area more quickly and safely." CP 1505. He explained, "The other railway crossings to the north and to the south of the proposed crossing do not adequately address public health and safety needs because [of] congestion on Columbia Center Blvd. to the east and Steptoe to the west." *Id.* Richland's police chief added that "addition of the north/south access allows for increased officer safety in the event that an officer is in need of assistance from the neighboring jurisdiction." CP 812. Kennewick's fire chief explained, "An improvement of mere seconds may significantly impact the outcome for critical events related to a medical emergency or fire." CP 944. TCRY assigns no error to the Commission's finding that the crossing "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.” CP 644.

The record shows that the crossing will likely promote economic development by enhancing access to existing businesses and developable land. The JUB study found that the “area around Center Parkway is dominated by commercial development.” CP 93. South of the tracks is a major shopping mall. *Id.* A Holiday Inn and two undeveloped commercial lots lie just north of the tracks. *Id.* Collectively, the lots contain nearly 60 developable acres. CP 105. Additional businesses lie further north, where the proposed extension of Center Parkway intersects Tapteal Drive. CP 97, 1055-56, 1342, 1405. According to the JUB study, the crossing will foster a “synergy” between businesses located north and south of the tracks. CP 105. Kennewick’s traffic engineer testified that the crossing “will provide significant benefits to citizens and visitors by providing a critical access link between shopping, hotels and restaurants.” CP 1405. Richland’s development manager agreed that the crossing “provides improved access to developable lands.” CP 832. One of TCRY’s witnesses acknowledged that the crossing will improve access to the Holiday Inn. CP 1245.

Finally, the record shows that the crossing fulfills longstanding planning goals. Richland’s development manager testified that the crossing is an express element of the regional transportation plan adopted by the

Benton-Franklin Council of Governments. CP 831. Kennewick's traffic engineer agreed that the regional transportation plan "contemplates and approve[s]" the crossing. CP 1402; *see also* CP 1036. Richland's development services manager added that, in 2006, Richland "officially incorporated" the crossing into its comprehensive plan. CP 1010. A transportation expert who co-authored the JUB study agreed that "the crossing is the product of a comprehensive planning effort that is geared to improve the region's transportation network." CP 1699.

The record amply demonstrates that public need for the proposed crossing outweighs the risk of harm.

**D. TCRY's Cursory Fee Request Is Inadequately Briefed**

TCRY requests "an award of its costs and attorney fees" under the Equal Access to Justice Act (EAJA), RCW 4.84.350. Br. of Appellant at 39. Under the EAJA, "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). A qualified party "prevails" if it obtains relief on a "significant issue" and achieves some sought-after benefit. *Id.*

This Court should deny fees and costs because TCRY makes no effort to identify the "significant issue" on which it anticipates relief and

fails to establish that it is a “qualified party.” Courts require more than a passing request. *See Edelman v. State ex rel. Pub. Disclosure Comm’n*, 152 Wn.2d 584, 592, 99 P.3d 386 (2004) (rejecting inadequately briefed request). In any event, even if TCRY somehow meets the definition of “prevailing party,” the Commission’s final order was “substantially justified” within the meaning of RCW 4.84.350(1). For the reasons discussed above, the order had a “reasonable basis in law and fact.” *Dodge City Saloon, Inc. v. Liquor Control Bd.*, 168 Wn. App. 388, 405, 288 P.3d 343 (2012) (quoting *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007)). TCRY deserves no award.

## VI. CONCLUSION

The proposed Center Parkway crossing comes loaded with advanced safety features designed to protect even the most careless drivers. The risk of harm is inherent, but this will truly be the Cadillac of grade crossings. Balanced against this mitigated risk of harm, this Court will find strong evidence of public need. The crossing will promote economic growth, ease traffic congestion, aid emergency responders, and fulfill longstanding planning goals. On this well-developed record, the Commission’s finding sufficient public need was easily within its broad discretion. This Court should affirm.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2015.

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**CERTIFICATE OF SERVICE**

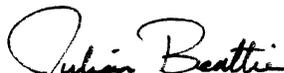
I hereby certify that on this 1st day of June, 2015, I caused to be served a true and correct copy of the foregoing Brief, by Email and United States mail.

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