

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of

CWW LLC,

 Petitioner,

Requesting Extension of Time to Complete
Project Funded by the Grade Crossing
Protective Fund

DOCKET TR-210281

COMMISSION STAFF’S PETITION
TO AMEND ORDER 01

USDOT: 808632U

I. INTRODUCTION

1 The CWW LLC (CWW) petitioned for and received from the Commission approval for an expenditure from the Grade Crossing Protective Fund (GCPF) to modify a highway-rail grade crossing at which its road crosses State Route 125 (SR-125) in Walla Walla County. The order approving CWW’s petition imposed a condition requiring inspection and approval of the work by the Commission’s staff (Staff) before it could obtain reimbursement from the GCPF.

2 Due to a novel staffing shortage, the Commission does not currently employ the inspectors certified by the Federal Railroad Administration (FRA) in the Signal and Train Control discipline needed to inspect CWW’s crossing project upgrades. Staff is working to hire the requisite inspectors, but there will be a gap in this area until inspectors are hired and fully certified by the FRA.

3 To ensure CWW receives grant reimbursement in a timely manner, Staff requests under WAC 480-07-875(1) that the Commission amend the conditions of approval found in Order 01 in this docket to allow CWW to obtain GCPF reimbursement upon its certification that it has properly completed the work required by its petition, subject to certain conditions intended to protect the public interest.

4 Staff has conferred with CWW, and it does not object to amendment of Order 01.

II. RELIEF REQUESTED

5 Staff requests that the Commission amend Order 01 in this docket to allow payment
from the GCPF to CWW to reimburse it for work performed modifying the SR-125
highway-rail grade crossing upon its certification that it has made the modifications in
accordance with all applicable laws and relevant standards. Staff requests that the
amendment also require that CWW refund that payment within 30 days of its refusal to
remedy any deficiencies noted by Staff in an inspection when Staff employs the inspectors
with the relevant FRA certification.

III. STATEMENT OF FACTS

6 In April 2021, CWW petitioned the Commission for authorization to modify a
highway-rail grade crossing at SR-125 north of Walla Walla, Washington, identified as
USDOT 808632U.¹ As the named respondents consented to entry of an order approving the
petition,² the Commission approved the petition with conditions in May 2021.³

7 Those conditions were originally proposed by Staff.⁴ One of them provided that
“[p]ayment will be made upon presentation of claim for reimbursement for materials and
verification by Commission Staff that the work has been satisfactorily completed.”⁵

8 When Staff proposed that condition, it employed the FRA-certified inspectors
necessary to verify the CWW’s work.⁶ It employed them still when the Commission

¹ *In re Petition of CWW Seeking Approval to Upgrade Signals at a Highway-Rail Grade Crossing and Requesting Disbursement from the Grade Crossing Protective Fund*, Docket No TR-210281, Order 01, 1 ¶ 1 (Sept. 23, 2021) (hereinafter “CWW’s Petition”).

² *Id.* at 1 ¶ 2.

³ *Id.* at 2 ¶ 6.

⁴ *Id.* at 2 ¶ 5.

⁵ *Id.* at 3 ¶ 13(2).

⁶ Decl. of Michael Turcott at 1 ¶ 5.

imposed the condition when entering Order 01.⁷ But in mid-October 2021, several inspectors left the Commission's employ, and the departing inspectors included those FRA-certified in the Signals and Train Control discipline. That discipline is the one relevant for reviewing CWW's modifications to the SR-125 crossing.⁸

9 Staff cannot predict when it will be able to replace the departed inspectors with qualified replacements as the positions require unique experience.⁹ Accordingly, Staff cannot say when CWW will be able to obtain reimbursement from the GCPF under the condition as currently written in Order 01.

IV. STATEMENT OF ISSUES

10 Should the Commission amend Order 01 to allow payment from the GCPF to CWW, upon its certification that it has satisfactorily completed the work authorized by its petition, subject to a requirement that it refund the money if it will not remedy any defects discovered by Staff upon a later inspection?

V. ARGUMENT

11 Staff cannot in the foreseeable future complete the inspection Order 01 required before CWW can receive reimbursement from the GCPF for the work upgrading the SR-125 crossing. Staff does not view this as desirable, for reasons of fairness and public policy. Accordingly, Staff requests that the Commission find that changed conditions justify amendments to Order 01 and, accordingly, make those amendments.

⁷ *See id.*

⁸ Decl. of Michael Turcott at 1 ¶¶ 5-6.

⁹ Decl. of Michael Turcott at 1 ¶ 6.

12 The Commission may “alter or amend any order or rule made, issued, or promulgated by it” after providing notice to the affected public service company.¹⁰ The alteration or amendment becomes effective upon service on that company.¹¹

13 The Commission may amend an order in response to a petition requesting that it do so.¹² Any petition seeking amendment of an order must comply with the substantive requirements for a petition for rehearing.¹³ The petition must thus “set forth sufficient grounds for [amending] the commission order and must include substantial evidence or an offer of proof in support of the requested relief.”¹⁴ “[S]ufficient grounds” for an amendment include “[c]hanged conditions since the commission entered the order.”¹⁵

14 The Declaration of Michael Turcott, filed concurrently with this petition, provides the necessary evidence of changed circumstances. As detailed by Mr. Turcott, when the Commission entered Order 01, Staff employed the inspectors necessary to perform the inspection that it requires, but no longer does so. And, as Mr. Turcott also declares, Staff cannot say when it will be able to hire replacement inspectors.

15 That change in circumstances prevents the CWW from obtaining the GCPF reimbursement contemplated by Order 01 for the foreseeable future. The Commission should recognize as much and amend Order 01 to allow the CWW to present a claim for reimbursement upon certifying that it has completed the work required by its petition in accordance with all applicable statutes, regulations, orders, and industry standards.

¹⁰ RCW 81.04.210.

¹¹ *Id.*

¹² WAC 480-07-875(1).

¹³ WAC 480-07-875(1).

¹⁴ WAC 480-07-870(1).

¹⁵ WAC 480-07-870(1)(a).

16 The Commission can ensure that the CWW’s certification is meaningful by amending Order 01 to include a condition protecting the public interest. Staff ultimately will hire the inspectors necessary to review the CWW’s work. At that point, Staff will inspect the crossing modifications. The Commission can amend Order 01 to require CWW to refund the GCPF payment if Staff discovers defects in that inspection that CWW refuses to remedy. Any refusal by CWW to comply with that amended condition would subject it to penalties,¹⁶ providing it with a strong incentive to ensure the work is performed properly.

VII. CONCLUSION

17 Commission Staff requests that the Commission amend Order 01 in this docket as discussed above.

DATED this 23rd day of November 2021.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

/s/ Jeff Roberson, WSBA No. 45550
Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 522-0614
jeff.roberson@utc.wa.gov

¹⁶ RCW 81.04.380.