

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

Washington State Department of	)	DOCKETS TR-081229, TR-081230,
Transportation,	)	TR-081231, and TR-081232
	)	(consolidated)
Petitioner.	)	
	)	
v.	)	ORDER 02
	)	
Central Puget Sound Regional	)	
Transportation Authority (Sound	)	ORDER CONSOLIDATING
Transit), City of Lakewood and	)	DOCKETS AND DENYING
Tacoma Rail	)	MOTIONS TO RESCIND FINAL
	)	ORDERS
Respondents.	)	
	)	
.....	)	

1 *Synopsis. The Commission denies the City of Lakewood’s motions to rescind four final orders entered on September 24, 2008, which authorized certain safety improvements at four highway-railroad grade crossings in the northern portion of Lakewood. WSDOTs’ petitions and the Commission’s final orders provided full and proper notice regarding the purpose, context, and extent of the requested safety upgrades. WSDOT’s current petitions seeking authority for similar safety improvements at three other highway-railroad grade crossings in the southern portion of Lakewood, as well as one additional crossing in the City of DuPont, do not justify rescinding the Commission’s prior approvals.*

**BACKGROUND**

2 On July 2, 2008, the Washington State Department of Transportation (WSDOT) filed four petitions with the Washington Utilities and Transportation Commission (Commission) seeking approval to modify four existing public highway-railroad grade crossings, all located in Lakewood, Pierce County, at: Steilacoom Boulevard Southwest (TR-081229 (USDOT #085400D, UTC #43A7.88)), 108<sup>th</sup> Street Southwest (TR-081230 (USDOT#085404F, UTC #1J 9.09)), Bridgeport Way

Southwest (TR-081231 (USDOT#085821P, UTC #1L.60)), and 100<sup>th</sup> Street Southwest (TR-081232 (USDOT#085402S, UTC#1J 8.40). Each petition noted that the requested modifications were to support implementation of daily passenger train traffic at up to 79 miles per hour (mph).

3 Respondents Tacoma Rail, Sound Transit and the City of Lakewood each waived their rights to hearings on the matters and consented to entry of orders by the Commission without further notice or hearing.<sup>1</sup>

4 On September 24, 2008, the Commission granted each of WSDOT's four petitions, with conditions, and approved various safety modifications at each grade crossing.

5 On January 19, 2010, WSDOT filed five additional petitions with the Commission seeking approval to modify five existing highway-rail grade crossings, three of which are located in Lakewood, Pierce County, at: Clover Creek Drive SW Docket (TR-100127), Berkeley Street SW (TR-100128), and North Thorne Lane SW (TR-100129). The other two crossings are located at 41<sup>st</sup> Division Drive on Joint Base Lewis-McChord (TR-100130) and Barksdale Avenue in the City of DuPont (TR-100131).

6 Respondents Tacoma Rail, Sound Transit and Joint Base Lewis-McChord each waived their respective rights to hearing on the matters and consented to entry of orders by the Commission without further notice or hearing.<sup>2</sup>

7 Respondents City of Lakewood and City of DuPont objected to WSDOT's petitions. The Commission consolidated the four petitions involving grade crossings located in Lakewood and DuPont and scheduled an evidentiary hearing on the proposed modifications to those crossings for June 7-8, 2010.

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<sup>1</sup> Tacoma Rail's waivers were filed July 17, 2008, Sound Transit's waivers were filed July 29, 2008, and the City of Lakewood's waivers were filed September 19, 2008.

<sup>2</sup> Tacoma Rail's waivers were filed February 16, 2010, Joint Base Lewis-McChord's waiver was filed February 18, 2010, and Sound Transit's waivers were filed February 19, 2010.

### CITY OF LAKEWOOD'S MOTIONS TO RESCIND

- 8 On March 30, 2010, the City of Lakewood filed four individual Motions to Rescind Final Order Granting, With Conditions, a Petition to Modify; and Consolidate for Hearing (Motions to Rescind) in Dockets TR-081229, TR-081230, TR-081231, and TR-081232. In essence, the City asks the Commission to rescind its prior orders approving safety modifications at the northern Lakewood crossings, consolidate the four petitions filed by WSDOT in July 2008 with those filed this year, and then consider the proposed safety modifications at all eight crossings (seven in Lakewood and one in DuPont) at the evidentiary hearing set approximately two months hence.
- 9 Lakewood contends that the waivers it filed in September 2008 were based on its understanding that WSDOT's petitions sought safety upgrades to support extension of Sound Transit's "Sounder" rail service into the City of Lakewood, not the Point Defiance Bypass Project.<sup>3</sup> According to the City, WSDOT obtained its September 2008 waivers "at a time when there was little, if any, activity" on Amtrak's Point Defiance Bypass project and WSDOT was only seeking waivers for those crossings associated with the Sounder project.<sup>4</sup> The City supports the passenger rail service associated with the Sounder project but opposes the Point Defiance Bypass project.
- 10 Lakewood believes that the Commission should review the Amtrak Point Defiance Bypass project as a whole to ensure consistency in the application of safety concerns. Therefore, the City seeks to have WSDOT's proposed safety modifications at all seven crossings in Lakewood that are part of the Point Defiance Bypass project consolidated and considered in a single hearing.

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<sup>3</sup> See Order 01, ¶ 2, in Dockets TR-081229, TR-081230, TR-081231, and TR-081232, where we noted as follows: "The Point Defiance Bypass project is a partnership between Sound Transit and WSDOT to improve reliability of the Amtrak Cascades passenger service between Portland, Oregon, and Seattle, and to extend commuter rail service to Lakewood. Currently, passenger trains slow down to maneuver on the curved tracks along southern Puget Sound and share the track with freight trains. Once construction of the project is complete in 2010, passenger trains will travel on an 18-mile inland "bypass" route that runs along the west side of Interstate 5, from south Tacoma through Lakewood and DuPont. Most freight trains will continue to use the existing tracks along Puget Sound."

<sup>4</sup> City of Lakewood's Motions to Rescind, at 2:9-18. The City argues that "it is now clear that the four waivers the City signed within the context of the "Sounder" project were to the benefit of the then inactive Amtrak "Point Defiance Bypass" project" *Id.*, at 2:22-24.

### OPPOSITION TO LAKEWOOD'S MOTIONS

- 11 **Staff.** On April 6, 2010, Commission Staff filed its opposition to Lakewood's motions. Commission Staff suggests that the City of Lakewood's motion is analogous to a motion to set aside a final judgment under Civil Rule (CR) 60(b), which would only allow relief upon a finding of mistake, inadvertence, surprise, excusable neglect, an irregularity in obtaining a final order, or similar justification.<sup>5</sup>
- 12 Staff contends that Lakewood's current surprise to find its waivers benefit Amtrak passenger service cannot be a sufficient basis to set aside the Commission's orders because CR 60(b)(1) requires motions based on surprise to be filed within one year of entry of a judgment.<sup>6</sup> Here, 18 months elapsed before Lakewood filed its motion. Staff further contends that the City has also failed to demonstrate any "extraordinary circumstances" that might justify relief under CR 60(b)(11). According to Staff, the City's change of position on desiring a hearing, originally waived in September 2008, is not an extraordinary circumstance.<sup>7</sup> Finally, Staff points out that setting aside these Commission orders will harm third parties, to include the public and WSDOT.<sup>8</sup>
- 13 **WSDOT.** On April 7, 2010, WSDOT filed its opposition to Lakewood's motions. According to WSDOT, there is no question that the City was aware of the Point Defiance Bypass Project when it signed its waivers in 2008.<sup>9</sup> WSDOT echoes Commission Staff's arguments with regard to CR 60(b) and the need to be able to rely on final orders.<sup>10</sup> Moreover, WSDOT points out that it has actually relied on the finality of the September 2008 orders and, in conjunction with Sound Transit, has

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<sup>5</sup> Commission Staff's Opposition, ¶ 5.

<sup>6</sup> *Id.* at ¶ 6.

<sup>7</sup> *Id.* at ¶¶ 7-8.

<sup>8</sup> *Id.* at ¶ 9.

<sup>9</sup> WSDOT's Response in Opposition, ¶¶ 2 and 8-9; *see also* Declaration of Kevin M. Jeffers at ¶¶ 5 and 6-10.

<sup>10</sup> WSDOT's Response in Opposition, ¶¶ 6 -11.

already committed funds and signed contracts authorizing work at these crossings, some of which has already been completed.<sup>11</sup>

### ANALYSIS AND DECISION

- 14 Parties to a Commission final order can seek reconsideration,<sup>12</sup> rehearing,<sup>13</sup> or judicial review.<sup>14</sup> Further, the Commission has the power to rescind its own orders.<sup>15</sup> In this case, following consideration of WSDOT's petitions at a Commission open meeting, the Commission granted WSDOT's petitions as consent items on the open meeting agenda, delegating authority to its Executive Director and Secretary to enter the orders on behalf of the Commission.<sup>16</sup>
- 15 The record demonstrates that the City of Lakewood received notice of WSDOT's petitions and waived its right to a hearing on the proposed modifications. After reviewing the case records in these dockets, we conclude that the City of Lakewood knew, or should have known, that the waivers it signed in September 2008 applied to proposed safety improvements that would benefit not only the Sounder commuter rail service, but also the additional passenger train traffic associated with Amtrak

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<sup>11</sup> *Id.* at ¶¶ 7; *see also* Declaration of Kevin M. Jeffers at ¶¶ 11-15.

<sup>12</sup> WAC 480-07-850 requires petitions for reconsideration of a final order to be filed within 10 days of its entry.

<sup>13</sup> WAC 480-07-870 permits any person affected by a final order to seek rehearing and does not specify any time limitation.

<sup>14</sup> *See* WAC 480-07-825(10) and RCW 34.05.542(2), requiring petitions for judicial review to be filed with the appropriate Superior Court within 30 days after service of the final order.

<sup>15</sup> WAC 480-07-875(1) provides that the Commission may “alter, amend, or rescind any order that it has entered, after notice to the public service company or companies affected and to all parties in the underlying proceeding, and after allowing an opportunity for hearing as in the case of complaints. Any order altering, amending, or rescinding a prior order will have the same effect as any other final order when served upon the public service company or companies affected.”

<sup>16</sup> *See* WAC 480-07-900(4)(c).

rerouting its Cascade service onto a Point Defiance Bypass route. The City of Lakewood's City Manager, Andrew Neiditz, concedes as much in his declaration.<sup>17</sup>

- 16 The opening paragraph of each of our final orders in these dockets expressly states that “[m]odifying the crossing is part of the Point Defiance Bypass project.” Further, we note that WSDOT’s petitions stated that the expected passenger train traffic would increase from two daily freight trains and no passenger trains to two daily freight trains and up to 36 daily passenger trains at each crossing.<sup>18</sup> If nothing else, this dramatic increase in the number of passenger trains (18 daily roundtrips) should have put Lakewood on notice that the proposed improvements to the crossings were for more than Sounder service.
- 17 We also note that Sounder service to Lakewood will eventually serve the transit center located on Pacific Highway. Of the four crossings the City now asks us to reconsider, the Bridgeport Way SW crossing is located southward of this station and could never have reasonably been expected to be part of the Sounder project. Lakewood’s motion offers no explanation for how the City could have been misled or confused by waiving its hearing rights with regard to the improvements to the Bridgeport Way SW crossing which Sounder commuter trains will never reach.
- 18 We do not lightly disturb orders previously entered where no party or person can demonstrate patent error or a prejudicial violation of process. This is particularly so where parties have properly relied upon our orders, and amendment or rescission would be detrimental to those parties’ interests. Here, WSDOT has moved forward on the approved safety modifications and is presently performing work at one or more of these crossings.

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<sup>17</sup> Mr. Neiditz acknowledges that “in the course of pursuing “Sounder” service, waivers were signed to facilitate the work necessary to bring “Sounder” service to Lakewood, although on their face, these waivers relate to the Washington State Department of Transportation (WSDOT) “Point Defiance Bypass” project, a project the City of Lakewood opposes.” See Declaration of Andrew Neiditz, ¶ 6.

<sup>18</sup> Sections 3 and 4 of the petitions for 108<sup>th</sup> Street SW and 100<sup>th</sup> Street SW expected up to 36 passenger trains per day at those crossings (including low-speed trains to and from a layover), while the petition for Steilacoom Blvd SW expected up to 24 daily passenger trains and the petition for Bridgeport Way SW expected up to 12 daily passenger trains.

19 The City's motions do not question the adequacy of WSDOT's approved safety  
upgrades, but simply ask us to conduct a hearing on the merits at this late date. The  
City of Lakewood does not present us with good cause of the sort described in  
CR 60(b) or any other law or rule to justify our rescission of these orders. Tellingly,  
the City of Lakewood's motions make no reference to any legal basis for its request.

20 We conclude that the City of Lakewood's motions must be denied.

21 Inasmuch as the foregoing matters involve related principles of law and fact, it is  
appropriate that they be consolidated for determination pursuant to WAC 480-07-320.

### FINDINGS AND CONCLUSIONS

22 (1) The Washington Utilities and Transportation Commission is an agency of the  
State of Washington having jurisdiction over public railroad-highway grade  
crossings within the State of Washington. *RCW 81.53*.

23 (2) On September 24, 2008, the Commission entered separate orders in Dockets  
TR-081229, TR-081230, TR-081231, and TR-081232, approving WSDOT-  
proposed safety upgrades to four railroad-highway grade crossings located  
within the City of Lakewood, Washington.

24 (3) The City of Lakewood waived its right to hearings on the proposed safety  
upgrades more than 18 months ago and now seeks to withdraw those waivers.

25 (4) The subject matter of each of those Commission orders and each of the City of  
Lakewood's motions is sufficiently related to merit consolidation.

26 (5) WSDOT and others have relied upon the approvals provided in the orders.

27 (6) The City of Lakewood failed to provide good cause or other sufficient  
justification to rescind any of the final orders.

28 (7) The City of Lakewood's motions to rescind the Commission's existing orders  
in Dockets TR-081229, TR-081230, TR-081231, and TR-081232 should be  
denied.

**ORDER**

THE COMMISSION ORDERS:

- 29 (1) The City of Lakewood's motions to rescind the Commission's final orders in  
Dockets TR-081229, TR-081230, TR-081231, and TR-081232 are  
consolidated.
- 30 (2) The City of Lakewood's motions to rescind the Commission's final orders in  
Dockets TR-081229, TR-081230, TR-081231, and TR-081232 are denied.

Dated at Olympia, Washington and effective April 15, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission.  
Administrative relief may be available through a petition for reconsideration,  
filed within 10 days of the service of this order pursuant to RCW 34.05.470 and  
WAC 480-07-850.**