

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

CWW LLC,

Petitioner,

Seeking Approval to Upgrade Signals at a
Highway-Rail Grade Crossing and
Requesting Disbursement from the Grade
Crossing Protective Fund

DOCKET TR-210226

COMMISSION STAFF'S PETITION
TO AMEND ORDER 01

USDOT: 808939F

I. INTRODUCTION

1 The CWW LLC (CWW) petitioned for and received from the Commission approval for an expenditure from the Grade Crossing Protective Fund (GCPF) to modify a highway-rail grade crossing at Prospect Avenue in Walla Walla County. The order approving its petition conditions reimbursement from the GCPF for the work upon inspection and approval by Staff. Due to a current staffing shortage, the Commission does not currently employ the Federal Railroad Administration (FRA) certified inspectors in the Signal and Train Control discipline necessary to review CWW's crossing project upgrades. While Commission Staff (Staff) is working to hire inspectors, there will be a gap in this area until inspectors are hired and fully certified by the FRA.

2 To ensure CWW receives grant reimbursement in a timely manner, Staff requests that the Commission modify the conditions of approval found in Order 01 in this docket to allow for payment from the GCPF to CWW upon its certification that it has properly completed the work require by its petition, subject to certain conditions intended to protect the public interest.

3 Staff has conferred with CWW, and it does not object to this petition.

II. RELIEF REQUESTED

4 Staff requests that the Commission amend Order 01 in this docket to allow payment
to CWW from the GCPF to reimburse it for work performed modifying the Prospect Avenue
crossing upon CWW’s certification that it has made the modifications in accordance with all
applicable laws and relevant standards. Staff requests that the amendment also require that
CWW refund that payment within 30 days of its refusal to remedy any deficiencies noted in
a later Staff inspection.

III. STATEMENT OF FACTS

5 In April 2021, CWW petitioned the Commission for authorization to modify a
highway-rail grade crossing at Prospect Avenue near Walla Walla, Washington, identified as
USDOT 808939F.¹ The named respondent did not oppose the petition,² and the Commission
approved the petition with conditions in September 2021.³

6 The conditions were originally proposed by Staff.⁴ One of them provided that
“[p]ayment will be made upon presentation of claim for reimbursement for materials and
verification by Commission Staff that the work has been satisfactorily completed.”⁵

7 Staff employed the FRA certified inspectors necessary to verify the CWW’s work at
the time it recommended that condition to the Commission;⁶ it continued to employ them at
the time that the Commission entered Order 01 and imposed the condition.⁷ In mid-October
2021, however, several rail inspectors left the Commission’s employ, and the departing

¹ *In re Petition of CWW Seeking Approval to Upgrade Signals at a Highway-Rail Grade Crossing and Requesting Disbursement from the Grade Crossing Protective Fund*, Docket TR-210226, Order 01, 1 ¶ 1 (Sept. 23, 2021) (hereinafter “CWW’s Petition”).

² *Id.* at 1 ¶ 2.

³ *Id.* at 2 ¶ 6.

⁴ *Id.*

⁵ *Id.* at 3 ¶ 13(2).

⁶ Decl. of Michael Turcott at 1 ¶ 5.

⁷ *See id.*

inspectors included those with FRA certification in the Signals and Train Control discipline, the one needed to review CWW's modification to the Prospect Avenue.⁸ Unfortunately, Staff cannot predict when it will be able to replace the departed inspectors with qualified replacements given the unique expertise required by these positions.⁹ Accordingly, as Order 01 is currently written, Staff cannot say when CWW will be able to obtain reimbursement from the GCPF.

IV. STATEMENT OF ISSUES

8 Should the Commission amend Order 01 to allow payment from the GCPF to CWW, upon its certification that it has satisfactorily completed the work authorized by its petition, subject to a requirement that it refund the money if it will not remedy any defects discovered by Staff upon a later inspection?

V. ARGUMENT

9 Staff cannot in the foreseeable future complete the inspection Order 01 required before CWW can receive reimbursement from the GCPF. Staff does not view this as desirable, for reasons of fairness and public policy. Accordingly, Staff requests that the Commission recognize that recent events justify amendments to Order 01 and duly make those amendments.

10 The public service laws authorize the Commission to “alter or amend any order or rule made, issued, or promulgated by it” after providing “notice to the public service company affected.”¹⁰ The alteration or amendment becomes effective upon service to the relevant public service company.¹¹

⁸ Decl. of Michael Turcott at 1 ¶¶ 5-6.

⁹ Decl. of Michael Turcott at 1 ¶ 6.

¹⁰ RCW 81.04.210.

¹¹ *Id.*

11 Any petition seeking amendment or alteration of an order must comply with the substantive requirements for a petition for rehearing.¹² Such petitions must thus “set forth sufficient grounds for [altering, amending, or rescinding] the commission order and must include substantial evidence or an offer of proof in support of the requested relief.”¹³ “Changed conditions since the commission entered the order” may provide the requisite “sufficient grounds.”¹⁴

12 As detailed in the Declaration of Michael Turcott, filed concurrently with this petition, when the Commission entered Order 01, Staff employed the inspectors necessary to perform the inspection that it requires. As of mid-October 2021, it no longer does so. And Staff cannot say when it will be able to hire replacement inspectors.

13 That change in circumstances prevents for the foreseeable future the CWW from obtaining the GCPF reimbursement contemplated by Order 01. The Commission should recognize as much and amend Order 01 to allow the CWW to present a claim for reimbursement with a certification that it has completed the work required by its petition in accordance with all applicable statutes, regulations, orders, and industry standards.

14 The Commission can ensure that the CWW’s certification is meaningful by amending Order 01 to include a condition protecting the public interest. Staff ultimately will hire the inspectors necessary to review the CWW’s work. At that point, Staff will inspect the crossing modifications. The Commission can amend Order 01 to require CWW to refund the GCPF payment if Staff discovers defects in that inspection that CWW refuses to remedy. Any refusal by the CWW to refund the payment would thus violate the amended Order 01

¹² WAC 480-07-875(1).

¹³ WAC 480-07-870(1)

¹⁴ WAC 480-07-870(1)(a).

and subject the CWW to penalties,¹⁵ which will provide a strong incentive for CWW to ensure the work is performed properly.

VII. CONCLUSION

Commission Staff requests that the Commission amend Order 01 in this docket as discussed above.

DATED this 15th day of November 2021.

Respectfully submitted,

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¹⁵ RCW 81.04.380.