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

9 CITY OF KENNEWICK,

10
11 Petitioner,

12 vs.

13 TRI-CITY and OLYMPIA RAILROAD, et
14 al.,

15
16 Respondent.

DOCKET NO. TR-040664 and TR-050967

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18 TRI-CITY AND OLYMPIA RAILROAD'S
19 SUPPLEMENTAL BRIEF

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21 **COMES NOW** Respondent Tri-City and Olympia Railroad, hereafter "TCRY", by
22 and through its attorneys of record, Brandon L. Johnson and Minnick • Hayner, P.S., and
23 provides the following Supplemental Brief in follow-up to the hearing that occurred on
24 October 19 – 20, 2006, before the Washington State Utilities and Transportation Commission,
25 and also in response to the City of Kennewick's Supplemental Brief.

26 **I. BACKGROUND**

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28 The City of Kennewick (hereafter "City" or "Kennewick") has petitioned the
29 Washington State Utilities and Transportation Commissions (hereafter "WUTC") for an
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1 Order allowing it to install a silent at-grade crossing at the proposed northern extension of
2 Center Parkway. Following the October 2006 hearing before Administrative Law Judge
3 Patricia Clark, the parties submitted a joint pleading concerning the possibility of a conflict
4 between Washington State Law and the Federal Railroad Administration (“FRA”) on the
5 issue of FRA requirements for silent crossings and Washington Law requiring crossings to be
6 open. The City of Kennewick has now filed its Supplemental Brief.
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9 The City’s Brief raises what are essentially two arguments. First, that the City has
10 discretion to determine whether Center Parkway needs to be extended and “[i]t is not the role
11 of the railroads nor the Commission to second guess this decision.” Second, that because an
12 above ground or below ground (separated) crossing would be more expensive than an at-grade
13 crossing, it is not practicable for the City to do anything other than an at-grade crossing
14 because it has “determined that the difference is cost prohibitive.”
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18 Unfortunately, applying the rationale set forth in the City’s argument would
19 completely divest any decision making ability from the WUTC. Because at-grade crossings
20 will always be less expensive than separated crossings, if the City is correct that its sole
21 discretion is the only standard, there is simply no point in having the WUTC review petitions
22 for new crossings. In reality, the WUTC does have the ability to review the merits of the
23 City’s application and to make an order approving or denying the City’s petition regardless of
24 the City’s arguments to the contrary.
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28 TCRY believes that the City’s self serving limitations on WUTC authority are
29 necessary for it to have any chance at success because when one evaluates the evidence that
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1 has been presented to the WUTC and fairly weighs the City’s claim of alleged need against
2 the safety considerations, impact on local residents near the proposed crossing, and the impact
3 on railroad operations, it becomes clear that the City’s Petition should be denied.
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5 6 **II. ARGUMENT**

7 8 **A. Scope of Proceedings.**

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10 The City first argues that the Respondents’ efforts to limit the hearing to the City’s
11 Petition was improper. The City argues that it is not required to provide “final design
12 drawings with a petition.” In support of this argument, the City relies on the broad grant of
13 authority to the Commission pursuant to RCW 81.53.070.¹ However, it is the City who
14 wishes to construct the new at-grade crossing and therefore the City who bears the burden of
15 filing a petition “setting forth the reasons why the crossing cannot be made either above or
16 below grade.” RCW 81.53.030.
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19 Contrary to the City’s arguments, the Respondents were not attempting to limit the
20 Commission’s authority regarding what can be ordered. Rather, the attempt was to clarify for
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¹ This is one of several examples of inconsistencies within the City’s Brief. On the one hand,
26 the City argues that the Commission lacks authority to deny the petition because “[i]t is not
27 the role of the railroads nor the Commission to second guess [the] decision” to extend Center
28 Parkway. (Kennewick Brief at 2.) When it furthers its position, the City attempts to limit the
29 Commission’s authority. However, it takes the opposite approach and emphasizes the
30 Commission’s discretion and authority when it comes to the deficiencies in the Petition it
submitted.

1 what the City was petitioning. This was achieved through the testimony of Stephen Plummer,
2 the City's Project Engineer:

3
4 Q. Okay.

5 And on pages 9 to 10 of your testimony, you talked about an alternative
6 alignment for railroad tracks. But again, that is not what you are
7 seeking for the WTC to authorize in this hearing, is it; you're not
8 asking for only one or two crossings you're actually asking to go across
9 four tracks?

10 A. If we have to, we would, we are seeking to go across four tracks.
11 Ideally we would still attempt to negotiate with all of the railroads
12 involved to come up with mitigation with regards to the lost siding so
13 that they could continue their operations and reduce the number of
14 crossings to one track. We would hope that the railroad would be
15 willing to entertain those ideas.

16 Q. But you're not amending your application to provide that the WTC
17 should authorize this extension only if you are able to reduce the
18 number of tracks to only one or two tracks?

19 A. That's correct.

20 Plummer, TR. 140:11 – 141: 5. That the City's Petition does not ask the Commission to
21 adopt any of the track variations discussed by the City was also reinforced by Wayne Short,
22 the City's hired consultant. Short, TR. 307:22 – 308:4.

23 The Respondents have been placed at a disadvantage by the City's lack of planning.
24 The Respondents, and Commission for that matter, have been asked to respond to an
25 application that specifically and expressly seeks a "silent" at-grade crossing. However, as set
26 forth in the joint post-hearing pleading, it is undisputed that only the FRA has authority to
27 grant a "silent" crossing. The City concedes that no such application has been filed.
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1 Plummer, TR. 147:2-6. Moreover, the City engineer estimates that only 30% of the design
2 work needed for the proposed crossing has been completed. Plummer, TR. 152:2-4.
3

4 In sum, it is not the Respondents who are challenging the authority of the WUTC.
5 Rather, the Respondents are, and were, simply attempting to define the scope of the City's
6 petitions and confirming that no modification of the existing tracks is sought therein.
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9 **B. Substantive Issues.**
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11 The City raises a number of issues in its Brief; and also neglects a number of issues.
12 TCRY believes that the City's analysis is fundamentally flawed. The City has taken the
13 approach that it has the ultimate discretion to determine whether the proposed crossing shall
14 go forward and that the only question is whether the City has adequately demonstrated that a
15 separated crossing is practicable. The City then answers the practicable question in the
16 affirmative, primarily based on its argument that a separated crossing has been determined to
17 be "cost prohibitive."² Kennewick Brief at 2. Essentially, the City's position is that the
18 proposed crossing is inevitable "because the necessity of the crossing is not subject to
19 scrutiny." Kennewick Brief at 6.
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27 ² Another interesting point raised by the City's brief is that the "cost prohibitive" decision was
28 made jointly by both Kennewick and "its partner" the City of Richland. Richland is not a
29 party to these proceedings. TCRY questions whether it is appropriate for a non-party to be
30 involved in this proceeding and the underlying analysis.

1 TCRY disagrees, and believes that the Commission is given the authority to question
2 the alleged “need” for the crossing as well as the totality of all of the circumstances. Based on
3 the totality of the circumstances presented here, the City’s petitions should be denied.
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7 **1. At-Grade Crossings are Not Favored and the Petitioner Bears the Burden of**
8 **Proving that an At-Grade Crossing is Appropriate.**

9 The City cites to a portion of RCW 81.53.020, but fails to include the language
10 regarding the general rule that new crossings be separated. The full citation reads:

11 **Grade separation required where practicable**

12
13 All railroads and extensions of railroads hereafter constructed shall cross
14 existing railroads and highways by passing either over or under the same, when
15 practicable, and shall in no instance cross any railroad or highway at grade
16 without authority first being obtained from the commission to do so. **All**
17 **highways and extensions of highways hereafter laid out and constructed**
18 **shall cross existing railroads by passing either over or under the same,**
19 **when practicable, and shall in no instance cross any railroad at grade**
20 **without authority first being obtained from the commission to do so:**
21 **PROVIDED, That this section shall not be construed to prohibit a railroad**
22 **company from constructing tracks at grade across other tracks owned or**
23 **operated by it within established yard limits. **In determining whether a****
24 **separation of grades is practicable, the commission shall take into**
25 **consideration the amount and character of travel on the railroad and on**
26 **the highway; the grade and alignment of the railroad and the highway;**
27 **the cost of separating grades; the topography of the country, and all other**
28 **circumstances and conditions naturally involved in such an inquiry.**

29 RCW 81.53.020 (emphasis added).

30 The basis for this general requirement that new crossings be separated is long-standing
and simple—anytime vehicles and trains cross paths there is a risk to safety:

1 The statute law of this state relating to grade crossings has for many years been
2 based upon the theory that **all grade crossings are dangerous and**
3 **administrative commissions have existed for many years with extensive**
4 **powers of regulation.** As early as 1909 an act was passed providing that all
5 railroads, or extensions thereof thereafter constructed, should cross all existing
6 railroads and highways by passing under or over, unless authorized to do
7 otherwise by consent of the railroad commission.

8 Reines v. Chicago, M., St. P. & P.R. Co., 195 Wash. 146, 150, 80 P.2d 406 (1938) (emphasis
9 added). Common sense dictates that there is a risk anytime vehicles and trains cross paths.
10 This increased risk has been statutorily recognized for nearly 100 years. As the Petitioner, it
11 is the City that bears the burden of showing that this risk is outweighed by the totality of the
12 circumstances.

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15 **2. Even If it is Not Practicable for the Proposed Crossing to be Separated, the**
16 **Commission Retains Authority to Deny the Petition Based on the Totality of the**
17 **Circumstances.**

18 The City relies on an outdated and no longer effective version of RCW 81.53.030 to
19 support its argument that if the Commission determines a separated crossing is not practicable
20 then an at-grade crossing must be approved. In reality, the Commission retains the authority
21 to approve or deny the petition even when a separated crossing is not practicable:
22

23 If it finds that it is not practicable to cross the railroad or highway either above
24 or below grade, the commission shall enter a written order in the cause, **either**
25 **granting or denying the right to construct a grade crossing at the point in**
26 **question.**

27 RCW 81.53.030 (emphasis added).
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1 The correct standard that is applied by the Commission to petitions for new crossings
2 was set forth in Town of Tonasket, TR-921371 (1993), which stated:
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4 The Commission will direct the opening of a grade crossing within its
5 jurisdiction **when the inherent and the site-specific dangers of the crossing**
6 **are moderated to the extent possible** with modern design and signals **and**
7 **when there is an acute public need which outweighs the resulting danger**
8 **of the crossing**. Such needs which have been found appropriate include the
9 lack of a reasonable alternate access for public emergency services; and the
sufficiency of alternate grade crossings, perhaps because of traffic in excess of
design capacity.

10 Id. at 4 (emphasis added). Thus, it is clear that the City must show an “acute public need” for
11 the subject crossing, as well as how the safety considerations have been accounted for. TCRY
12 does not believe that the City has met its burden.
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16 **3. The Evidence Presented to the Commission Demonstrates that the City’s**
17 **Petitions Should be Denied.**

18 In its Brief, the City focuses on the considerations that are specifically listed in RCW
19 81.53.020. However, it discounts the fact that the Commission is specifically mandated to
20 consider “all other circumstances and conditions naturally involved” in the analysis. The City
21 either completely ignores or summarily discounts the issues of need for the crossing, safety,
22 the impact on the local residents, and the impact on the railroad operations. TCRY believes
23 that these issues are equally, if not more in some cases, important than the considerations
24 addressed by the City. Most of the issues discussed by the City are set forth below, as are the
25 additional issues that TCRY believes should also be evaluated.
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1 **a. The amount and character of travel on the railroad and on the highway.**

2 The two primary arguments presented by the City justify the proposed crossing are
3 enhancing economic development on Tapteal Drive and improving traffic flow. Kennewick
4 Brief at 5; Darrington, TR. 284:21-22. The City presents these two arguments as if their
5 validity is undisputed. However, reviewing the evidence leads to a different conclusion. For
6 example, the Kennewick City Manager did not know if any traffic studies were performed.
7 Hammond, TR. 118:24 – 119:2. In fact, there were none. Kennewick’s traffic engineer did
8 not perform any statistical analysis and did not perform any measure of the alleged time
9 savings. Deskins, TR 184:17 – 186:8. Rather, he testified that he was just “guesstimating.”
10 Deskins, TR. 186:9-10. Even then, his estimate was a savings of 3-4 minutes. Deskins, TR.
11 200:17 – 201:18. Mr. Deskins opined that people would benefit from the proposed extension
12 when comparing prices on electronics, such as iPods:
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15 “If you want to find a iPod and check the price at Circuit City and then come
16 back to the mall and find the prices there, it’s just a lot easier if you can exit
17 out the backside and go on Center Parkway instead of having to go out to the
18 boulevard where it’s very congested and up and over the overpass.”
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20 Deskins, TR. 192:8-14.
21

22 The evidence presented shows that the proposed extension will have very little impact
23 on relieving congestion. Kennewick’s project engineer estimated that the proposed extension
24 would relieve traffic on Columbia Center Boulevard by only 5%-10%. Plummer, TR. 153:2-
25 7. The expert hired by the UP testified that it would relieve traffic on Columbia Center
26 Boulevard by only 5%-6%. Hammond, TR. 242:24 – 243:20.
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1 Additionally, Kennewick’s City Manager testified that the proposed extension would
2 primarily benefit people accessing the area from the North. Hammond, TR. 120:10 – 121:4.
3
4 However, the time studies performed by HNTB showed no benefit for traffic coming to the
5 area from Highway 240. Hammond, TR. 242:11-14. Highway 240 is the primary highway
6 lying immediately to the north. See Exh. No. 2.
7

8 In short, there is very little evidence to support the City’s claim that the proposed
9 extension will improve traffic flow. And in any event, the evidence certainly does not rise to
10 the level of showing an “acute public need.” Town of Tonasket, TR-921371, p. 4 (1993).
11

12 With regard to the amount and character of railroad traffic, that topic is discussed in
13 detail in section 3(g) below. Without going into detail, the testimony showed unequivocally
14 that rail cars are switched by three different railroads at least 5 days per week. Moreover, it
15 should be noted that the City focuses primarily on the testimony relating to the UP.
16
17 Kennewick Brief at 6-7. However, it is undisputed that TCRY’s operations are much more
18 substantial (see Peterson, TR. 367:19 – 375:13), and none of the “concessions” that were
19 allegedly made by the UP were made by TCRY.
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23 **b. The grade and alignment of the railroad and the highway.**
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25 TCRY does not take the position that the proposed crossing is impossible from an
26 engineering standpoint. However, TCRY finds it noteworthy that the City repeatedly stressed
27 how things could be altered to make the crossing smoother. As noted above in Section A,
28 however, the petitions do not seek these changes.
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1 The evidence from the City concerning how the crossing would operate over the tracks
2 as they exist, which is sought by the petitions, was that it would “not be a very good ride” and
3 would be comparable to pulling off of a road into a driveway; “it would be a low speed
4 movement.” Plummer, TR. 134:23 – 135:3. In fact, the City’s position was not to
5 demonstrate the qualities of the proposed crossings, but rather to point out that there are other
6 crossings located in the City that are *almost as bad*:
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8
9 Q. Just so I can be clear on this, the purpose of Exhibits 39 and 40 is
10 basically to show that there are worse crossings in the Cities than what
11 is being proposed here; is that correct?

12 A. **Well, not necessarily worse but almost as bad.** It’s really just to
13 show that a rough ride across the railroad tracks is not unheard of.

14 Q. When were those other crossings installed?

15 A. Oh, I couldn’t say that exactly, that’s an older part of town.

16 Q. So those are significantly older crossings?

17 A. They have been upgraded, or at least some of them have, by both BNSF
18 and UPR over the years, but yet, they are significantly older.

19 Q. Do you know when they were last upgraded?

20 A. Not exactly, no.

21
22
23 Plummer, TR. 142:18 – 143:8 (emphasis added). Essentially, the City’s best argument for the
24 ride over the petitioned for crossing is that there are crossings in other parts of the City that
25 are nearly as bad as what is being proposed. It is difficult to believe that this is the standard
26 envisioned by the applicable statute.
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1 **c. The cost of separating grades.**

2 The City argues that it would cost substantially more to make the proposed crossing a
3 separated crossing as opposed to an at-grade crossing. TCRY does not dispute this. As it was
4 pointed out during testimony, this is *always* true:
5

6 Q. So, well, okay, would it be fair to sum it up as there's a higher
7 construction cost to the City and impacts on adjoining property
8 owners?

9 A. Yes.

10 Q. Okay. But certainly that's the case, would be the case with any grade
11 separation project, wouldn't it?
12

13 A. Yes.

14 Plummer, TR. 144:17-24.
15

16 The bottom-line is that cost is not dispositive. If showing an increased cost was all
17 that was necessary, then all new crossings would be at-grade. The reality is that this is only
18 one of the factors to be viewed, and is not determinative.
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21 **d. There has been no showing of an acute public need for the proposed crossing.**

22 As discussed above, the Commission has stated that it will grant an at-grade crossing
23 "when there is an acute public need which outweighs the resulting danger of the crossing."
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25 Town of Tonasket, TR-921371, p. 4 (1993). The City has argued that the need is in the form
26 of improving traffic flow and increasing economic development. The lack of evidence
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1 demonstrating the alleged traffic benefits are set forth in § 3(a) above, and will not be
2 repeated here.

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4 There are, however, also serious questions regarding the second justification relied
5 upon by the City—that the proposed extension is needed to spur on development. The City’s
6 traffic engineer testified that he did not know if Tapteal would be developed without the
7 extension. Deskins, TR. 195:15-21. However, John C. Darrington, the Richland City
8 Manager, conceded that growth is currently occurring along Tapteal. Darrington, TR. 284:17
9 – 288:5. He stated that the map at Exhibit No. 2 was “a very early map” and there was “much
10 more development” than what was shown. Darrington, TR 282:14-22.

11
12 The reality is that development is occurring right now on Tapteal. The area is growing
13 without the benefit of the proposed extension. And in any event, it is difficult to believe that
14 ease in comparing prices on iPods is the “acute public need” referred to in Town of Tonasket,
15 TR-921371, p. 4 (1993).

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21 **e. The City has discounted and/or ignored the safety issues that will result from the
22 proposed crossing.**

23 At-grade railroad crossings pose safety concerns. Reines, 195 Wash. at 150. The City
24 has shown disregard to the safety issues that arise with an at-grade crossing. First, the City’s
25 Brief contains very little discussion on this subject, and what is discussed is limited to UP
26 switching activities. This downplays the railroad activity by avoiding the activity of the
27 BNSF and TCRY. This was also true with the testimony. For example, the City testified that
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1 only two (2) trains would cross the proposed extension each day. Hammond, TR. 126:21-22.
2 This is of course not the case, as the UP may cross the proposed extension up to eight (8)
3 times alone. Leathers, TR. 317:5-25. The BNSF will also cross as part of its switching. And
4 TCRY, because it is switching with two different railroads, will cross the proposed extension
5 so frequently that it could only be classified as “a bunch of times.” Peterson, TR. 375:4-6.
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8 The reality is that the City did not feel the safety issues warranted even conducting a
9 study:
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11 Q. On pages 5 to 6 of your testimony, you talked about the risks of at-
12 grade crossings, and I’m wondering whether you performed any
13 specific safety study for this crossing?

14 A. No, ma’am.

15 Q. Did you review HNTB’s safety analysis for this crossing?

16 A. I have looked at it.

17 Q. Did you disagree with it?

18 A. Well, I think it’s probably got its points, but I think it’s also somewhat
19 exaggerated.
20

21 Plummer, TR. 138:3-13. Not only has the City shown that it has discounted the safety risks,
22 but it provided pre-filed testimony that adding an at-grade crossing would actually *increase*
23 safety. Exh. No. 1, p. 2:24 – 3:5. This issue was also discussed during cross-examination:
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25 Q. You also state that adding—extending Center Parkway will make these
26 trips not only easier, but safer. Tell me how residents who now travel
27 across a railroad crossing over four tracks that includes switching
28 activity is safer?
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1 A. I guess, from my observation, the switching that occurs there is—it's
2 infrequent at best. Now, I speak from the context of somebody that
3 was the City Manager of Gillette, Wyoming, where there was a lot of
4 switching that occurred in the downtown area, and someone who was a
5 City Manager of Rawlins, Wyoming, where there is a lot of switching
6 in the downtown area. This is relatively minor to those situations.

7 Q. Okay. But that doesn't answer my question. The question is how does
8 having residents go over railroad crossings that include switching
9 activity, regardless of the volume of switching activity, how is that
10 safer than not going over a railroad crossing?

11 A. Well, I think volume is a real key to this. If there is a lot of volume,
12 there's a lot of train traffic. Then there are a lot of opportunities, if I
13 could use that term, for a conflict between rail traffic and vehicular
14 traffic. But my point is that there isn't a great deal, in comparison with
15 my experience in other areas.

16 Q. But you'd agree, would you not, a road that doesn't have a railroad
17 crossing is going to have a less opportunity for railcar and automobile
18 collisions than a road that does have a railroad crossing?

19 A. That's correct.

20 Darrington, TR. 288:6 – 289:13. The pre-filed testimony of Mr. Darrington, that adding an
21 at-grade crossing will *increase* safety is simply unfounded and defies common sense. It is
22 also interesting to note that his testimony is based on the alleged light railroad traffic, and that
23 the City has repeatedly underestimated the amount of traffic (Hammond, TR. 126:21-22) and
24 all but ignored the number of times that TCRY will be required to cross the proposed
25 extension in order to switch with both the UP and BNSF. See Peterson, TR. 367:19 – 375:13.

26 In sum, the evidence shows that the City has failed to appreciate the inherent safety
27 issues that occur at an at-grade crossing, has made no attempt to study them as it relates to not
28 only an at-grade crossing, but a crossing over four (4) rail lines at a location where switching
29

1 activity occurs, and has instead attempted to downplay the issues. Considering that the City
2 failed to perform a traffic study, it is not surprising that the City presented no evidence
3 regarding any studies relating to the safety of pedestrians and bicyclists. By no stretch of the
4 imagination has the City shown that the alleged “need” for this crossing outweighs the safety
5 considerations at issue. Rather, the evidence shows that the City does not even evaluated the
6 relative safety issues in play.
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11 **f. Impact on residential neighbors.**

12 The City has entirely discounted the impact that the proposed crossing will have on
13 the local residents in the area. The City acknowledges that installation of the crossing will
14 likely place the refrigerated rail cars even closer to the homes of the area residents.
15

16 Hammond, TR. 119:14-25; Plummer, TR. 137:6-10; Darrington, TR. 283:22 – 284:8. It is
17 really undisputed that installation of the crossing will cause this to occur:
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19 Well, the crossing would reduce the amount of cars we could hold out there
20 from probably 45 to 35, 30, because it would take out 615 feet of track, and it’s
21 roughly ten 65 foot cars. Now, **what we’d have to do, it would cause us to
22 have to shove the cars farther west down along the neighborhood where
23 we had the complaints for the reefers, refrigerated cars running and
24 disturbing the neighbors.** That’s the—one of the negatives, the loss of the
25 cars and the fact you’d have to shove them farther west.

26 Leathers, TR. 316:6-16 (emphasis added); see also Leathers, TR. 324:16 – 326:17.

27 The City’s response is to say that because the railroad has the legal right to store the
28 refrigerated cars there, it is not an issue, at least not one important enough to really be
29 considered. Kennewick Brief at 14-15. The City also discusses the possibility that the
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1 crossing would be silent, which might reduce train horn noises.³ However, all of the evidence
2 regarding neighborhood complaints centers on the noise from the refrigerated cars.
3

4 TCRY believes that the unavoidable negative impact on the local residential neighbors
5 is patently one of the “other circumstances and conditions naturally involved” with the
6 proposed crossing and must be taken into consideration. RCW 81.53.020. This issue is
7 especially important to TCRY, because it is the local railroad. It will receive the complaints
8 from the residents. It is undisputed that the complaints are already there and TCRY and the
9 UP have attempted to mitigate the situation by moving the refrigerated rail cars as far east as
10 possible. Leather, TR. 326:9-11. Installing the crossing will require the refrigerated cars to
11 be stored farther west, deeper into the residential area, and will no doubt result in even more
12 complaints. This is another consideration that should be accounted for and that shows the
13 subject petitions should be denied.
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19 **g. Impact on railroad operations.**

20 That this is not a typical at-grade crossing request is, of course, patently obvious. The
21 crossing would be over four (4) railroad lines at the precise location where TCRY switches all
22 of its rail traffic with both the UP and the BNSF. Despite these additional considerations, the
23 City has discounted the impact on railroad operations in much the same manner that it has
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27 ³ This is another example of internal inconsistency in the City’s position. The City earlier
28 argues that it is not tied to its petition and the crossing can be made regardless of whether it
29 receives FRA approval to be a silent crossing. However, here the City uses potential benefits
30 from a silent crossing as evidence for why the crossing should be approved.

1 failed to properly address issues of safety and vehicular traffic impacts. The evidence
2 presented is that the City made *no* projections of future railroad traffic volumes and
3 performed *no* studies. Plummer, TR. 169:18 – 170:10; Deskins, TR. 196:7 – 197:13.
4

5 The City now questions whether impact on the railroad operations is even an issue that
6 should be discussed. Kennewick Brief at 16 (“The City does not concede that impacts to rail
7 operations is a factor that relates to practicability of a below-grade crossing.”).⁴ The City then
8 takes the position that because there was no testimony that switching operations will not
9 become *impossible*, that it is only extra work for the railroads, which is evidently not a
10 concern of the City, and therefore there is no problem. Kennewick Brief at 16.
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13 The City’s minimal discussion of this issue is focused on the UP’s operations. The
14 evidence from the UP was that the crossing would reduce the UP’s track and would pose a
15 “real hardship” on the UP. Leathers, TR. 316:6-9, 327:11-12. However, the evidence shows
16 beyond a doubt that TCRY’s operations at the subject location are much greater than the other
17 railroads:
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20 [S]ee, what you have to understand is that TCRY, Mr. Leathers is speaking for
21 the Union Pacific portion of it only, and we also serve the BNSF, so there’s
22 three railroads that are working there, and because we’re serving both of them,
23 our—when we get to the interchange to do our portion of the business, we’re
24 dealing with not only UP traffic, but also BN traffic, and we are kind of like
25 the local milk man. We’d have to prepare the cars for delivery at destination,
26 and both the BNSF and the Union Pacific are delivered to us for that purpose

27
28 ⁴ TCRY is perplexed by this statement because the subject petitions do not seek a below-grade
29 crossing. TCRY concedes that if the City were seeking to install a below-grade crossing there
30 would be no disruption to railroad operations once the crossing was completed. However, the
City’s petitions seek at-grade crossings, which inherently impact railroad operations.

1 from their yards. So there is more for us to do than either of the BNSF and the
2 Union Pacific.

3 Peterson, TR. 350:13-25. The impact of the proposed crossing is therefore much greater on
4 the TCRY than any other party. This was explained by Mr. Peterson in detail. See Peterson,
5 TR. 363:20 – 375:13.
6

7 One point that warrants further clarification is the apparent dispute between Mr.
8 Peterson and Mr. Leathers concerning whether cars being switched can be located within 250
9 feet of the crossing. Mr. Leather’s testimony stems from the General Code of Operating
10 Rules (“GCOR”). See Parties Joint Initial Brief on Legal Issue at 3. The UP has adopted the
11 GCOR; TCRY has not. Moreover, the purpose of the requirement in the GCOR that rail cars
12 not be parked closer than 250 feet to crossings is for sight issues. It has nothing to do with the
13 activation and operation and gates, warning lights, signals, etc.
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17 Mr. Peterson’s testimony was that we do not know what requirements concerning
18 activation and operation and gates, warning lights, signals, etc. may or may not be required by
19 the FRA as part of a silent crossing. Of course, neither does the City because they have not
20 contacted the FRA about this crossing. Plummer, TR. 147:3-6.
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22
23 The reality is that no one knows at what distance the gates will be activated and
24 deactivated because that determination is made by the FRA. TCRY’s point is that the
25 proposed crossing, or crossings, are much wider than a traditional crossing because it covers
26 four (4) rail lines. The City is proposing to install two separate crossings, one over the UP’s
27 lines and one over Port of Benton/TCRY’s lines. See Exh. No. 4. Of course, the close
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1 proximity of the two sets of railroad lines, and the fact that the City's proposed extension of
2 Center Parkway would cross all four tracks is why these matters were consolidated in the first
3 place. See "Prehearing Conference Order; Order of Consolidation" dated January 19, 2006.

4
5 TCRY believes that the close proximity of the two proposed crossing will certainly
6 require that the operation of the gates, warning lights, signals, etc., be coordinated and tied
7 together. Again, there is no evidence on this issue in the record because the FRA, who makes
8 these determinations, has not been contacted. In any event, TCRY believes that the proposed
9 crossings must be viewed in conjunction with one another. The switches that are used by
10 TCRY to separate the BNSF and UP rail traffic are located to the East of the crossings. Exh.
11 No. 4. Because TCRY can only place UP railcars on UP/TCRY lines, and BNSF railcars
12 cannot be placed on the UP line (Peterson, TR. 361:2-7), the switching activities of TCRY
13 will involve multiple crossings of each separate crossing. See Peterson, TR. 365:6 – 375:13.

14
15 TCRY believes that the FRA requirements include providing adequate time for all
16 vehicles, including tractor-trailers and buses, to be able to clear the crossings. Because the
17 City has not designed the proposed crossing beyond 30%, and because the FRA has not been
18 asked to evaluate the crossing, it is impossible to determine whether the triggers for the
19 activation and operation and gates, warning lights, signals, etc. will be located at a distance of
20 only 250 feet. Thus, Mr. Leather's testimony should be evaluated in light of the above, and
21 not read as an absolute that the railroads will lose *only* 250 feet to either side of the proposed
22 crossing.
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1 In sum, this is not an ordinary crossing. This is a proposed at-grade crossing over four
2 (4) rail lines at the precise location where three (3) railroads switch rail traffic. The impact on
3 all of the railroads, and particularly TCRY, is substantially greater than for the typical
4 crossing over a railroad's line. The City has discounted and ignored the impacts on the
5 railroads. It has taken the attitude that while it will cause more work for the railroads, that is a
6 railroad problem, not a City problem. But it is the City that wants to extend its road to cross
7 the existing rail lines. TCRY believes that the inevitable negative impact on the railroads is
8 most certainly a factor that the Commission should consider, and that consideration of the
9 same shows that the impact on the railroads far exceeds the alleged need for the proposed at-
10 grade crossing.
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15 16 **III. CONCLUSION**

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18 The City's legal analysis misses the mark. The Commission has the authority to deny
19 the subject petitions even if it determines that a separated crossing is not practicable. TCRY
20 believes that application of the correct legal standard and application of the same to the
21 evidence presented shows that the City has failed to show an "acute public need" for this
22 crossing. Further, the City has either ignored or discounted relevant considerations involving
23 safety, the impact on local residential neighbors, and the substantial impact on railroad
24 operations.
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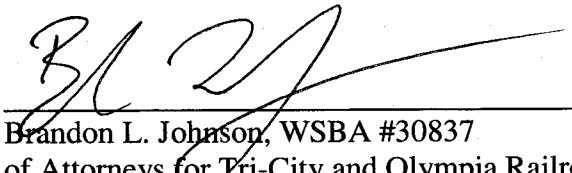
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28 In short, it is not sufficient for the City to claim it has discretion to determine when
29 and where crossings will be made, that a separated crossing will cost more and is therefore
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1 “cost prohibitive”, and because the crossing will not make railroad switching operations
2 impossible, it should therefore be approved. Viewing the totality of the circumstances in
3 conjunction with the correct legal standard shows that the subject petitions should be denied,
4 and TCRY respectfully requests that the Commission issue an order denying both of the
5 City’s petitions.
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9 **DATED** this 19th day of January 2007.
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11 **MINNICK • HAYNER, P.S.**
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15 By:


16 Brandon L. Johnson, WSBA #30837
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26 BLJ\Tri-City & Olympia Railroad (TCRY)\Center Parkway Crossing\Pleadings\TCRY Supplemental Brief (2) 070118
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TRI-CITY AND OLYMPIA
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BRIEF - 22

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