

January 19, 2007

CAROLYN L. LARSON

DIRECT DIAL
503.417.5462

E-MAIL
cll@dunn-carney.com

ADDRESS
Suite 1500
851 S.W. Sixth Avenue
Portland, Oregon
97204-1357

Phone 503.224.6440
Fax 503.224.7324

INTERNET
www.dunncarney.com

Via Federal Express

Carole Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 98504-7250

Re: City of Kennewick vs. Union Pacific Railroad, et al.
Dockets TR-040664 and TR-050967, Consolidated
Our File No. UNI045-0016

Dear Ms. Washburn:

Enclosed are an original and three (3) copies of Union Pacific Railroad's Post-Hearing Brief in the above-referenced matter. A copy of the brief was sent by regular U.S. Mail and electronic mail to all parties of record.

If you have any questions, please feel free to contact me.

Very truly yours,

Carolyn L. Larson

CLL:jcm
Enclosures

cc: Brandon Johnson (w/encl., e-mail and U.S. mail)
John Ziobro (w/encl., e-mail and U.S. mail)
Jonathan Thompson (w/encl., e-mail and U.S. mail)
Bradley Scarp (w/encl., e-mail and U.S. mail)

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BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,)	
)	DOCKET NO. TR-040664
Petitioner,)	
)	
v.)	
)	
UNION PACIFIC RAILROAD,)	
)	
Respondent.)	
<hr/>		
CITY OF KENNEWICK,)	DOCKET NO. TR-050967
)	(Consolidated)
Petitioner,)	
)	
v.)	UNION PACIFIC RAILROAD'S
)	POST-HEARING BRIEF
PORT OF BENTON and TRI-CITY &)	
OLYMPIA RAILROAD,)	
)	
Respondent.)	
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1 deeper into the adjoining neighborhood. Absent Federal Railroad Administration (FRA)
2 approval for a quiet zone, the new crossing would trigger a requirement that trains blow their
3 horns in this area, an often unwelcome sound to residents and hotel guests.

4 The City has not met its burden of establishing a substantial public need for a road
5 extension at this location that would outweigh the risks and detriments. Its assertion that the
6 road extension would relieve congestion on Columbia Center Boulevard was not borne out by
7 the evidence presented at the October 19-20, 2006 hearing. Its claim that the road extension
8 would reduce travel times was not quantified by any City travel time studies; in fact, evidence
9 submitted by UP showed the time savings to be minimal. The City of Richland's assertion that
10 the road connection is needed to encourage retail development along Tapteal Drive would, if
11 true, describe an indirect public benefit rather than a direct public need. The need for the
12 crossing is too insubstantial to overcome the problems it would create.

13 At the October hearing, the City suggested that some of the problems with its crossing
14 proposal could be corrected if various modifications were made. It is UP's position that, if the
15 City seeks authority to install a crossing other than the four-track proposal for which it has
16 formally sought authority, it must file an amended petition describing what it truly seeks. It is
17 not tolerable for the City to seek approval of a "worst case scenario," asking the Commission to
18 "trust" that the City will be able make substantial modifications to what it has requested. The
19 respondents need to know what the City actually seeks to do so that any fatal flaws can be
20 identified.

21 II. LEGAL STANDARD FOR APPROVAL OF CROSSING.

22 The City erroneously contends that "the only burden on the City" for obtaining a new at-
23 grade crossing "is to demonstrate that an under or over-grade crossing is not practicable."
24 City's Brief at 20.¹ For this argument, the City relies on *State ex rel. City of Toppenish v. Public*
25

26 ¹ Union Pacific does not object to an undercrossing. This brief is applicable only if the Commission finds that an
undercrossing is not practicable and is considering whether to authorize an at-grade crossing.

1 *Service Commission*, 114 Wash. 307 (1921), which determined, based on a prior version of
2 Washington’s statute on new crossings, that the Commission is obligated to authorize an at-
3 grade crossings if an above or below grade crossing would not be practicable. Reliance on
4 *Toppenish* is misplaced, however, as Washington’s statute on new crossings has been
5 substantially modified since *Toppenish*.

6 The current version of RCW 81.53.030 reads: “[i]f [the Commission] finds that it is not
7 practicable to cross the railroad or highway either above or below grade, the commission shall
8 enter a written order in the cause, *either granting or denying* the right to construct a grade
9 crossing at the point in question” (emphasis added). In *Town of Tonasket v. Burlington*
10 *Northern Railroad Company*, TR-921371 (1993), the Commission recited the state’s public
11 policy as to railroad crossings and the balancing process to be undertaken when considering
12 whether to authorize a new one:

13 All crossings at grade are dangerous, and the policy of the law is strongly against
14 the allowance of such crossings. * * * Because of the strong public policy against
15 the opening of a crossing, the proponents of a crossing have a heavy burden to
overcome in order to demonstrate that a crossing should be established.” *Id.* at 4.

16 The correct legal standard for deciding whether to allow a new at-grade crossing (or
17 close an existing one) is to apply a balancing test comparing the convenience and necessity for
18 the crossing to the hazards posed by it. This test derives from *Department of Transportation v.*
19 *Snohomish County*, 35 Wn.2d 247, 254 (1949) which states “we must also consider the
20 convenience and necessity of those using the crossing and whether the need of the crossing is so
21 great that it must be kept open notwithstanding its dangerous condition.” The Commission’s
22 balancing test allows the grant of a new at-grade crossing if “the inherent and site-specific
23 dangers of the crossing are moderated to the extent possible with modern design and signals and
24 when there is an acute public need which outweighs the resulting danger of the crossing.”
25 *Tonasket* at 4 citing *Whatcom County v. Burlington Northern Railroad Company*, TR-1725 and
26 TR-1726 (1985). Thus, in this case, the City carries the heavy burden of proving that the public

1 need for the crossing is so acute that it justifies the addition of a type of crossing disfavored
2 strongly by the Legislature and the Commission for its inherent danger to public safety.

3 To satisfy this burden of proof, the Commission has determined that “acute public need”
4 may include: “the lack of alternative reasonable access; the lack of alternative reasonable access
5 for public emergency services; and the insufficiency of alternate grade crossings, perhaps
6 because of traffic in excess of design capacity.” *Id.*

7 These standards dovetail with what the City would need to establish in order to condemn
8 a right of way across UP’s property, which would be its next step if it were to convince the
9 Commission that an at-grade crossing were justified. Railroads and cities both have the right to
10 condemn property. For a city to condemn property already devoted to public use as a railroad
11 right of way, the city’s use must not unduly interfere with the railroad’s use. *State ex rel. Puget*
12 *Sound & B.R. Ry. Co. v. Joiner*, 182 Wash. 301, 47 P.2d 14 (1935) dealt with the state’s
13 condemnation of the outer edge of the railroad’s right of way for highway purposes. In
14 reviewing whether property already devoted to public use could be condemned, the court stated:
15 “[e]xcept where property devoted to a public use is sought for a superior public use, the right to
16 condemn such property must be so exercised as not to substantially interfere with the prior use.”
17 (citing *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 P. 332). In the
18 *Joiner* case, the court reviewed the railroad’s current and future expected uses of its right of way
19 and determined that the outer 15 feet of the right of way were not needed for railroad purposes.

20 In *State ex rel. Portland & Seattle Ry. Co. v. Superior Court*, 45 Wash. 270, 88 P. 201
21 (1907), one railroad sought to extend its rail line through the center of the yards and terminal
22 grounds of another railroad. The court determined that the new line would “seriously interfere
23 with the use of existing company’s terminal yards.” While recognizing a railroad’s right to
24 condemn land for its right of way, the court stated:

25 In such a case the established rights of the prior locator should be considered, and,
26 if the public necessities of the new locator can be reasonably as well served by
another location, it ought not to be permitted to enter established grounds and

1 cross a system of established and proposed tracks so as to seriously interfere with
2 present traffic and with plans for future and increased traffic. If there should be
3 no other reasonable route then, without doubt, the older locator would be
4 subjected to the burden of the public necessities of the newer one. What may
5 constitute another reasonable route must be a question of fact in each case,
6 depending upon all the circumstances and the entire environment. * * * To justify
7 such taking there must be a necessity; 'a necessity so absolute that without it the
8 grant itself will be defeated. * * *'

9 The City must establish an acute public need for the crossing that outweighs its
10 interference with railroad operations and harmful effects on the adjoining neighborhood. As
11 shown below, it has not met that burden.

12 III. THE CROSSING WOULD INTERFERE WITH RAILROAD OPERATIONS.

13 Lloyd Leathers testified as to how a roadway across the tracks would interfere with UP's
14 interchange operations. Instead of being able to hold 40-45 cars on UP Pass, capacity will be
15 reduced to 30-33 cars.² As shown on Exhibits 17, 18, 46 and 47, the number of cars being
16 interchanged at Richland Junction increased in 2006 over 2005 traffic figures. Both Lloyd
17 Leathers and Randolph Peterson testified that they expect future increases.³ Reducing the
18 amount of trackage available to interchange cars hampers the railroads' ability to move this
19 freight.

20 In addition, the crossing will create more work for UP. If it has more than 23-25 cars to
21 leave for TCRY, it will need to split the cars on each side of the crossing.⁴ If it has more than
22 ten cars to leave for TCRY, it will need to cross Center Parkway eight times.⁵ Each time, it will
23 need to make sure it has moved a sufficient distance past the crossing to allow the gates to go
24 back up.⁶

25 The impact on TCRY is more severe. TCRY is interchanging with both the BNSF
26 Railway and UP at Richland Junction. It brings cars to Richland Junction "unblocked." In

² Exh. No. 15, Leathers, 2:14-20, 4:14-23.

³ Leathers, TR. 341:1 - 342-1; Peterson, TR. 343:20 - 344:7, 346:7-14.

⁴ Exh. No. 15, Leathers, 2:17-19

⁵ Exh. No. 15, Leathers, 3:22 - 4:4.

⁶ Leathers, TR. 318:15 - 319:1

1 other words, when it arrives at Richland Junction, it does not have all of the cars destined for UP
2 in one solid block and those destined for BNSF in another block. The cars are interspersed
3 together.⁷ This means that TCRY must go back and forth through the switches east of the
4 proposed crossing to send cars destined for UP to UP Pass and cars destined for BNSF to Port
5 Pass. As demonstrated by Randolph Peterson at the hearing, the TCRY crews will need to cross
6 and recross the new road numerous times in order to interchange cars with UP and BNSF.
7 Many of those moves will be made with the locomotive shoving cars backward across the
8 crossing.⁸

9 For TCRY, these switching moves are complicated by the fact that the switch between
10 the Port Main and Port Pass is so close to the proposed crossing.⁹ The switches east of the
11 crossing are depicted on Exhibit 4. As TCRY heads east, it faces a switch less than 500 feet east
12 of the east edge of the proposed new roadway.¹⁰ If TCRY were to adjust its operations to ensure
13 that it wasn't fouling the signal circuits for the crossing gates when it stopped to throw that
14 switch, it would have to limit the number of cars it could pull past the crossing. This would add
15 to the number of switching moves needed to interchange cars with UP and BNSF: it would need
16 to "make a lot smaller cuts."¹¹ The alternative (allowing cars to foul the circuitry and keep the
17 gates down even though no train were occupying the crossing) is also unsatisfactory.

18 For the reasons discussed above, the proposed crossing would interfere with existing and
19 future operations on the interchange tracks.

20 IV. THE CROSSING POSES SAFETY RISKS.

21 The state of Washington recognizes that all crossings at grade are dangerous. *Tonasket*
22 at 4, citing *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 06
23 (1938). John Trumbull's testimony pointed out dangers specific to this crossing, such as having

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⁷ Peterson, TR. 350:13-25; 366:2-25.

25 ⁸ Peterson, TR. 367:19 - 368:16; 370:23 - 375:13.

⁹ Peterson, TR. 360:20 - 361:1.

26 ¹⁰ See the third to last page of Exh. No. 7, a drawing on a 1" to 200' scale, which shows the location of each
existing turnout ("T.O.").

¹¹ Peterson, TR 358:18 - 359:5.

1 multiple tracks, where “motorists might mistakenly assume that stationary railcars spotted near a
2 crossing are the reason for the crossing gates’ activation * * * [and attempt] to drive around the
3 gates, only to be hit by a train approaching on the second track which was hidden from view by
4 the stationary cars on the closer track.”¹²

5 Trumbull also pointed out that impatient pedestrians might try to climb through a train
6 that was stopped across a crossing while an air brake test was being conducted.¹³ Leathers
7 testified that UP would move the cars off the crossing to conduct the air brake test if there was
8 room to do so.¹⁴ In other testimony he stated that at most 23-25 cars could fit on the UP Pass to
9 the west of the crossing.¹⁵ Thus, there would not always be room to conduct the air brake test
10 west of the crossing. The longer the train, the more likely the train would sit on the crossing
11 during the air brake test. Likewise, the longer the train, the longer the air brake test would take,
12 since part of the test is walking both sides of the train.¹⁶ A similar situation would exist for
13 TCRY and its activities at Richland Junction during the mid to late morning hours¹⁷ when
14 higher use of the crossing by motorists and pedestrians would be expected.

15 The City conducted no safety studies of the crossing.¹⁸ It assumed that the risk of
16 accidents was small based on slow train speeds and its erroneous belief that only one or two
17 trains went by the Center Parkway area each day.¹⁹ As pointed out by Randy Hammond, slow
18 train speeds make little difference when pedestrians are involved.²⁰ And, as was made clear in
19 the testimony of Leathers and Peterson, trains would cross backwards and forwards over the
20 crossing up to eight times per day for UP and many more times per day for TCRY.²¹ That does
21

22 ¹² Exh. No. 32, Trumbull, 3:24 - 4:2.

23 ¹³ Exh. No. 32, Trumbull, 3:18-23.

24 ¹⁴ Leathers, TR. 319:2-6; 321:9-18.

25 ¹⁵ Exh. No. 15, Leathers 2:17-18.

26 ¹⁶ Exh. No. 32, Trumbull, 3:18-20.

¹⁷ Peterson, TR. 351:24 - 352:3.

¹⁸ Plummer, TR. 138:3-7.

¹⁹ Robert Hammond, TR. 126:13-22; Randy Hammond, TR. 245:16-25; 249:13 - 250:5.

²⁰ Randy Hammond, TR. 245:21-25.

²¹ Leathers, TR. 317:4-25; Peterson. TR. 374:20 - 375:13.

1 not include the BNSF moves. When all of the train moves are taken into account, there are
2 numerous opportunities each day for collisions to occur at the proposed crossing. For
3 pedestrians in particular, the crossing poses significant risks. Certainly both motorists and
4 pedestrians face a greater risk of being hit or run over by a train if the crossing is installed than
5 if the crossing application is denied.

6 V. THE CROSSING WOULD EXPOSE NEIGHBORS TO MORE NOISE.

7 It is undisputed that extending Center Parkway across the four interchange tracks would
8 bring more noise to the neighborhood west of the crossing. Refrigerator cars that UP can now
9 store east of the neighborhood will need to be stored opposite houses west of the crossing.²² The
10 City argued that the railroads are legally entitled to store cars deeper into this neighborhood.²³
11 That is beside the point. When trying to establish whether a crossing is “required for the public
12 convenience and necessity,” the Commission should consider the impact on nearby residents,
13 rather than focus exclusively on the convenience of some motorists. Neighborhood residents
14 are also members of the public.

15 VI. THE CROSSING IS NOT NEEDED.

16 None of the City’s justifications for the crossing establish an “acute public need” for the
17 crossing so as to overcome the adverse impacts its construction would create. Three
18 justifications were given: (A) that the road extension would alleviate congestion on Columbia
19 Center Boulevard; (B) that the road extension would reduce travel time between Columbia
20 Center Mall and Taptal Business Park; and (C) that the roadway would enhance economic
21 development in Taptal Business Park and undeveloped pockets of land south of the tracks.
22 None of these justifications stood up to scrutiny or is sufficient to outweigh the adverse impacts
23 the crossing would have on railroad operations, safety, or the well-being of the neighborhood to
24 the west of the crossing.

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26 ²² Leathers, TR. 316:2:16.

²³ Leathers, TR. 336:2 - 337:7.

1 (A) Alleviation of Congestion Would Be Minimal.

2 Based on the traffic figures in SCM's consultant report to the City, the extension of
3 Center Parkway would alleviate congestion on Columbia Center Boulevard in the year 2023 by
4 only 5 - 6%.²⁴ That is insignificant.

5 (B) Travel Time Savings Would Be Minimal.

6 The City estimated travel time savings of three to four minutes, but never did any travel
7 time studies.²⁵ Its estimated time savings were for the route depicted on Exhibit 31 between
8 points at either end of the roadway extension. Those beginning and ending points (between
9 Mail on the Mall and the Holiday Inn Express) do not, however, represent typical origination
10 and destination points for shoppers. UP's expert witness did conduct travel time studies.²⁶ He
11 found that that the "long route" (without the new crossing) between the intersection of Center
12 Parkway and Tapteal Drive and the intersection of Columbia Center Boulevard and Quinault
13 Street at the southeastern edge of Columbia Center Mall took 132.9 seconds going southbound
14 and 182.1 seconds going northbound. When the long route from the Holiday Inn Express to the
15 far edge of the mall takes only two to three minutes to begin with, there is certainly no acute
16 public need to shorten that travel time. Any savings of time achieved by the new crossing
17 would be so small as to be inconsequential.

18 (C) Commercial Development is Occurring Without the Crossing (and Installing a
19 Crossing to Enhance Retail Development Is Not a Public Purpose).

20 The City Manager of Richland asserted that a road connection across the tracks is
21 needed to encourage retail development, primarily along Tapteal Drive.²⁷ As established at the
22 hearing, however, commercial development already is taking place along Tapteal Drive

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²⁴ Exh. No. 7, Fig. 3b and 3c; Exh. No. 38, p. 4; Randy Hammond, TR. 242:24 - 243:20.

26 ²⁵ Deskins, TR. 184:17 - 186:10; 200:17 - 201:18.

²⁶ Exh. 38, p. 8, and Table 2 on p. 10.

²⁷ Darrington, TR. 284:24 - 285-5; 286:14 - 287:2.

1 notwithstanding the absence of the crossing. For example, two-year-old aerial photos of the
2 area are out of date because they do not show new stores being built along Tapteal Drive.²⁸

3 Even if the evidence demonstrated that a crossing would encourage faster retail
4 development, it is questionable whether such a goal qualifies as a “public purpose,” so as to
5 justify interfering with railroad operations and exposing the public to safety risks. *In re City of*
6 *Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981), addressed a city plan to condemn property for a
7 “downtown focus point” to “forestall the decay experienced by other cities’ retail cores.” *Id.*
8 The city planned to construct a park on a portion of the condemned property and deed the rest to
9 a developer for retail shops. The court agreed that the project was “in the public interest,” but
10 determined that its primary purpose was to increase retail shopping opportunities. Although
11 well-intentioned, the court ruled, such use of the property was not really a public purpose and
12 thus the city could not condemn the land. *Id.* at 627.

13 Similarly, encouraging retail development along Tapteal Drive is not a public purpose.
14 Encouraging faster retail growth, with the potential for increased tax revenues to support public
15 services may have some indirect “public benefit.”²⁹ But enhanced public revenues are, standing
16 alone, insufficient to satisfy the City’s heavy burden of establishing that there is an “acute
17 public need” that outweighs the dangers of the crossing, its interference with pre-existing
18 railroad operations, and the noise impacts on neighboring residents.

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26 ²⁸ Darrington, TR. 285:13 - 286:5.

²⁹ Darrington, TR. 287:3-24.

1 VII. COMMISSION MUST RULE ON CROSSING AS CURRENTLY
2 PROPOSED BY CITY.

3 At several points during the hearing, the City or its attorney suggested that any problems
4 with the requested four-track crossing could be remedied, that the crossing actually could be
5 more level than shown on the City's drawings, and that it could be reconfigured to cross fewer
6 tracks than the City is seeking approval to cross. See, for example, attorney Ziobro's re-direct
7 examination of Mr. Plummer.³⁰ At the same time, the City insisted that it did not want the
8 Commission to condition its authorization of the crossing on those problems being cured.³¹

9 The City, in essence, is saying "approve this bad crossing and trust us to make it better."
10 That would be bad policy. The City has had ample time to develop a better proposal.
11 Respondents deserve the right to review what is being proposed and identify fatal flaws. It does
12 not serve the public interest to authorize an unsatisfactory crossing and give the City the sole
13 discretion to make (or not make) improvements on it.

14 The pre-filed testimony of Raymond Wright pointed out the problems with the uneven
15 driving surface of the roadway.³² Even though the City received that testimony in November
16 2005, it had no plans or sketches showing how it would like to change the elevation of the
17 railroad tracks to smooth out the roadway surface. This failure to provide specifics suggests that
18 the fix may not be so easy; certainly the lack of specifics thwarts any reasonable review by the
19 respondents.

20 The City's ideas for moving interchange operations east of the crossing were at the
21 "conceptual" stage only.³³ The conceptual drawings failed to consider the need for slope
22 easements or retaining walls to account for the large elevation difference between the tracks and

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³⁰ Plummer, TR. 159:24 - 160:24.

³¹ Plummer, TR. 141:1-5; Kaufman, TR. 216:14-21.

³² Exh. No. 37, Wright, 3:23 - 4:5; Exh. No. 38, p. 12-14.


³³ Short, TR. 303:9-11.

1 the Home Depot parking lot north of the tracks.³⁴ Even at the conceptual stage, it was clear the
2 railroads would have less room to store cars than they now have.³⁵

3 UP asks the Commission to rule on the crossing as currently proposed by the City. If the
4 City seeks authority for a different or better crossing, UP requests that the Commission require
5 the City to submit a formal application for approval of that improved crossing.

6 DATED this 19th day of January, 2007.

7 DUNN CARNEY ALLEN HIGGINS & TONGUE LLP

8 
9 _____
10 Carolyn L. Larson, WSBA No. 29016
11 Email: cll@dunn-carney.com
12 Attorneys for Union Pacific Railroad Company

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26 _____

³⁴ Short, TR. 303:2-18.

³⁵ Short, TR. 307:1-4.

1 **TABLE OF AUTHORITIES**

2 **STATE CASES**

3 *In re City of Seattle*, 96 Wn. 2d 616, 638 P.2d 549 (1981)..... 10

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7 *Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d

8 06 (1938) 6

9 *State ex rel. City of Toppenish v. Public Service Commission*, 114 Wash. 307

10 (1921) 2

11 *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 P. 332 4

12 *State ex. rel. Portland & Seattle Railway Co. v. Superior Court*, 45 Wash. 270,

13 88 P. 201 (1907) 4

14 *State ex rel. Puget Sound & B.R. Railway Co. v. Joiner*, 182 Wash. 301, 47 P.2d

15 14 (1935) 4

14 **STATE STATUTES**

15 RCW 81.53.030 3

16 **MISCELLANEOUS**

17 *Town of Tonasket v. Burlington Northern Railroad Company*, TR-921371 (1993) 3

18 *Id.* at 4 3

19 *Tonasket* at 4 3

20 *Tonasket* at 4 6

21 *Whatcom County v. Burlington Northern Railroad Company*, TR-1725..... 3

22 *Id* 4

CERTIFICATE OF SERVICE

I hereby certify that the foregoing UNION PACIFIC RAILROAD'S POST-HEARING

BRIEF was served on:

Washington Utilities & Transportation Committee
1300 So. Evergreen Park Drive, S.W.
Olympia, WA 98504-7250

- By hand delivery
By first-class mail
By certified mail
[X] By overnight mail
[X] By email
By facsimile transmission

Brandon L. Johnson
Minnick Hayner, P.S.
249 W. Alder
Walla Walla, WA 99362
For Tri-City & Olympia Railroad

- By hand delivery
[X] By first-class mail
By certified mail
By overnight mail
[X] By email
By facsimile transmission

John S. Ziobro, City Attorney
City of Kennewick
210 W. 6th Avenue
Kennewick, WA 99336
For City of Kennewick

- By hand delivery
[X] By first-class mail
By certified mail
By overnight mail
[X] By email
By facsimile transmission

Jonathan Thompson
Asst. Attorney General
PO Box 40128
Olympia, WA 98504-0128
For WUTC Staff

- By hand delivery
[X] By first-class mail
By certified mail
By overnight mail
[X] By email
By facsimile transmission

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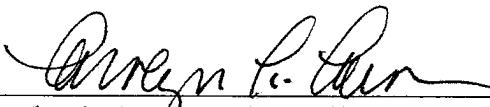
1 Bradley Scarp
2 Montgomery Scarp
3 1218 3rd Avenue
4 Seattle, WA 98101
For BNSF Railway Company

By hand delivery
 By first-class mail
 By certified mail
 By overnight mail
 By email
 By facsimile transmission

5 With first-class postage prepaid and deposited in Portland, Oregon.

6 DATED this 19th day of January, 2007.

7 DUNN CARNEY ALLEN HIGGINS & TONGUE LLP

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9 _____
10 Carolyn L. Larson, WSBA 29016
11 Attorneys for Respondent, Union Pacific Railroad Company
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