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January 22, 2007

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *City of Kennewick v. Union Pacific Railroad,* Docket No. TR-040664, and
City of Kennewick v. Port of Benton and Tri-City & Olympia Railroad,
Docket No. TR-050967 (Consolidated)

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and 3 copies of Commission Staff's Response Brief, and Certificate of Service.

Sincerely,

JONATHAN C. THOMPSON
Assistant Attorney General

JCT:tmw
Enclosures
cc: Parties

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK, Petitioner, v. UNION PACIFIC RAILROAD, Respondent.	DOCKET NO. TR-040664
CITY OF KENNEWICK, Petitioner, v. PORT OF BENTON AND TRI-CITY & OLYMPIA RAILROAD, Respondents.	DOCKET NO. TR-050967 **(Consolidated)**

RESPONSE BRIEF OF COMMISSION STAFF

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I. INTRODUCTION

Contrary to City of Kennewick's assertion in its brief, the Commission may deny a petition for an at-grade crossing, if it finds that the petitioning road authority has failed to show "an acute public need which outweighs the resulting danger of the crossing."

This brief will outline the analysis that the Commission has developed in past cases when considering petitions for new grade crossings. Also, the brief will address the types of evidence that, in Staff's view, are relevant (and irrelevant) to the Commission's inquiry. Additionally, the brief will explain why Staff believes the City's evidence, at least on this record, is insufficient to warrant granting the City's petition.

First, the City's plans for moderating the inherent and site-specific dangers of this unusual grade crossing proposal are indefinite to non-existent. Second, the City's evidence of public need for the crossing is significantly weakened by the existence of close alternative routes and by the City's failure to make any considered analysis of the impact that ongoing train switching operations may have on the usefulness of the crossing to motorists who would use the crossing. Consequently, in Staff's view, it is impossible on this record for the Commission to determine whether the asserted public need outweighs the resulting danger of the crossing. Third, assuming that the Commission even reaches the question of the practicability of a grade-separated crossing, it may also deny the City's petition on the ground that it has provided insufficient evidence regarding the relative cost of at-grade and separated-grade options.

II. ANALYSIS

The City argues that the only question before the Commission is whether a grade separated crossing (*i.e.*, an over- or under-crossing) is "practicable." It argues, based on

an old decision interpreting a prior version of what is now RCW 81.53.030, that the Commission is not allowed to decide that the City has failed to demonstrate a need for the crossing. Rather, the City asserts, the Commission has to take the need for a crossing as a given and then decide only whether an over- or under-crossing is practicable from a cost standpoint. Under the City's theory, because the cities of Richland and Kennewick assert they are unwilling to pay the additional cost of an under-crossing, grade separation is, therefore, not "practicable," and the Commission has no choice but to approve the at-grade crossing.

The City does not argue that an under-crossing is impossible as an engineering matter, but only that it estimates an under-crossing to cost more than $9 million, while a grade crossing would be around $3 million. The City concedes that there would be an unknown additional cost for the at-grade crossing, if the City was allowed to pay for construction of a replacement siding track at a different location and to change the elevation of the remaining track to create a smoother crossing for cars and trucks.

The City asserts that the danger of collision will be low and the traffic both on the street and the railroad will be relatively light. The City argues that the Commission should not consider the impact on railroad operations (*i.e.*, delay and inconvenience to railroad switching activity), but that even if it does, the evidence is that the impact on the railroads will not be great.

Perhaps because it incorrectly assumes a very limited role for the Commission in considering a petition for a grade crossing, the City's plans (and, consequently, its evidence) are, so far, merely "preliminary" or "conceptual." Most notably, it offers no evidence of how protective devices would function and how motor vehicles and trains

would actually interact at the crossing. The cross-examination hearings demonstrated that City's witnesses, in many cases, had significant misunderstandings of the type and frequency of train traffic at the location of the proposed crossing.

As the City points out in its brief, there is nothing necessarily wrong with the City presenting various design alternatives for the Commission's consideration. However, that does not relieve the City of the obligation to present analysis of its proposed alternatives in sufficient detail for the Commission to be able to meaningfully weigh the asserted public need against the site-specific hazards. The City has failed to do that.

A. The Relevant Inquiry When A Road Authority Petitions For A New At-Grade Crossing.

1. *City of Toppenish* is no longer good law and the Commission may deny a petition for a new grade crossing even when the road authority says it is unwilling to pay the additional cost of grade separation.

The City mistakenly relies on *State ex rel. City of Toppenish v. Public Service Commission*, 114 Wash. 301, 194 P. 982 (1921) to assert that the Commission's role does not include assessing public need for the proposed grade crossing. The statutory language that the court found dispositive in the 1921 case has since been amended in a way that reverses that court's conclusion. When the *City of Toppenish* case was decided, the relevant statute read as follows:

> If the commission finds that it is not practicable to cross the railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing.

114 Wash. at 306; Laws of 1913, c. 30, § 3. The court in the 1921 case found, based on this language, that the Commission had no choice but to grant the grade crossing if it found an over or under crossing impracticable. *Id.* at 307. The court found the Commission had exceeded its authority by denying a grade crossing, even though it also

found that an over-crossing was not practicable. The court said that it was for the road authority, not the Commission, to decide whether "there shall be a crossing at the place proposed." *Id.*

As a result of a change in 1961, however, (as modified by a non-substantive 1984 amendment), the sentence above now reads:

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

[Emphasis added.] This change gave the Commission the authority to do what the court in 1921, interpreting the earlier statute, said the Commission could not do. That is, the Commission may deny a petition for a grade crossing, even if an over or under crossing is not practicable. That means the Commission need not defer to the road authority's determination that there shall be a crossing "at the point in question." In other words, the Commission may undertake the same analysis it undertakes when it considers a petition by a railroad to close an existing roadway that crosses the railroad at-grade.[1]

2. The Commission considers whether inherent and site-specific grade crossing dangers will be sufficiently moderated and whether an acute public need outweighs the remaining dangers.

The Commission's regulatory authority over grade crossings includes the authority to prescribe what signals and warning devices are to be used at a crossing.

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[1] When the Commission argued to the court in *City of Toppenish* that the court's interpretation did not make sense in light of the Commission's authority under related statutory provisions to order closure of at-grade crossings, the court conceded that this was a persuasive argument, but could not be squared with the mandatory language directing the Commission to grant the petition for a new grade crossing when grade separation is not practicable. 114 Wash. at 308. That mandatory language was changed by the 1961 amendment as described above. Because the legislature changed the language, there is no reason conclude that the Commission may not consider public need in a petition for a new crossing, just as it is authorized to do when it considers whether to discontinue an existing crossing. *See Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254, 212 P.2d 829 (1949) (citing with approval test that balances public convenience and necessity with danger of grade crossing when deciding whether to close a crossing).

RCW 81.53.261.[2] It also includes the authority to prescribe the "method and manner" of crossing and whether a grade crossing should even exist. RCW 81.53.050. A petition for a new grade crossing under RCW 81.53.030 necessarily raises all of these considerations. All of RCW 81.53 informed by the policy against the allowance of grade crossings because of the inherent risk of such crossings. RCW 81.53.020; *see Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 195 Wash. 146, 80 P.2d 406 (1938); *State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County*, 5 Wn.2d 95, 104 P.2d 764 (1940).

In Commission decisions that have followed the statutory change discussed above, the Commission has viewed its job as follows:

> The 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 sufficiency of alternate grade crossings, perhaps because of traffic in excess of design capacity.

Town of Tonasket, TR-921371, p. 4 (1993); *see also Burlington Northern Railroad Company v. City of Ferndale*, TR-940330 (1995), (copies of both decisions are attached for the parties' convenience).

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[2] This is to be distinguished from what the Federal Railroad Administration does in considering a petition for a quiet zone. The only issue before the FRA in such a case is whether there are sufficient safety measures in place to reverse the otherwise applicable federal rule that requires train horns to be sounded each time a train approaches a grade crossing (and instead to prohibit the sounding of the horn). The FRA's authority to waive its train horn rule does not take away from this Commission's more fundamental authority to prescribe what safety devices are required as a matter of general public safety.

B. The City's Evidence of Acute Public Need For the Grade Crossing.

1. The City's real "public need" is promotion of development on Tapteal Drive. The weight this need should be given against the site-specific hazards is a question of first impression.

The city managers of both Richland and Kennewick asserted that the main purpose for the crossing was to facilitate development along Tapteal Drive, north of and parallel to the tracks. Tr. 284-285, 298-299 (Darrington); Tr. 120 (Robert Hammond). Kennewick's traffic engineer confirmed that the primary objective of the proposed extension of Center Parkway is to tie together the existing mall retail area with the developing Tapteal Drive retail area, allowing shoppers more direct access between shops located in the two retail areas. Tr. 187, 191-192 (Deskins).

The City also asserts in its brief that the proposed crossing would relieve traffic congestion on Columbia Center Boulevard. Kennewick Br. at 5. The testimony of Kennewick's traffic engineer suggests, however, that the object is not to relieve congestion that would otherwise exist but, rather, to facilitate new development on Tapteal Drive by tying that area together more closely with the existing mall development. Tr. 191-192 (Deskins). The only study produced by the City or any other party shows only slight to moderate reduction of traffic on other roadways (five to six percent on Columbia Center Boulevard by 2023). Tr. 243 (Randy Hammond); Tr. 153 (Plummer). Moreover, that traffic relief is composed entirely of trips associated with the development of the Tapteal Business Park – development that the proposed crossing itself is intended to facilitate. Ex. 38, p. 4.

The Commission has previously stated that it would consider the fact of traffic in excess of design capacity at alternate grade crossings as persuasive on the question of

public need. *Town of Tonasket*, TR-921371, p. 4 (1993). However, this is not a case of a road authority proposing a new crossing to relieve existing traffic congestion. This is a case of the proposed crossing creating its own additional traffic demand by facilitating additional development and then meeting the demand it creates. Because of this, any argument that the crossing will create fuel savings and reduce emissions and collisions on other roadways is not pertinent.

The City did not offer any studies or the testimony of an economic development professional to substantiate its economic development claims, nor did it offer any quantitative analysis of improvements in traffic flow. Tr. 193-194 (Deskins).

2. The City's evidence of "public need" is weakened by its failure to consider how the railroads' switching operations would impact the usefulness of the crossing.

The City's evidence included statements that it likely would apply to the Federal Railroad Administration (FRA) for approval for a "quiet zone." Within a quiet zone, the federal rule requiring train engineers to sound the train's horn at every grade crossing is reversed, and sounding the horn is prohibited. As outlined in the joint brief on this issue, in order to obtain approval for a quiet zone, the FRA likely would require the City to install four quadrant gates (which block both lanes of travel when lowered) and lights at both sides of the crossing, as well as wayside horns at the crossing. The City could not say with certainty whether it would install these types of devices, Tr. 147 (Plummer), Tr. 198 (Deskins), and its witnesses had no specifics about how the protective devices would be set up or how they would function in general, Tr. 148-149 (Plummer), Tr. 198 (Deskins), let alone over four sets of tracks over an obviously very long crossing distance. *See also* Tr. 199-200 (Deskins) (doesn't know whether there would be a traffic

signal at Tapteal Drive and Center Parkway and, therefore, whether traffic signal preemption circuitry would be necessary to assure that cars are not cued up at red lights and unable to clear tracks when gates go down).

City officials could not say how these devices would be triggered by the trains moving back and forth over the tracks for the purpose of exchanging cars at this location, or whether mandated air brake testing would result in prolonged blocking of the crossing. Tr. 148-149 (Plummer), Tr. 198 (Deskins). City officials had little idea how frequently, how long or on which days the railroads' switching operations would cause the gates to close, preventing use of the crossing.

The railroads presented extensive evidence that the switching operations of the three railroads require many back and forth movements per day across the location that the City proposes for the crossing, yet City officials seemed to lack an accurate understanding of when or how often railroad switching operations occur. Compare Tr. 126 (Robert Hammond) (number of trains per day is two), with Direct Testimony of Leathers and Labberton, generally, and Tr. 350 (Peterson) (TCRY does more switching than either UP or BNSF). Compare, also Tr. 161 (Plummer) (no switching on weekends) and Tr. 197 (Deskins) (assumes switching is at night and on weekdays) with Tr. 335 (Leathers) (TCRY switches on Saturdays), and Tr. 357 (TCRY switching could take a good portion of the morning if crossing constructed) and Tr. 264 (Labberton) (BNSF switches Sunday through Thursday).

The City's traffic engineer conceded that frequency and length of time that the crossing is closed to traffic because of train movements could diminish the usefulness of the crossing to motorists. Tr. 196 (Deskins). The City's traffic engineer downplayed the

importance of frequent blocking of the crossing by observing that motorists would have close, alternative routes for reaching Tapteal Drive from Center Parkway when the crossing gates were closed (*i.e.*, either Gage/Steptoe or Columbia Center Boulevard). Tr. 197-198. While this obviously is true, it certainly does not bolster the "acute need" for the new crossing.

The City obviously would prefer to pay the railroads to construct a new siding that would allow switching operations to occur at a different location. Tr. 163 (Plummer). The cost of this is uncertain and would, at least to some extent, narrow the gap in cost between a grade crossing and an under-crossing.

Another aspect of the crossing that would appear to diminish its usefulness (as evidenced by the fact that the City's preferred option is to be allowed to fix it at its own expense, Tr. 166, 167) is the bumpy road surface that would be necessary to cross the four sets of tracks at their existing elevations. There is extensive debate in the record as to whether this presents a safety hazard, but it clearly is far from an ideal design. Tr. 165 (Plummer) (calling the design a "worst case scenario"); Tr. 256, 257 (Randy Hammond) (characterizing the change in grade as "drastic" and likely to fail general design criteria); *but see* Tr. 208-213 (analysis shows that a low-boy trailer could cross the tracks without getting hung up).

The City has made no study of what the cost would be to change the elevation of the railroad tracks in order to create a smoother crossing for motorists. Tr. 171 (Plummer). Again, the additional cost would narrow the gap in cost between a grade crossing and an under-crossing.

C. Site-Specific Hazards.

1. The railroads raise potential site-specific hazards to pedestrians, as a result of switching activities, and to motorists, as a result of the uneven crossing surface.

In addition to explaining the inherent danger of grade crossings, the railroads also identify site-specific hazards to pedestrians at this location, Ex. 32, p. 3 (Trumbull), as well as a possibility that vehicles could hang up on the uneven crossing surface, potentially rendering them unable to get out of the way of an oncoming train. *See* Tr. 208-213. Union Pacific's consultant used an accident prediction model (that does not necessarily take the type of protective device or speed of trains into account) to predict an accident approximately once every 16 years. Tr. 245. While the slow speed of trains at this location (15 miles per hour) suggests that train/vehicle collisions would not be severe, collisions involving pedestrians obviously could be severe. *Id.*

2. The City largely has failed to show how it would moderate inherent and site-specific hazards identified by the railroads.

While the City's evidence does appear to dispel the safety concerns related to the crossing surface, Tr. 208-213 (Kaufman), the City does not address the hazards to pedestrians. As discussed above, neither has the City even decided the type of protective devices it would employ nor how those devices work in connection to the railroad's switching activities. Consequently, it is impossible for the Commission to reach any meaningful conclusion about whether the site-specific and inherent dangers of the grade crossing will be moderated.

D. Cost of Grade Separation — "Practicability."

1. The relative cost of an under-crossing versus a grade crossing is of little importance because the City has failed to show an acute need for a crossing that outweighs inherent and site-specific dangers of a grade crossing.

As discussed above, even assuming that a road authority petitioning for a grade crossing shows that construction of a grade-separated crossing (*e.g.*, an under-crossing) is not practicable, the Commission may still deny the petition. The relevant portion of RCW 81.53.030 states: "If it finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, either granting *or denying* the right to construct a grade crossing at the point in question." (Emphasis added.) RCW 81.53.030 does not itself provide a standard for deciding whether to deny a petition for a crossing when a grade separated crossing is not practicable. The standard is provided in the closely related statute RCW 81.53.060, which authorizes the Commission to decide, among other things, whether "*the public safety requires* . . . the closing or discontinuance of an existing highway crossing, ..." In *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 212 P.2d 829 (1949), the court cited, with approval, the following statement of the balancing process that the Commission's predecessor followed in considering a closing closure proposal:

> Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding its dangerous condition.

As described above, the Commission has followed this same balancing process both in considering petitions for closure of existing crossings and in considering petitions for establishment of new crossings.

Thus, the Commission's analysis should proceed as follows:

1) Will the inherent and the site-specific dangers of the crossing be moderated to the extent possible with modern design and signals?

If the record provides assurance that the answer to this question is yes, the analysis can proceed to step two. If the Commission cannot make such a finding, it should deny the petition, though not necessarily with prejudice.

2) Is there is an acute public need for the proposed grade crossing that outweighs the resulting danger of the crossing?

Again, if the record provides assurance that the answer to this question is yes, the analysis can proceed to step three. And again, if the Commission cannot make such a finding, it should deny or dismiss the petition.

3) Is it impracticable for the road authority to construct a grade-separated crossing instead of an at-grade crossing?

If the record shows that that grade separation *is not* practicable because of prohibitive cost or for a technical reason, the Commission should grant the petition. If the Commission finds, on the other hand, that grade separation *is* practicable, it should deny the petition for an at-grade crossing; the road authority may construct an over- or under-crossing instead.

Thus, the question of practicability only becomes relevant if the City has overcome its burden on steps one and two of the analysis.

In Staff's view, it is unnecessary in this case for the Commission to decide whether it is practicable to construct an under-crossing. This is because, as discussed above, the City has failed to present evidence to enable the Commission to conclude 1)

that the inherent and the site-specific dangers of the crossing will be moderated to the extent possible with modern design and signals, and 2) that there is an acute public need for the proposed grade crossing that outweighs the resulting danger of the crossing.

2. Even if relevant to this case, the City's evidence regarding the relative cost of a grade crossing versus an under-crossing is incomplete.

The City claims that the $9 million cost it estimates for an under-crossing is prohibitively expensive because the participating cities of Richland and Kennewick are unwilling to spend that amount to have a crossing at this location. But that calculation certainly involves a weighing by the cities of the benefit they hope to achieve (whether in economic development or traffic congestion relief) versus the cost. *See* Tr. 123 (Robert Hammond). Thus, a claim of prohibitive expense may be nothing more than a conclusion that the project doesn't produce much public benefit when compared with other possible uses of the partner cities' money.[3] For that reason, the Commission should not adopt the City's analysis that the question of "practicability" turns only on whether it is willing to bear the expense of grade separation. The City's proposed analysis could lead to the perverse conclusion that a grade crossing must be approved precisely because there is relatively low public need for a crossing at this location.

Determining whether grade separation is "practicable" defies easy resolution. Given enough money and the authority to acquire adjoining property through eminent domain, it seems likely that any highway-rail crossing could be grade-separated. Therefore, the question of "practicability" is always likely to involve a claim of prohibitive cost and will require a comparison of relative cost of an at-grade crossing

[3] There also is some inconsistency between the claim that the proponent cities are unwilling to pay the cost of an over-crossing and in the Richland city manager's testimony that his city needs the crossing in order to promote new retail development so that the city will obtain the benefit of increased tax revenues.

versus a grade-separated crossing. High cost in general, as well as in comparison to the cost of an at-grade crossing, is certainly relevant to the question of practicability. Also, if the risk of collision is relatively low at the site, it may not be "practicable" to spend a large amount on grade separation.

Although the City does present some evidence that an under-crossing likely would be very costly (perhaps $9 million), its evidence regarding the likely cost of an at-grade crossing ($3 million) is very incomplete and could easily be much greater. This is because of two potentially significant but unquantified cost items. The first is the cost the City may be required to pay for the relocation of a siding track (because the crossing results in a loss of rail car storage capacity on the existing sidings). Tr. 222 (Trumbull), Tr. 140, 153, 154, 163 (Plummer). The second is the cost of changing the elevation of the remaining mainline tracks, which the City appears intent upon doing. Tr. 171 (Plummer).

Even if the Commission decides that there is sufficient evidence to proceed to the question of practicability of grade separation, it could still dismiss the City's petition based on the inadequacy of its cost evidence.

E. Irrelevant Issues.

1. The Commission should not consider, when weighing public need against resulting danger, the inconvenience that the proposed crossing may cause for the railroads' operations.

In Staff's view, the burdens that the proposed grade crossing would impose on the various railroads' operations are not relevant to the analysis that the Commission is authorized to make under RCW 81.53. This is true for a number of reasons:

1) The statute does not direct the Commission to consider the impact a proposed crossing would have on railroad operations. RCW 81.53 is clearly concerned with the safety of road users. Even if the statute could be interpreted to allow a weighing of the relative benefit of the proposed crossing versus the impact on railroad operations, state authority to regulate conditions at grade crossings is confined to issues of safety and does not extend to siting of railroad facilities or regulation of railroad operations. *City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002) (discussing the Surface Transportation Board's preemptive authority over railroad operations, including switching activities under the Interstate Commerce Commission Termination Act); *see also* 49 U.S.C. § 20106 (savings provision for state railroad safety regulation of matters not covered by Federal Railroad Administration rules or that are necessary to address essentially local safety hazards).

2) The affected railroads likely are entitled, under applicable eminent domain law, to compensation for any reduction in the value of their property that is caused by the need to accommodate a road easement through the switching area. Tr. 222 (railroad would likely be entitled to compensation for any loss of railcar storage capacity on siding tracks that may result from the crossing), *see State v. Hokenson,* 113 Wash. App. 1054 (2002) (explaining that compensation due when government takes a portion of property is the difference in the before and after value of the property and may include severance damage mitigation costs).

3) Additionally, the railroads can petition the Surface Transportation Board for a finding that a particular taking of its land is so burdensome that it is preempted as an unreasonable interference with interstate commerce, despite the usual rule that

condemnation of highway right-of-way over tracks is not preempted as an unreasonable interference with interstate commerce. *See City of Lincoln v. Surface Transportation Board*, 414 F.3d 858 (2005) (upholding STB order declaring that city's proposed taking of portion of railroad right-of-way for bike trail was federally preempted as unreasonable interference with rail transportation); *Maumee & Western Railroad Corp.*, STB Finance Docket No. 34354, 2004 WL 395835 (S.T.B.) (2004) ("routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as the would not impede rail operations or pose undue safety risks").

In short, the impacts on the railroads' ability to make profitable use of their property are not within the scope of RCW 81.53, and the railroads have other avenues for addressing whatever rights they may have in that regard.

2. The Commission also should not consider assertions of noise impacts on residential neighborhoods that are not germane to the road authority's assertion of public need.

Staff recommends that the Commission limit its review of the City's evidence of public need to the transportation benefits identified by the City. The Commission's expertise in this area does not extend to a consideration of whether negative environmental impacts of the crossing outweigh the asserted transportation benefits.

III. CONCLUSION

For the reasons stated above, Staff recommends that the Commission either dismiss or deny the City's petition for an at-grade crossing at the location identified in the petition. If the Commission finds that the City's evidence is insufficient to enable to the Commission to decide the matter, it may dismiss the petition without prejudice. If the Commission is able to conclude, on this record, that the public need for the crossing does

not outweigh the inherent or site specific danger of the crossing, it may deny the petition with prejudice.

DATED this 22nd day of January, 2007.

Respectfully submitted,

ROBERT M. MCKENNA
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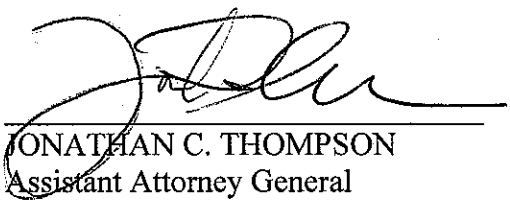

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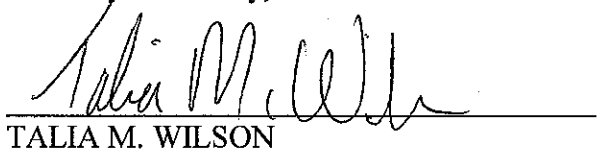
Docket Nos. TR-040664/TR-050967 (consolidated)
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 22nd day of January, 2007.



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