[Service date June 24, 2014]

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,	)	DOCKET TR-130499
	)	
Petitioner,	)	
	)	ORDER 04
v.	)	
	)	
PORT OF BENTON, TRI-CITY & OLYMPIA RAILROAD COMPANY, BNSF RAILWAY COMPANY, AND UNION PACIFIC RAILROAD,	)	DENYING PETITION FOR RECONSIDERATION, PETITION FOR STAY, AND PETITION FOR REHEARING
	)	
Respondents.	)	
. . . . .	)	

MEMORANDUM

I. Background and Procedural History

1 The City of Kennewick (Kennewick) filed a petition with the Washington Utilities and Transportation Commission (Commission) on April 8, 2013, seeking approval to construct a highway-rail at-grade crossing as part of a project to extend Center Parkway from an existing roundabout in Kennewick, where the parkway intersects Gage Boulevard, continuing north to intersect Tapteal Drive in the City of Richland (Richland). On May 31, 2013, Richland petitioned to intervene in support of Kennewick's petition.

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

3 The Commission's regulatory staff (Staff) supports Kennewick's petition.[1]

4 Following evidentiary hearings on November 19-20, 2013, a public comment hearing on November 20, 2013, in Richland, Washington, and briefing by the parties, the Commission entered Order 02, its Initial Order, on February 25, 2014, denying Kennewick's petition. Kennewick and Richland (Cities) filed a joint Petition for Administrative Review on March 18, 2014.

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

6 The Commission entered Order 03-Final Order Granting Petition for Administrative Review, reversing Order 02, on May 29, 2014. TCRY filed its joint Petition for Reconsideration of Final Order, Petition for Rehearing, and Petition for Stay of Order on June 9, 2014. Staff and the Cities responded on June 1, 2014, opposing TCRY's Petition for Rehearing and Petition for Stay of Order.

II. Petitions for Reconsideration, Rehearing, and Stay

7 TCRY argues that "Order 03 reverses the Initial Order without rationale, analysis or reason."[2] TCRY focuses initially on the fact that Order 03, our Final Order Granting Petition for Administrative Review, states that:

> We agree with the analysis, the findings, and the conclusion reached in the Initial Order that the benefits to public safety alleged by the Cities

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

[2] TCRY Petition at 8:7-8.

> are too slight on their own to support the petition, even though the inherent risks are mitigated to a large extent by the project design.[3]

TCRY ignores, however, that the key operative phrase in the quoted sentence, italicized here, explains that the "benefits to public safety alleged by the Cities *are too slight on their own* to support the petition."[4] Order 03 follows immediately with the point that:

> If the feasibility of grade separation and public safety as a component of public need were our only concerns, we would end our discussion here and sustain the Initial Order. However, having studied the full record, *we find reason to analyze this matter outside the narrow constraints of these two questions.* We address in the next section of this Order an additional point of decision that we find determinative.[5]

The emphasized language in the quote above succinctly describes the Commission's responsibility when reviewing an Initial Order, whether on its own motion[6] or, as in this case, in response to a petition for administrative review filed by a party.[7] The Administrative Procedure Act describes this responsibility as follows:

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[3] Order 03 ¶ 16. The project is designed to mitigate the inherent dangers to vehicles and pedestrians by using active warning devices and taking other measures. Specifically, the Cities propose to install advanced signage, flashing lights, an audible bell, automatic gates, and a raised median strip designed to prevent drivers from going around lowered gates, as illustrated in Order 03. *Id.* ¶ 13 Figure 2 At-Grade Crossing Configuration. Ms. Hunter testifies for Staff that she believes these safety features "are sufficient to moderate, to the extent possible, any danger that may exist at the crossing." Indeed, Ms. Hunter, comparing the proposed Center Parkway crossing to an existing crossing with similar characteristics and using the Federal Railroad Administration accident predictor model to determine the probability of an accident at the proposed crossing is .018701 percent for any one-year period.

[4] *Id.* at 9:14-15 (quoting from Order 03 ¶ 15 (emphasis added)). The Cities and the Initial Order focus attention on the question whether the crossing would result in incremental improvements to public safety by, for example, improving first responder times in the area. We agree with the Initial Order's determination that the incremental increases in public safety the Cities allege are too slight on their own to support their petition, but we also are mindful of the Initial Order's finding and agreement "with Commission Staff that the petition's proposed advance and active warning devices would moderate the risks presented by this crossing to the extent possible at this site."

[5] Order 03 ¶ 16 (italics added for emphasis).

[6] *See* RCW 34.0.464(1)(a).

[7] *See* RCW 34.05.464(1)(b).

> The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.[8]

In other words, administrative review under the APA is *de novo*, as noted in Order 03.[9] The independent nature of this *de novo* review is emphasized further in the next section of RCW 34.05.464, which states that: "The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties."[10]

8 Despite these clear statements of the law governing review, TCRY grounds its Petition with an argument that the Commission is limited in its consideration on review to points expressly argued by a party seeking review:

> Order 03, while accepting all parts of the Initial Order, injects for the first time in this proceeding the concept of "Broader Public Need" with two components – economic development and deference to local government. The Commission uses these concepts, never argued by the Cities, to sweep aside the determination of the ALJ who heard the evidence and was able to observe the demeanor and credibility of the witnesses, allowing the Cities to prevail without ever putting TCRY on notice of the arguments that the Commission now uses to impose a significant burden on TCRY and the public by reversing the Initial Order.[11]

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[8] RCW 34.05.464(4).

[9] Order 03 ¶19, footnote 14.

[10] RCW 34.05.464(5).

[11] Petition at 10:1-10. This is in apparent reference to ¶ 11 in Order 03, where we say:

> We agree that we should evaluate the petition to determine whether a grade-separated crossing is practicable and whether a demonstrated public need for the

TCRY, misses several fundamental points. Contrary to what TCRY argues, we did not accept in Order 03 "all parts of the Initial Order" and, indeed, found it focused too narrowly on the evidence and argument concerning public safety. 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[12] to other aspects of public need as demonstrated in the record of this proceeding. The Commission did not "sweep aside" the ALJ's determination in Order 02; it found the parties' arguments and the ALJ's analysis too focused on a single issue and, following a review of the full record, found reasons to "enter a final order disposing of the proceeding" differently than did the ALJ in his Initial Order.[13] Finally, the Commission does not make "arguments"; it makes decisions and these are announced through its orders. At every stage, parties have the right to challenge the Commission's determinations in its orders, as TCRY has done here in its Petition for Reconsideration. There simply is no issue of "notice" here. TCRY has not been deprived of any process to which it is due.

9 In addition to making its threshold argument that the Commission erred in Order 03 by taking a broad view of the record on review, considering facts and policy issues not addressed in the Initial Order, TCRY argues concerning two substantive matters salient to the Commission's decision on review: 1) the benefits to economic development that Order 03 weighs as a component of the public need analysis; 2) our policy determination that, while not controlling,[14] some deference should be given to the Cities' transportation and land use planning goals when the Commission evaluates public need.

> crossing outweighs the hazards of an at-grade crossing. We agree with most of the Initial Order's findings and conclusions on these questions, but we conclude that a broader public need than the public safety concerns the parties advocate supports the petition.

[12] This is not to say that we ignore public safety as a factor. We consider specifically, for example, that Staff's support for the proposed crossing is predicated largely on Ms. Hunter's safety analysis, as discussed above. *See supra* ¶ 7 footnote 3.

[13] *See* RCW 34.05.464(7) and WAC 480-07-825(9).

[14] The Cities argue the GMA may override our authority under RCW 81.53. The Initial Order rules to the contrary and we find no reason to address the question further. *See* Order 02 ¶¶ 42-44.

10 Much of TCRY's argument related to these matters simply rehashes points made in the Initial Order related to public safety. TCRY misleadingly and incorrectly argues that Order 03 "overturns the Initial Order without finding any issue with its propriety [, amounting] to a wholesale subversion of the adjudicative process."[15]

11 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.[16] We also consider the evidence in the context of policy considerations not addressed in the Initial Order. 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 inherent risk, when coupled with evidence of economic development benefits the balance shifts. In addition, while the ALJ's role does not necessarily require consideration of the broader policy implications of the Commission's adjudicative orders, the Commissioners' role requires this inquiry. Thus, in Order 03 we determined that:

> In addition to economic benefits, the Commission as a matter of policy should give some deference to the Cities' transportation and land use planning goals, as these are matters of local concern and within the jurisdictional authority of the Cities. . . . Although Kennewick is not legally exempt from our jurisdiction, it is consistent with legislative policies implementing Constitutional home rule that the Commission give significant weight to the evidence concerning the Cities' perspective that the Center Parkway extension is important to transportation planning and economic development in both jurisdictions. [17]

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[15] Petition for Reconsideration at 21:11-14.

[16] *See Benton County v. BNSF Railway Company*, Docket TR-100572, Order 06, Initial Order Granting Benton County's Petition for an At-Grade Railroad Crossing, Subject to Conditions ¶¶ 33-37 (Feb. 15, 2011) ("Considering both the improvement in public safety in the community and the greater economic development prospects in Benton County that will result from the proposed project, the Commission determines that there is a demonstrated public need for the crossing that outweighs the hazards inherent in an at-grade configuration.").

[17] Order 03 ¶ 25.

We thus harmonize the state's Growth Management Act (GMA) with our statute requiring Commission approval of at-grade railroad crossings, except in first-class cities such as Richland,[18] which are expressly exempt from our jurisdiction.[19]

12 TCRY's objection that in thus harmonizing the two statutes "the Commission has effectively granted the Cities the unilateral power to construct at-grade crossings, while rejecting the argument that approval of this crossing is required by statutory mandate" is misplaced and, indeed, flatly erroneous. 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.

13 In addition to these arguments, TCRY devotes considerable portions of its Petition to arguments that are at best tangential to the bases for our decision in Order 03. In argument filling over seven pages of its twenty-nine page Petition for Reconsideration, TCRY argues "the Cities are entitled to no 'deference'" because conflicting evidence in the record concerning the potential for increases in train traffic over time is the product of "sleight of hand and failure of candor" by Richland in working with its witnesses and presenting its case before the ALJ. We find no support in the record for this unfortunate assertion. In any event, we do not question in Order 03 the Initial Order's finding that:

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[18] We note in Order 03 that Richland's population is greater than 50,000 and that of Kennewick greater than 75,000. Both are qualified to be first-class cities but Kennewick has opted to be a code city instead. The Tri-cities metropolitan area, including Pasco and surrounding urban and suburban areas is more than 250,000. *Id.* footnote 23. *See also Id.* footnotes 20-22.

[19] In our order on review we say that:

> We agree with the Initial Order's determination that the GMA does not relieve the Commission from its statutory obligation to regulate public safety at rail crossings, including the one proposed here. The two statutes do not conflict with each other and the integrity of both statutes within the overall statutory scheme is preserved by reading the GMA together and in harmony with RCW 81.53. The Initial Order ends its discussion of this issue without considering how this harmony should be achieved in the context of the facts presented in this case. We find it necessary to undertake this analysis on review.

Id. ¶ 19 (citing *Philippides v. Bernard*, 141 Wn.2d 376, 385, 88 P.2d 939 (2004), *citing State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) ("In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.")).

> The risks of an accident at the proposed crossing are relatively low considering current and projected train traffic, predicted levels of vehicle traffic, and plans to install active warning devices and other safety measures.[20]

Moreover, the only discussion of deference in Order 03 bears no relation whatsoever to our weighing of the evidence concerning the balance between claimed improvements in public safety and the inherent or demonstrated risk of an accident at the proposed crossing. Instead, as discussed above, we determined as a matter of policy that it is appropriate for the Commission to give some deference to the Cities' transportation and land use planning goals when evaluating the question of public need.

In simple terms, TCRY's argument in this regard misses the mark by a wide margin.

14 TCRY also discusses at length proceedings addressing Kennewick's 2004 and 2005 petitions for authority to construct and at-grade crossing at Center Parkway. These petitions were consolidated and in 2007 the Commission entered an Initial Order denying them.[21] TCRY's discussion of the 2007 order in its Petition for Reconsideration essentially is a collateral attack on the Initial Order's determinations that these earlier proceedings do not bar Kennewick's petition here under the doctrine of *res judicata*[22] and do not properly articulate the standard the Commission applies in cases such as this one.[23] We have no need to address these points raised by TCRY.

15 In sum, we find nothing in TCRY's lengthy Petition that persuades us to reconsider the Commission's determinations in Order 03, to reopen the record and rehear the matter, or to stay the effectiveness of the order. We conclude here that we should deny TCRY's joint Petition for Reconsideration of Final Order, Petition for Rehearing, and Petition for Stay of Order.

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[20] Order 02 ¶ 76; Order 03 ¶ 35.

[21] *City of Kennewick v. Union Pacific Railroad*, Docket TR-040664, Order 06 and Docket TR-050967, Order 02, Initial Order Denying Petition[s] (January 26, 2007). The Initial Order in these dockets became final by operation of law on February 15, 2007. We note that the Commission does not consider Initial Orders precedential.

[22] *See* Order 02 ¶¶ 37-41.

[23] *Id.* ¶ 58.

ORDER

THE COMMISSION ORDERS:

16 (1) TCRY's Petitions for Reconsideration, Rehearing and Stay are denied.

17 (2) The Commission retains jurisdiction to enforce the terms of this Order.

Dated at Olympia, Washington, and effective June 24, 2014.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

JEFFREY D. GOLTZ, Commissioner