

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK,	)	DOCKET TR-040664
	)	
Petitioner,	)	ORDER 06
	)	
v.	)	
	)	INITIAL ORDER DENYING
UNION PACIFIC RAILROAD,	)	PETITION
	)	
Respondent.	)	
	)	
.....	)	
CITY OF KENNEWICK,	)	DOCKET TR-050967
	)	
Petitioner,	)	ORDER 02
	)	
v.	)	
	)	INITIAL ORDER DENYING
PORT OF BENTON AND TRI-CITY	)	PETITION
& OLYMPIA RAILROAD,	)	
	)	
Respondent.	)	
	)	
.....	)	

- 1     *Synopsis: This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the petitions for an at-grade crossing of Center Parkway with the Union Pacific Railroad’s dead end spur west of Richland Junction and the Port of Benton and Tri-City & Olympia Railroad’s Hanford Industrial Branch west of Richland Junction will be denied.*
  
- 2     **Nature of the Proceedings:** The City of Kennewick (Kennewick)<sup>1</sup> filed two petitions for at-grade crossings. The first petition is for approval of an at-grade crossing of Center Parkway with the Union Pacific Railroad’s (UPRR) dead end spur west of Richland Junction. The second petition is for approval of an at-grade crossing

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<sup>1</sup> Kennewick filed the petitions on behalf of the City of Kennewick and the City of Richland. References to the acronym “Kennewick” refer to both cities.

of Center Parkway over the Port of Benton (Benton)<sup>2</sup> and Tri-City & Olympia Railroad's (TCRY) Hanford Industrial Branch west of Richland Junction. The petitions were consolidated for hearing.<sup>3</sup>

- 3 **Procedural history:** A comprehensive procedural history of the initial stages of these petitions was set forth in previous orders of the Washington Utilities and Transportation Commission (Commission) and will not be repeated herein.<sup>4</sup> The petitions were heard upon due and proper notice to all interested parties before Administrative Law Judge Patricia Clark October 19, and 20, 2006, in Olympia, Washington.
- 4 During the hearing, on October 19, 2006, Kennewick and the Port of Benton reached an agreement whereby the Port of Benton granted Kennewick an easement allowing Kennewick to construct a railroad crossing over its tracks subject to the rights of its lessee, TCRY.<sup>5</sup> The Agreement recognized that the lessee, TCRY, and UPRR, opposed the at-grade crossing. Given the agreement, the Port of Benton did not appear at hearing.
- 5 At the conclusion of the hearing on October 20, 2006, the Administrative Law Judge established two post-hearing briefing schedules after input from the parties. During testimony adduced at hearing it became apparent that there was a potential conflict between Washington state law and Federal Railroad Administration (FRA) requirements for silent, at-grade crossings. The first briefing schedule was mandatory and required parties to address the apparent conflict in law and, if there was a conflict, an analysis of which requirement would prevail. On November 20, 2006, the parties timely filed a joint brief on this issue. The joint brief demonstrated that there is no conflict of law. The second briefing schedule was discretionary and permitted post-hearing briefs on the issues in these proceedings. If Kennewick elected to file post-hearing briefs, the remaining parties were permitted to file responsive briefing. Kennewick elected to file post-hearing briefing and timely filed its brief on December 20, 2006. The TCRY, UPRR, BNSF, and Commission Staff timely filed briefs on or before the deadline of January 22, 2007.

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<sup>2</sup> The Port of Benton leases its track to Tri-City & Olympia Railroad.

<sup>3</sup> Order 05 entered in Docket TR-040664 on January 19, 2006, and Order 01 entered in Docket TR-050967 on the same date.

<sup>4</sup> *Id.*

6 **Initial Order:** The presiding administrative law judge proposes to deny the petitions.

7 **Appearances:** The parties were represented as follows.

Petitioner, City of Kennewick by John Ziobro  
City Attorney's Office  
P.O. Box 6108  
Kennewick, WA 99336-0108  
Attorney City

Commission Staff by Jonathan Thompson  
Assistant Attorney General  
1400 S. Evergreen Park Dr. SW  
Olympia, WA 98504-0128

Respondent, UPRR by Carolyn L. Larson  
Dunn Carney Allen Higgins & Tongue LLP  
851 SW Sixth Avenue, Suite 1500  
Portland OR 97204-1357

Respondent, Port of Benton by Daryl Jonson<sup>6</sup>  
Cowan Moore Stam & Luke, P.S.  
P.O. Box 927  
Richland, WA 99352

Respondent, TCRY by Brandon L. Johnson  
Minnick-Hayner  
P.O. Box 1757  
Walla Walla, WA 99362-0348

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<sup>5</sup> The Agreement renders moot the outstanding motion to dismiss for lack of jurisdiction filed by the Port of Benton on February 7, 2006.

<sup>6</sup> The Port of Benton reached an agreement with the Cities of Kennewick and Richland and did not enter an appearance at hearing.

Respondent, BNSF Railway by Kevin MacDougall  
Montgomery Scarp MacDougall, PLLC  
Seattle Tower, 27<sup>th</sup> Floor  
1218 Third Avenue  
Seattle, WA 98101

## DISCUSSION

- 8 **Issue:** The principal issue in these proceedings is whether Kennewick should be authorized to extend Center Parkway between Tapteal Drive and Gage Boulevard with an at-grade crossing over four sets of railroad tracks owned by the UPRR and the Port of Benton. The tracks owned by the Port of Benton are leased to the TCRY. The other parties to these proceedings, UPRR, TCRY, BNSF, and the Commission Staff oppose granting the request for an at-grade crossing.
- 9 **Applicable Law:** The Commission's authority to regulate the safety of grade crossings is set forth in Chapter 81.53, RCW. The law, RCW 81.53.020, disfavors at-grade railroad crossings and requires railroad crossings to be constructed with a grade separation, where practicable. The same statute provides that Kennewick must obtain authority from the Commission for the at-grade crossing. According to RCW 81.53.030, the Commission has discretion to grant or deny petitions for opening at-grade crossings.
- 10 The Commission's consideration of whether to grant an at-grade crossing is premised on the theory that all at-grade crossings are dangerous.<sup>7</sup> The Commission then considers the following analysis:

[T]he Commission will direct the opening of a grade crossing within its jurisdiction when the inherent and the site-specific dangers of the crossing are moderated to the extent possible with modern design and signals and when there is an acute public need which outweighs the resulting danger of the crossing. Such needs which have been found appropriate include the lack of a reasonable alternate access for public emergency services; and the

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<sup>7</sup>RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146,150, 80 P.2d 406 (1938).

sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.<sup>8</sup>

- 11 If the petitioner demonstrates that the inherent and site-specific dangers are moderated to the extent possible and there is an acute public need for the crossing that outweighs the danger, then the analysis turns to application to the factors in RCW 81.53.020, to determine whether a separation of grades is practicable. That statute provides in pertinent part, that:

[I]n determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway, the grade and alignment of the railroad and the highway, the cost of separating grades, the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry.

- 12 **Burden of Proof:** Kennewick has the burden of proving that the inherent and site-specific dangers at the proposed crossing have been moderated to the extent possible and that there is an acute public need to construct an at-grade crossing at Center Parkway between Tapteal Drive and Gage Boulevard that outweighs the danger. If Kennewick meets that burden, then Kennewick bears the burden of demonstrating that a separation of grades is impracticable.

- 13 **Petitions for At-Grade Crossings:** The Cities of Kennewick and Richland are interested in extending Center Parkway between Tapteal Drive in Richland and Gage Boulevard in Kennewick.<sup>9</sup> At the present time, four sets of railroad tracks obstruct the southern extension of Center Parkway from Tapteal Drive and the northern extension of Center Parkway from Gage Boulevard.<sup>10</sup> There is a regional shopping mall on the southern side of the railroad tracks and other commercial and retail development north of the railroad tracks.<sup>11</sup> The closest ingress and egress between the two commercial and retail areas is at either Columbia Center Boulevard or Steptoe

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<sup>8</sup> *Town of Tonasket*, Docket No. TR-921371 (1993).

<sup>9</sup> Darrington, Exh. No. 1 at 1:24-25

<sup>10</sup> Darrington, Exh. No. 2.

<sup>11</sup> Darrington, Exh. 2.

Street. Columbia Center Boulevard is approximately 0.38 miles to the east of the proposed crossing.<sup>12</sup> There is a separated grade crossing, an overpass, at Columbia Center Boulevard.<sup>13</sup> Steptoe Street is approximately 0.6 miles to the west of the proposed crossings.<sup>14</sup> There is an at-grade crossing at Steptoe Street.<sup>15</sup>

- 14 *Inherent Danger in At-Grade Crossings:* There are two petitions at issue in this proceeding because four sets of railroad tracks, used and operated by three different railroads, would be affected by this crossing.<sup>16</sup> The first petition involves UPRR. The proposed extension of Center Parkway would cross two UPRR tracks that are used for interchanging cars with the TCRY.<sup>17</sup> The southerly track is the end portion of the Kalan Industrial lead and is referred to as the old Union Pacific (UP) Main.<sup>18</sup>
- 15 UPRR uses these tracks to interchange cars with TCRY.<sup>19</sup> TCRY sets out cars (primarily refrigerator cars or “reefers”) in the morning and UPRR picks up the TCRY cars in the evening as well as setting out cars for TCRY to pick up the following morning.<sup>20</sup> The procedure for picking up and setting out cars varies depending on the number of cars to be picked up from TCRY.<sup>21</sup> If UPRR had 9-10 or fewer cars to pick up, it would cross Center Parkway twice.<sup>22</sup> If UPRR had more than 10 cars to pick up, it would cross Center Parkway up to eight times to complete the switching operation.<sup>23</sup>
- 16 The second petition at issue involves TCRY and BNSF’s use of the Port of Benton track. BNSF uses the track to interchange cars with TCRY.<sup>24</sup> TCRY sets out cars for BNSF in the morning and BNSF picks them up between noon and 6:00 p.m., and sets out cars for TCRY to pick up the following morning.<sup>25</sup> BNSF performs these switching operations in the location of the proposed crossing approximately one time

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<sup>12</sup> Darrington, Exh. No. 2 and Plummer Exh. No. 6 at 8:22-24.

<sup>13</sup> Plummer, Exh. No. 6 at 8:22-24

<sup>14</sup> Darrington, Exh. No. 2 and Plummer, Exh. No. 6 at 8:21-22.

<sup>15</sup> Plummer, Exh. No. 6 at 8:21-22.

<sup>16</sup> Plummer, Exh. No. 6 at 3:6-8.

<sup>17</sup> Leathers, Exh. No. 15 at 2:8-9.

<sup>18</sup> Leathers, Exh. No. 15 at 2:9-11.

<sup>19</sup> Leathers, Exh. No. 15 at 2:22.

<sup>20</sup> Leathers, Exh. No. 15 at 2:22-24.

<sup>21</sup> Leathers, Exh. No. 15 at 2:25-26.

<sup>22</sup> Leathers, Exh. No. 15 at 3:24.

<sup>23</sup> Leathers, Exh. No. 15 at 3:25-26.

<sup>24</sup> Labberton, Exh. No. 50 at 2:25-26.

<sup>25</sup> Labberton, Exh. No. 50 at 2:26-27.

per day, five days per week.<sup>26</sup> BNSF would cross Center Parkway approximately four times for each switching operation.<sup>27</sup>

17 TCRY has a long-term lease with the Port of Benton for track that meets the UPRR track at Richland Junction.<sup>28</sup> TCRY interchanges cars with both UPRR and the BNSF at that junction.<sup>29</sup> TCRY has both a main line and a siding at Richland Junction.<sup>30</sup> TCRY's main line connects to the UPRR branch line and the siding is the track primarily used for interchanging rail traffic with BNSF.<sup>31</sup> TCRY uses the UPRR Old Pass for interchanging traffic with UPRR.<sup>32</sup> TCRY picks up and drops off UPRR cars at least once a day.<sup>33</sup> Depending on the time of year, TCRY picks up BNSF cars multiple times a week.<sup>34</sup> It is not unusual for TCRY to conduct switching operations two to three times a day during the busy season.<sup>35</sup> TCRY was unable to state with specificity the number of times it would cross Center Parkway during its switching operations, but with the combined UPRR and BNSF interchange traffic, it would be "a lot."<sup>36</sup>

18 Kennewick stated that there are other at-grade crossings in Washington that have extensive rail movement.<sup>37</sup> There is an at-grade crossing at East D Street, in Tacoma, where over 45 freight and 10 passenger trains pass daily.<sup>38</sup> Numerous switching operations occur at the same location 24 hours a day.<sup>39</sup> This street is currently being grade separated.<sup>40</sup> At the Stacy Street Yard in Seattle, there is an at-grade crossing at Royal Brougham, a major roadway, where switching occurs 24 hours a day, seven days a week.<sup>41</sup>

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<sup>26</sup> Labberton, Exh. No. 50 at 3:15-16.

<sup>27</sup> Labberton, Exh. No. 50 at 3:24.

<sup>28</sup> Peterson, Exh. No. 41 at 2:20-23.

<sup>29</sup> Peterson, Exh. No. 41 at 2:23-24.

<sup>30</sup> Peterson, Exh. No. 41 at 2:28-29.

<sup>31</sup> Peterson, Exh. No. 41 at 2:9 and 3:1.

<sup>32</sup> Peterson, Exh. No. 41 at 3:1-2.

<sup>33</sup> Peterson, Exh. No. 41 at 9:6-9.

<sup>34</sup> Peterson, Exh. No. 41 at 9:10-13.

<sup>35</sup> Peterson, Exh. No. 41 at 9:27-29.

<sup>36</sup> Peterson, TR. 357:9-12.

<sup>37</sup> Short, Exh. No. 48 at 7:19-25 and 8:1-2.

<sup>38</sup> Short, Exh. No. 48 at 7:21-22.

<sup>39</sup> Short, Exh. No. 48 at 7:22-23.

<sup>40</sup> Short, Exh. No. 48 at 7:23-24.

<sup>41</sup> Short, Exh. No. 48 at 7:24-25 and 8:1-2.

- 19 It is apparent from the foregoing facts that extensive switching operations for three railroads are conducted at the proposed Center Parkway crossing. Naturally, the nature and extent of the railroad traffic will impact the site-specific crossing dangers that are presented by the proposed crossing and that Kennewick must address in its demonstration of the types of signals and warning devices that Kennewick would need to install to moderate those dangers to the extent possible. The danger present at the proposed crossing also influences Kennewick's demonstration of acute public need.
- 20 The law disfavors at-grade crossings because certain risks are inherent.<sup>42</sup> In such crossings, trains and vehicles are in close proximity and there is the risk of a vehicle/train encounter, a pedestrian/train encounter, emergency vehicle delays, and general traffic delays.<sup>43</sup> The magnitude of switching operations at the proposed crossing increases the hazard for train collisions with vehicles, pedestrians, or bicycles resulting in personal injury and/or property damage because of the frequent occurrence of train activity.<sup>44</sup> In addition, with this site involving four railroad tracks, the drivers of vehicles who ignore warning signs and drive too fast for the conditions may launch over the second track or "bottom out" depending the speed and direction of the vehicle.<sup>45</sup> At-grade crossings present a physical point of contact between trains and other modes of travel, including pedestrians.<sup>46</sup> Accidents involving even slow-moving trains, as is the case with trains engaged in switching operations, may result in loss of life or serious injury to the pedestrians or vehicle's driver and any passengers involved as well injury to train crews.<sup>47</sup> Grade crossing accidents also have adverse psychological effects on train crews.<sup>48</sup>
- 21 The risks are exacerbated when the crossing involves more than one set of tracks. In crossings involving multiple tracks, such as the Center Parkway crossing, motorists might mistakenly assume that stationary railcars are the reason for crossing gate activation and may attempt to circumvent the gates only to be hit by a train

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<sup>42</sup> RCW 81.53.020; *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 406 (1938).

<sup>43</sup> Plummer, Exh. No. 6 at 5:20-21.

<sup>44</sup> Deskins, Exh. No. 13:15; Hammond, Exh. No. 37 at 4:14-17 and 5:4-6; Peterson, Exh. No. 41 at 6:17-18.

<sup>45</sup> Deskins, Exh. No. 13 at 3:15-17.

<sup>46</sup> Trumbull, Exh. No. 32 at 3:3-5.

<sup>47</sup> Trumbull, Exh. No. 32 at 3:7-8.

<sup>48</sup> Trumbull, Exh. No. 32 at 3:8-9.



approaching on another track that was hidden from view by the stationary cars.<sup>49</sup> Motorists may also grow impatient waiting for the train activity to cease and the crossing to clear resulting in motorists taking evasive driving action that increases the risk of accidents with other vehicles as they attempt to turn around and retrace their travel patterns to avoid the crossing delay.<sup>50</sup> More than 50 percent of accidents occur at signalized crossings.<sup>51</sup>

22 *Moderation of Danger to the Extent Possible:* The first prong of the legal test is for Kennewick to demonstrate that the inherent and site-specific dangers of the crossing are moderated to the extent possible by the installation of safety devices. The evidence on this topic was sparse. Kennewick stated that it intended to seek approval from the FRA to install a silent at-grade crossing.<sup>52</sup> For this type of crossing, Kennewick asserted that the FRA would require the installation of median barriers and crossing gates that fully block all four quadrants of the roadway.<sup>53</sup> However, in response to inquiry by Commission Staff, Kennewick was unable to articulate exactly the type of safety devices it would install to moderate the danger at the Center Parkway crossing site.<sup>54</sup> Specifically, Kennewick was asked if it proposed to put in four quadrant gates and median barriers if the FRA did not approve a silent crossing and Kennewick indicated that “we’re not really that far into the design. . .”<sup>55</sup> Kennewick was also unable to respond to inquiry regarding whether wayside horns constitute supplemental safety devices.<sup>56</sup> Kennewick indicated that information regarding crossing safety devices would be the type of work to be addressed by a consultant.<sup>57</sup> However, the study performed by the consultants hired by Kennewick contains a paucity of information on this topic. The study does address installing a railroad crossing with arms at a cost of \$220,000, but Kennewick did not present any specific design to protect the crossing.<sup>58</sup> One proposal was to install a median separator and four quadrant gates, but that was presented as only “one possible design.”<sup>59</sup> It is clear from the absence of a sufficient record on this topic that

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<sup>49</sup> Trumbull, Exh. No. 32 at 3:24-26 and 4:1-2.

<sup>50</sup> Peterson, Exh. No. 41 at 7:5-11.

<sup>51</sup> Trumbull, TR. 231:3-10,

<sup>52</sup> Kennewick has not yet sought approval from the FRA.

<sup>53</sup> Plummer, Exh. No. 6 at 8:3-6.

<sup>54</sup> Plummer, TR. 147:7-12.

<sup>55</sup> Plummer, TR. 147:10-12.

<sup>56</sup> Plummer, TR 148-5-25 and 149:1-4.

<sup>57</sup> Plummer, TR. 149:1-4.

<sup>58</sup> Plummer, Exh. No. 7 at 37:21.

<sup>59</sup> Deskins, TR. 198:10-14.

Kennewick did not meet its burden of proof that the site-specific and inherent risks of the Center Parkway crossing have been moderated to the extent possible.

- 23 Having failed to meet its burden of proof on the first prong of the applicable legal standard, the petitions could be denied without further discussion. However, it may provide some guidance to Kennewick for future filings to consider the second prong of the legal standard.
- 24 *Acute Public Need:* The second prong of the legal test applicable in these proceedings is for Kennewick to demonstrate that there is an acute public need for the crossing that outweighs the danger. For the City of Richland, the road extension would serve two purposes: (1) it would facilitate new commercial and retail development along Tapteal Drive,<sup>60</sup> and (2) it would improve traffic circulation.<sup>61</sup> The City of Kennewick cites the primary benefit of the crossing as relief of present and future traffic congestion from Columbia Center Boulevard which is currently approximately 40,000 vehicles per day.<sup>62</sup> The City of Kennewick also asserted that there would be greater accessibility to Kennewick retail business which would improve the economic strength and vitality of this area.<sup>63</sup>
- 25 With respect to commercial and retail development along Tapteal Drive, it appears that there is new commercial and retail development even absent the at-grade crossing at Center Parkway.<sup>64</sup> A newly-constructed Holiday Inn Express is located immediately north of the railroad tracks off Tapteal Drive.<sup>65</sup> There is also a Home Depot, a Costco, Circuit City, and Staples in the same area.<sup>66</sup> In addition, within the past two years, a Macy's furniture store was constructed and a second furniture store is under construction.<sup>67</sup> Thus, it appears that economic development in this area is occurring even without the proposed crossing. In any event, while economic

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<sup>60</sup> Darrington, Exh. No. 1 at 3:1-3 and Plummer, Exh. No. 6 at 3:13-15..

<sup>61</sup> Darrington Exh. No. 1 at 3:3-5

<sup>62</sup> Hammond, Exh. No. 5 at 2:17-18 and Hammond, TR. 120:10-20. The testimony of the City of Kennewick is in conflict on this issue. While one witness, Hammond cites relief of traffic congestion at the "primary benefit", another witness, Deskins, cites stimulation of economic growth as the "primary need." Deskins, Exh. No. 13 at 4:16.

<sup>63</sup> Hammond, Exh. No. 5 at 2:18-20 and Plummer, Exh. No. 6 at 3:13-15.

<sup>64</sup> Darrington, TR. 285:6-9.

<sup>65</sup> Darrington, Exh. No. 2 and Leathers, Exh. Nos. 23-26.

<sup>66</sup> Darrington, Exh. No. 2; Deskins, TR. 19:19-25 and 20:1-4; Deskins TR 204:5-11; Darrington, TR. 285:16-17; Darrington, TR. 294:13-14..

<sup>67</sup> Deskins, TR. 19:19-25 and 20:1-14 and Deskins, TR. 204:5-11.

development is definitely a positive goal for these cities, it does not rise to the level of an acute public need.

- 26 The second goal cited by Kennewick, traffic mitigation, may constitute acute public need if alternate crossings are insufficient to accommodate traffic.<sup>68</sup> Based on the record, it does not appear that the Center Parkway crossing would be particularly effective in achieving the goal of traffic mitigation. According to Kennewick, if the Center Parkway crossing is approved, the projected average daily volume of traffic on this roadway would be 2,200 vehicles.<sup>69</sup> The average daily volume of traffic is projected to increase to 4,250 by the year 2023.<sup>70</sup> Therefore, assuming that Kennewick is accurate in its estimates, only approximately 5-6 percent of the traffic would be diverted from Columbia Center Boulevard.<sup>71</sup> In 2023, approximately 700 vehicles could be diverted off Steptoe Street onto the new Center Parkway extension.<sup>72</sup> The traffic diversion from Steptoe Street was characterized as slight and probably within the daily variation of traffic on Steptoe Street.<sup>73</sup> Alleviating traffic congestion is a positive goal. However, the *de minimis* level of traffic diversion anticipated by Kennewick does not appear to be an effective means to accomplish that goal. Moreover, the two alternate crossings at Columbia Center Boulevard and Steptoe Street appear adequate to accommodate this level of traffic and both alternate crossings are within 0.6 miles or less of the proposed Center Parkway crossing. Therefore, Kennewick did not meet its burden of proof on the second prong of the legal standard.
- 27 Having concluded that Kennewick failed to meet its burden of proof for the first two prongs of the legal standard; that is, to demonstrate that it has moderated the risks associated with the crossing to the extent possible and that there is an acute public need for the crossing that outweighs the danger, the petitions should be denied.

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<sup>68</sup> See n. 8.

<sup>69</sup> Plummer, Exh. No. 6 at 6:18.

<sup>70</sup> Plummer, Exh. No. 6 at 6:18-19.

<sup>71</sup> Plummer, TR. 152:12-25 and 153:1-7 and Hammond, TR. 243:18-19..

<sup>72</sup> Hammond, TR. 243:8-12.

<sup>73</sup> Hammond, TR. 242:14-17.

## FINDINGS OF FACT

- 28 Having discussed above in detail all matters material to the Commission's decision, and having stated general findings, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the Commission's ultimate decisions are incorporated by this reference.
- 29 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to determine whether a highway may be extended across a railroad at grade.
- 30 (2) The City of Kennewick filed two petitions on behalf of the Cities of Kennewick and Richland to construct an at-grade crossing of four railroad tracks at Center Parkway.
- 31 (3) The first petition involves extending Center Parkway across two Union Pacific Railroad tracks.
- 32 (4) The second petition involves extending Center Parkway across two Port of Benton railroad tracks that are leased to Tri City and Olympia Railway.
- 33 (5) There is a regional shopping mall on the southern side of the railroad tracks and commercial and retail development north of the railroad tracks.
- 34 (6) Access between the regional shopping mall and the commercial and retail development is via either Columbia Center Boulevard or Steptoe Street.
- 35 (7) Columbia Center Boulevard is approximately 0.38 miles east of the proposed crossing and has an over-grade crossing of the railroad tracks.
- 36 (8) Steptoe Street is approximately 0.6 miles west of the proposed crossing and has an at-grade crossing of the railroad tracks. .

- 37 (9) Union Pacific Railroad, Tri City and Olympia Railway, and BNSF conduct extensive switching operations on the four tracks that are at issue in these petitions.
- 38 (10) Railway crossings at-grade are inherently dangerous because they present the potential for train and vehicular, pedestrian, or bicycle conflict.
- 39 (11) The potential for train and vehicular, pedestrian, or bicycle conflict is exacerbated by the existence of four railroad tracks and the presence of three railroads conducting switching operations at the proposed crossing site.
- 40 (12) Kennewick does not have a definitive plan for the types of safety equipment, including gates, signals, lights, and signage that would be installed at the proposed crossing.
- 41 (13) Kennewick proposed the railroad crossing to facilitate new commercial and retail development both north and south of the railroad tracks and to reduce traffic congestion.
- 42 (14) The other parties to these proceeding, Union Pacific Railroad, Tri City and Olympia Railroad, BNSF Railway, and the Commission Staff oppose granting the petitions.

### **CONCLUSIONS OF LAW**

43 Having discussed above in detail all matters material to the Commission's decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the Commission's ultimate decisions are incorporated by this reference.

- 44 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings, according to RCW 81.53.
- 45 (2) Pursuant to RCW 81.53, at-grade crossings are disfavored because of the inherent public risk.

- 46 (3) Pursuant to RCW 81.53.030 and case law,<sup>74</sup> the Commission may either grant  
or deny petitions for at-grade crossings.
- 47 (4) At-grade crossings may be permitted if the inherent and site-specific dangers  
of the crossing are moderated to the extent possible and there is an acute  
public need for the crossing that outweighs the danger.
- 48 (5) Kennewick has the burden of proof in these proceedings.
- 49 (6) Kennewick failed to meet its burden of proof that the inherent and site-specific  
dangers of the crossing are moderated to the extent possible and there is an  
acute public need for the crossing that outweighs the danger.
- 50 (7) The petition filed by the City of Kennewick for approval of an at-grade  
crossing of Center Parkway with the Union Pacific Railroad's dead end spur  
west of Richland Junction should be denied.
- 51 (8) The petition filed by the City of Kennewick for approval of an at-grade  
crossing of Center Parkway over the Port of Benton and Tri-City and Olympia  
Railroad's Hanford Industrial Branch we of Richland Junction should be  
denied.

## ORDER

### THE COMMISSION ORDERS THAT

- 52 (1) The petition filed by the City of Kennewick for approval of an at-grade  
crossing at Center Parkway with the Union Pacific Railroad's dead end spur  
west of Richland Junction is denied.

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<sup>74</sup> *Town of Tonasket*, WUTC Docket No. TR-921371 (1993) and *Department of Transportation v. Snohomish County*, 35 Wn 2d 247, 254, 212 P.2d 829 (1949).

- 53 (2) The petition filed by the City of Kennewick for approval of an at-grade crossing of Center Parkway over the Port of Benton and Tri-City & Olympia Railroad's Hanford Industrial Branch west of Richland Junction is denied.

Dated at Olympia, Washington, and effective January 26, 2007.

PATRICIA CLARK  
Administrative Law Judge

#### **NOTICE TO THE PARTIES**

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250