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**SUPREME COURT OF THE STATE OF WASHINGTON**

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TRI-CITY RAILROAD COMPANY, LLC,

Petitioner,

v.

STATE OF WASHINGTON, UTILITIES AND TRANSPORTATION COMMISSION,

Respondent,

CITY OF KENNEWICK and CITY OF RICHLAND,

Intervenor-Respondents.

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# WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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## I. INTRODUCTION

This Court should reject Tri-City Railroad Company's untimely argument that "due process" requires a new administrative hearing before the Washington Utilities and Transportation Commission. The Railroad made a nearly identical argument before the Commission but assigned no error to the Commission's order expressly denying that form of relief. By failing to challenge the Commission's ruling, the Railroad abandoned the issue. RAP 10.3(h); *Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 814-15, 638 P.2d 1220 (1982) (Supreme Court will not review unassigned errors). In any event, the record shows that the Railroad received a full and fair hearing.

This Court should also decline to hear the Railroad's allegation that the Commission improperly treated public comments as substantive evidence. The Court of Appeals correctly held that, even if the Railroad proved this allegation (a notion the Court doubted), it suffered no prejudice because substantial evidence independently supported the Commission's findings. Judicial relief under the Administrative Procedure Act requires a showing of "substantial prejudice." RCW 34.05.570(1)(d).

An overarching reason to deny review is the Railroad's total failure to address RAP 13.4(b)'s criteria governing acceptance of review. This omission confirms that the Railroad has no basis for further appeal.

## II. ISSUES

If this Court accepts discretionary review, it must resolve two issues:

> Whether the Commission's alleged creation of "three new legal criteria" entitles the Railroad to a new administrative hearing, even though the Railroad abandoned this issue before the Court of Appeals, and, in any event, the record shows that the Railroad received a full and fair hearing.
>
> Whether this Court should set aside the Commission's order because the Commission allegedly treated public comments as substantive evidence, even though the Railroad never proved this allegation and, in any event, suffered no prejudice because substantial record evidence independently supported the Commission's findings.

## III. STATEMENT OF THE CASE

As required by RCW 81.53.020 and .030, the City of Kennewick petitioned the Washington Utilities and Transportation Commission for permission to construct a new grade (ground-level) railroad crossing over tracks currently used by Tri-City Railroad Company. CP 77. The proposed crossing will connect a Kennewick street known as Center Parkway with a street in the neighboring city of Richland known as Tapteal Drive. *Id.* The Kennewick comprehensive plan, the Richland comprehensive plan, and the Benton-Franklin Council of Governments' regional transportation plan all identify the proposed crossing as an essential capital improvement. CP 637, 829-31, 862, 909.

The Commission heard Kennewick's petition under Part IV of the Administrative Procedure Act (APA), RCW 34.05. Richland intervened in support of Kennewick's petition. CP 201. The Commission's rail safety staff, which participated as an independent party, also supported the petition. CP 630. The Railroad stood alone in its opposition. CP 167.

Evidence admitted during the adjudication demonstrated that the proposed crossing will be relatively safe due to sophisticated safety features. 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 Commission found, and the Railroad conceded on appeal, 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.

On the other side of the balance, the evidentiary record demonstrated that public need for the proposed crossing is strong. Kennewick's traffic engineer testified that completion of the Center Parkway extension "is one very important way to help reduce the burden on congested principal arterial roads." CP 1403. 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. Additionally, the record showed that the crossing will likely promote economic development by enhancing access to existing businesses and developable land. A key traffic engineering study concluded that the crossing will foster a "synergy" between businesses located north and south of the tracks. CP 105.

The Commission accepted both written and oral public comments. CP 2126. Consistent with WAC 480-07-498, the Commission treated the comments as "illustrative," rather than substantive, evidence. All comments favored the proposed crossing. CP 2127-28.

In February 2014, the Commission's administrative law judge (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 before the three-member Commission. CP 458. In May 2014, the Commission entered a final order unanimously reversing the ALJ's initial order. CP 629-45. It found that the record contained broader evidence of public need than had been found by the ALJ. In particular, it found that the ALJ ignored evidence of "additional public benefits in the form of enhanced economic development opportunities." CP 642. It also found that the ALJ

misunderstood the "broader public policy context that gives a degree of deference to local jurisdictions in the areas of transportation and land use planning." *Id.* It concluded that, on balance, public need for the crossing outweighed the crossing's "demonstrated low level of 'inherent risk.'" *Id.*

The Railroad petitioned for reconsideration and, in the alternative, for rehearing. CP 649. In its request for rehearing, the Railroad asked the Commission to reopen the record on the issues of "economic development and deference to local government." CP 658. The Commission upheld its final order and expressly declined to grant rehearing. CP 702.

The Railroad sought judicial review under RCW 34.05.570. The Benton County superior court affirmed.

Before the Court of Appeals, the Railroad argued that the Commission (1) exceeded its statutory authority by considering factors other than public safety when evaluating public need for the proposed crossing; and (2) placed improper weight on public comments. The Court of Appeals unanimously rejected these arguments in a partially published opinion. No. 33031-1-III (Wash. Ct. App. June 16, 2016) ("Slip Op.").

In the published portion of its opinion, the Court of Appeals held, "The commission's consideration of local planning, including its consideration of the local government's economic development objectives, does not conflict with the plain language of the relevant statute." Slip Op.

at 3. In the unpublished portion, the Court held, "Because Tri-City has not demonstrated that it was substantially prejudiced even if the commission considered the public comments as substantive evidence, it is not entitled to judicial relief." Slip Op. at 25-26.

The Railroad moved for reconsideration, arguing, for the first time, that "due process" required the Court of Appeals to remand for a new administrative hearing. The Court denied the Railroad's motion.

## IV. REASONS WHY REVIEW SHOULD BE DENIED

The Railroad wants a second bite at the administrative apple, but it fails to explain which of RAP 13.4(b)'s criteria governing acceptance supports this burdensome outcome. The Railroad's failure to address RAP 13.4(b) should be fatal to its petition. *See* RAP 13.4(c)(7) (petition for review should contain a "direct and concise statement of the reason why review should be granted under one or more of the tests established in [RAP 13.4(b)], with argument"). But in any event, as discussed below, none of the criteria supports review.

### A. The Railroad Identifies No Conflicting Judicial Authority

Under RAP 13.4(b)(1) and (2), this Court may accept review if the Court of Appeals' decision conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals.

The Railroad identifies no such conflicts.

The principal question addressed by the Court of Appeals was whether the Commission's authority under RCW 81.53.030 to "grant or deny" Kennewick's petition included implied authority to consider "economic development interests, deference to local government, and the broader public policy environment" when evaluating public need for the proposed crossing. Slip Op. at 8.

To answer this question, the Court of Appeals applied this Court's well-established, uncontroversial rule that administrative agencies may fill statutory gaps by "'determin[ing] specific factors necessary to meet a legislatively mandated general standard.'" Slip Op. at 10 (quoting *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994)); *e.g.*, *Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982) (statutory construction may involve "administrative interpretation of the statute"); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975) ("[I]t is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme."). The Court of Appeals' refusal to substitute its construction of the statute "for a reasonable interpretation by the commission" was well within the bounds of established law. Slip Op. at 19 (citing *Hama Hama*, 85 Wn.2d at 448).

## B. The Railroad Identifies No Significant Constitutional Question

Under RAP 13.4(b)(3), this Court may grant review if the petition for review presents "a significant question of law under the Constitution of the State of Washington or of the United States."

The Railroad identifies no such question, and none exists.

### 1. The Railroad Received a Full and Fair Hearing

The Railroad first argues that "due process" requires this Court to remand for a new administrative hearing, since the parties allegedly lacked notice of the Commission's legal test. This argument is not reviewable, because the Railroad abandoned it before the Court of Appeals.

As recounted above, the Railroad made a nearly identical argument while this case was still pending before the Commission. Specifically, it argued that the Commission should grant "further adjudicatory proceedings" because the original adjudication deprived it of its "rights to procedural due process." CP 651, 675. It claimed that a new hearing would allow it "to produce evidence and legal argument to counter those arguments never articulated or relied upon by the Cities . . . but relied upon by the Commission in entering [its final order]." CP 652. The Commission expressly rejected these arguments in its written order denying rehearing. CP 702.

At the Court of Appeals, the Railroad assigned no error to the Commission's order denying rehearing. Its opening brief contained no request for rehearing and made no mention whatsoever of "due process."

By failing to challenge the Commission's ruling, the Railroad abandoned the issue. RAP 10.3(h); *Painting & Decorating Contractors of Am. Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 814-15, 638 P.2d 1220 (1982) (Supreme Court will not review unassigned errors).

The Railroad may believe that it resurrected the issue in its motion for reconsideration before the Court of Appeals. That maneuver, however, was improper, since appellate courts generally refuse to entertain claims for the first time on reconsideration. *E.g.*, *Nostrand v. Little*, 58 Wn.2d 111, 120, 361 P.2d 551 (1961). A key reason to forbid the practice is that the opposing party may have no opportunity to respond. Indeed, the Court of Appeals here denied the Railroad's motion without calling for an answer. The Commission consequently has had no opportunity to respond to the Railroad's claim—until now.

If this Court assumes that the issue has been properly resurrected, it should nevertheless deny review. As discussed below, the Railroad's half-hearted and unsupported invocation of "due process" does not qualify as "a significant question of law under the Constitution of the State of Washington or of the United States." RAP 13.4(b)(3).

Due process is a flexible concept, and what process is "due" in a particular situation depends on "(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures." *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The Railroad makes no attempt to balance these factors.

Ostensibly, the "private interest affected" is the Railroad's right to a fair administrative hearing. The Railroad claims this right was violated when the Commission, in its final order, "created three new legal criteria which were not part of the completed adjudicative proceeding, and applied facts not previously briefed by the parties in the completed adjudicative proceeding to those three criteria." Petition for Review at 6-7.

The Commission did not create "new legal criteria." It actually applied the same legal test used by its ALJ, whose initial order the Railroad fought to uphold. CP 551, 629. Indeed, both the ALJ and the Commission analyzed "whether there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at grade configuration." CP 445, 633.

Furthermore, the Railroad had ample notice that the Commission might consider economic and public policy interests when evaluating "public need" for the proposed crossing. The cities repeatedly argued before both the ALJ and the Commission that evidence of local economic benefits was relevant to public need, and that the Commission should defer to local land use decisions. *E.g.*, CP 405-06, 410-15, 420, 424-25, 462-63, 471-72, 477, 479, 496-501, 599, 606, 608-09, 824-32, 1009-18. If the Railroad missed these obvious issues, it can only blame itself.

The record as a whole shows that the Commission's "'existing procedures'" produced a full and fair hearing, and that the "'additional procedural safeguard[]'" desired by the Railroad—a new administrative hearing—is merely an unwarranted license to relitigate the issues. *In re Det. of Stout*, 159 Wn.2d at 370 (quoting *Mathews*, 424 U.S. at 334). The Railroad's wish for a "do-over" is not a significant constitutional issue that warrants further appellate review.

### 2. The Railroad Suffered No Prejudice from the Commission's Treatment of Public Comments

The Railroad also alleges a due process violation associated with the Commission's treatment of public comments. Under WAC 480-07-498, public comments are "illustrative," rather than substantive, evidence.

The Railroad claims that the Commission ignored WAC 480-07-498 when it cited certain public comments in its final order.

This claim is likewise unworthy of review. As the Court of Appeals correctly held, even if the Commission placed undue weight on the comments—a claim the Court of Appeals doubted[1]—the Railroad necessarily suffered no prejudice. Slip Op. at 22. That is because the evidentiary record independently contained undisputed substantial evidence supporting the Commission's findings of fact. *Id.* at 22-26. Under the APA, judicial relief requires a showing of "substantial prejudice." RCW 34.05.570(1)(d).

The Court of Appeals' analysis dictates the correct result here. If the Railroad cannot make even a basic showing of prejudice under the APA, its due process allegation certainly does not rise to the level of a "significant" constitutional issue under RAP 13.4(b)(3).

An additional reason to deny review is that the Railroad never articulates what, exactly, it wants this Court to do. Under RAP 13.4(c)(7),

[1] The Court of Appeals explained, "Arguably, the commission considered the public comments only as expressing public sentiment on the city's proposal. We say this based on the placement in the final order of the commission's discussion of the public comments (it follows discussion of the parties' evidence) and on the language used to describe the public comments (e.g., as 'underscor[ing]' the project's potential, 'emphasiz[ing] community expectations,' 'illustrat[ing] the local importance of recognizing the broader public policy environment,' and 'support[ing] the proposed project'). CP at 639-42." Slip Op. at 22.

a petition for review should include "[a] short conclusion stating the precise relief sought." The Railroad's petition ignores this rule.

### C. The Railroad Identifies No Issue of Substantial Public Interest

Under RAP 13.4(b)(4), this Court may grant review if the petition for review "involves an issue of substantial public interest that should be determined by the Supreme Court." The Railroad's desire to relitigate the issues involves no such issue.

The "public interest" actually weighs in favor of finality. As discussed above, the cities have long considered the proposed crossing to be an essential capital improvement that will reduce congestion, improve emergency response times, and promote local economic development. *See* CP 636-42 (portion of Commission's final order discussing public need). Although no grade crossing is perfectly safe, the proposed crossing will have "the most current automatic warning system available today." CP 1518. On balance, the proposed crossing is a carefully-planned, vital infrastructure project that should not be delayed by further litigation.

### D. The Commission was a Good Steward of the Agency Record

The Railroad's petition for review contains a casual but inflammatory accusation that "five members of the state Legislature engaged in *ex parte* communications with the Commission by way of a joint letter." Petition for Review at 6. The Railroad bends the facts.

In reality, the legislators sent the letter to the Commission's *staff*, not to the Commissioners who decided the case. CP 455. The letter urged the staff to initiate an administrative appeal of the ALJ's initial order or, in the alternative, to support the cities' appeal. CP 456. No evidence indicates that the Commissioners viewed the letter, much less improperly relied upon it. Indeed, the letter wound up in the appellate record only because the Commission's records custodians, as a matter of practice, incorporate every document associated with a docket when compiling the record. The letter was not part of the evidentiary record below.

## V. CONCLUSION

This Court should deny review because the Railroad is not entitled to a second bite at the administrative apple. The issues were fully and fairly litigated at the administrative level, and the Railroad offers no compelling reason for further delay.

RESPECTFULLY SUBMITTED September 16, 2016.

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## CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of September, 2016, I caused to be served a true and correct copy of the foregoing Washington Utilities and Transportation Commission's Answer to Petition for Review by United States mail and e-mail, to:

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