



Douglas G. Richardson
Mayor

April 23, 2010

Don Anderson
Deputy Mayor

Carole J. Washburn, Executive Secretary
Utilities & Transportation Commission
PO BOX 47250
1300 S Evergreen Park Drive SW
Olympia, WA 98504-7250

Claudia B. Thomas
Council Member

Walter Neary
Council Member

RE: Docket Nos. TR-100127, TR-100128, and TR -100129 (*Consolidated*)


Michael D. Brandstetter
Council Member

Enclosed for filing in this matter you will find the original and twelve copies of a Motion to Reconsider Order Denying Motions to Rescind Final Orders & Declaration of Service.

Mary Moss
Council Member

Sincerely,

Jason Whalen
Council Member


CHERYL A. THOMPSON
Administrative Assistant to
HEIDI ANN WACHTER
City Attorney

Andrew E. Neiditz
City Manager

CC: Kevin Jeffers, WSDOT
L. Scott Lockwood, Assistant Attorney General
Fronda Woods, Assistant Attorney General, WUTC

Heidi Ann Wachter
City Attorney

Alice M. Bush, MMC
City Clerk

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**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

In the matter of the Petitions of the Washington State Department of Transportation (WSDOT) to Modify a Highway-Rail Grade Crossing Located at Clover Creek Drive SW, Berkeley Street SW, and North Thorne Lane SW

Docket Nos. TR 081229, TR 081230, TR 081231, TR 081232 (*Consolidated*)

**MOTION TO RECONSIDER ORDER
DENYING MOTIONS TO RESCIND FINAL
ORDERS**

COMES NOW, City of Lakewood ("City"), by and through its attorney(s) of record, and moves the Washington State Utilities and Transportation Commission (WUTC or "Commission"), pursuant to WAC 480-07-875, to reconsider the Order Denying the Motion to Rescind dated April 15, 2010, rescind the waivers, all four of which are dated September 15, 2008, based on new information and allow the City to respond to an accurate Petition in these four crossings. In related cases, Consolidated Docket Nos. TR 100127, TR 100128 and TR 100129, recent testimony reveals that the Petitions do not adequately notify parties of the feasibility of over-crossings or under-crossings. Using separate Petitions for each crossing also misleads the parties as to the ultimate impact of the project in question.

The Commission issued an *Order Consolidating Dockets and Denying Motions to Rescind Final Orders* on April 15, 2010. On April 19, 2010 the City received by mail the hard

MOTION TO RECONSIDER ORDER DENYING
MOTIONS TO RESCIND FINAL ORDERS

CITY OF LAKEWOOD
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ORIGINAL

1 copy of testimony of Kevin Jeffers, P.E., Rail Engineering Manager for the Washington State
2 Department of Transportation (WSDOT), given on April 16, 2010 in Consolidated Docket
3 Nos. TR 100127, TR 100128 and TR 100129. This testimony is, in relevant part, at odds with
4 Petitions filed in those matters and calls into question the adequacy of notice in these matters.¹

5
6 Previous discussions as well as the ruling of the Commission discount any “surprise” on
7 the part of the City of Lakewood as to the true impact of the AmTrak “Point Defiance Bypass”
8 project. This, despite the fact that WSDOT has chosen to Petition crossing by crossing rather
9 than using the “Systems Approach” endorsed by the Federal Highway Administration
10 (FHWA).² The question now is whether the Commission will continue to discount the City’s
11 concerns in light of the testimony of Kevin Jeffers which shows that the Petitions in these
12 crossings have been treated as nothing more than another procedural step rather than the notice
13 tool they are supposed to be. The City is accused of changing position on the project. In fact,
14 in evaluating these crossing projects as a whole, it is WSDOT caught in the contradiction
15 between Petition and testimony.

16
17 **I. INDEPENDENT CONSIDERATION OF EACH CROSSING CONTRADICTS
18 THE PREFERRED APPROACH.**

19 The Washington State Department of Transportation (WSDOT) Amtrak “Point
20 Defiance Bypass” project involves seven highway-rail crossings in the City of Lakewood. All
21 seven are part of a single project and thus involve related issues of law and fact. The Federal
22 Highway Administration (FHWA) has identified the best approach to use in a setting such as
23 this:

24
25 ¹ For purposes of this brief, the City will focus on the primary concern of notice. This is not to waive any
26 arguments or issues presented elsewhere in Consolidated Docket Nos. TR100127, TR200128 & TR100129.

27 ² Railroad-Highway Grade Crossing Handbook – Revised Second Edition August 2007 – U.S. Department of
28 Transportation/Federal Highway Administration, Chapter III, Section D.

1 Assume that a segment of rail line is to be upgraded for unit train
2 operations or high-speed passenger service. This type of change in rail
3 operations would provide an ideal opportunity for the application of the
4 systems approach.³

5 The guidance goes on to explain that the systems approach allows for comprehensive
6 analysis.⁴ We are unable to do that here because the seven crossings have been addressed
7 independently.⁵ Separate consideration of any single crossing may result in disparity between
8 the modifications at these crossings although all are part of one system in the same urban area.
9 The Commission has ruled that because the City waived hearing as to four of the seven
10 crossings the preferred approach is not an option.

11 **II. TESTIMONY OF KEVIN JEFFERS IN RELATED HEARINGS DEMONSTRATES**
12 **THAT THE PETITIONS RESULTING IN WAIVER BY THE CITY WERE**
13 **INADEQUATE TO RESULT IN MEANINGFUL WAIVER.**

14 Because the City waived hearing in Docket Nos. TR081229, TR081230, TR081231
15 and TR081232, there was never any testimony to contradict the Petitions. In relevant part,
16 those Petitions state that to build an over-crossing or under-crossing is not feasible. In answer
17 to the question "Is it feasible to construct an over-crossing or under-crossing at the proposed
18 location as an alternative to an at-grade crossing?" the "no" line is marked for every one of the
19 seven crossings. The next question calls for an explanation and one is provided for every one
20 of the seven crossings. With the benefit of testimony in related Docket Nos. TR 100127, TR
21 100128 and TR 100129, we now know that either the explanation is inaccurate or the
22 testimony is.

23 ³ *Id.*

24 ⁴ *Id.*

25 ⁵ It should be noted that the way the Petitions were filed has resulted in five separate considerations by the
26 Commission, the first four of which have now, only after the City's recent Motion to Rescind, have been
27 consolidated into one. Because there may be a temptation to relate determinations regarding these four crossings,
28 where the City has had no voice, to the three now pending the potential harm to the City of the misleading notice
in the Petitions is compounded.

1
2 The issue is whether the Petition for Modification provides adequate notice to the
3 parties to allow those parties to provide meaningful waiver. It is the position of the City that to
4 affirmatively state that construction of an over-crossing or under-crossing is not feasible for
5 reasons such as wetlands or that buildings would have to be removed is very different than
6 project prioritization or cost-related reasons, which are much more subjective. Without a full
7 explanation, the summary statements of WSDOT in the Petitions make construction of an
8 over-crossing or under-crossing sound impossible.

9 This begs the question of how an agency can properly answer this kind of question in
10 sufficient detail given the nature of the form. There is guidance in case law, which when
11 adjudicating challenges to notice, favors applications which reference a “complete project
12 description”.⁶ No such reference is made here.

13
14 The City could not have assumed that WSDOT would say something different in
15 testimony than in the Petition. The problem is clear now only because the City has received
16 the contradictory testimony from Kevin Jeffers in the pending matters. To rule against the
17 City on this motion is to endorse the slipshod Petitions and require every party who could
18 potentially waive hearing to conduct an inquisition about which answers WSDOT will
19 continue to assert and which ones will change after the time for waiver has passed.

20 There is another question marked with “no” in every one of the seven instances but
21 without explanation. This is the question regarding whether a safer location exists within a
22 reasonable distance of the proposed location. For these seven crossings, there is an existing
23 active route within about five miles outside the urban core. However, for this question, there is
24

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27 ⁶ See *Nisqually Delta Association v. DuPont*, 103 Wn. 2d 720, 727, 696 P.2d 1222 (1985).

1 room for debate, as there is no statement in the Petition to contradict with testimony. Again,
2 there is no reference to a more comprehensive explanation.

3
4 With regard to this question of grade separation and where an explanation of why grade
5 separation is not feasible is included in each Petition, Kevin Jeffers has now provided by
6 written testimony a different explanation for three of those Petitions. A sampling follows:

7 **Clover Creek, Docket No. TR 100127**

8 Petition:

9 "There is approximately 200' to the intersection with Pacific Highway
10 SW, which is inadequate to accommodate the necessary grades."⁷

11 Written Direct Testimony of Kevin Jeffers:

12 "...WSDOT did not consider a grade separation of any kind." Without
13 reference to any authority whatsoever Mr. Jeffers states, "The volume of
14 traffic would not warrant even the lowest cost grade separation."⁸

15 **Berkeley Street, Docket No. TR 100128**

16 Petition:

17 "The existing site is surrounded by businesses, Interstate 5, and a military
18 installation. Constructing an overcrossing or undercrossing would require
19 elimination or relocation of some or all of these facilities. In addition, the
20 frontage road (Union Avenue), which is lined with businesses and
21 residences, would also require raising or lowering in order to match the
22 approach grades for the railroad grade separation."⁹

23 Written Direct Testimony of Kevin Jeffers:

24 Mr. Jeffers testifies to none of this but instead describes 3,000 foot walls
25 necessary to raise the train sufficiently above vehicles and, although this is

26 ⁷ Petition to Modify a Highway-Rail Grade Crossing; Clover Creek; WUTC Docket No. TR 100127 (later
27 consolidated with WUTC Docket Nos. TR 100128 and TR 100129).

28 ⁸ Written Direct Testimony of Kevin M. Jeffers, P.E., submitted April 16, 2010 by Staff of Washington State
Department of Transportation State Rail and Marine Office, Section IV, pages 17-19.

⁹ Petition to Modify a Highway-Rail Grade Crossing; Berkeley Street; WUTC Docket No. TR 100128 (later
consolidated with WUTC Docket Nos. TR 100127 and TR 100129).

1 about 20% of the cost of the grade separation described for North Thorne
2 Lane, concludes, "Grade separating these crossings is simply not
3 financially feasible."¹⁰

4 **North Thorne Lane, SW, Docket No. TR 100129**

5 Petition:

6 "The existing site is surrounded by a golf course and a wetland. WSDOT
7 has investigated an overpass in the area, but these investigations
8 determined that an overpass would require significant R/W takes and
9 reconfiguration of the roadway network as far east as Gravelly Lake Drive
10 SW."¹¹

11 Written Direct Testimony of Kevin Jeffers:

12 "WSDOT elected not to construct over-crossings or under-crossings,
13 because, as set forth below, constructing grade separations at this crossing
14 is not feasible within available funding." Mr. Jeffers goes on to explain,
15 "WSDOT has a plan to build a grade separation at North Thorne Lane SW
16 as part of the larger SR 704 – Cross Base Highway." His position is not
17 that the over-crossing is not feasible, it is that incorporating construction
18 into the Cross Base Highway project is "the most reasonable option."¹²

19 The testimony goes so far as to say state law does not require grade separation for this
20 project at any of the crossings, which takes train traffic from about two trains a day at 10 mph
21 to close to 20 trains per day, most of which will move at seventy-nine miles per hour. The
22 increase in train traffic is in the Petition, assuming that it is accurate, but never is it mentioned
23 that grade separation is not required by law. WSDOT gives an excuse for not doing it rather
24 than say the requirement does not apply. No context for financial feasibility is provided.

25 ¹⁰ Written Direct Testimony of Kevin M. Jeffers, P.E., submitted April 16, 2010 by Staff of Washington State
26 Department of Transportation State Rail and Marine Office, Section IV, pages 17-19.

27 ¹¹ Petition to Modify a Highway-Rail Grade Crossing; North Thorne Lane SW; WUTC Docket No. TR 100129
28 (later consolidated with WUTC Docket Nos. TR 100127 and TR 100128).

¹² Written Direct Testimony of Kevin M. Jeffers, P.E., submitted April 16, 2010 by Staff of Washington State
Department of Transportation State Rail and Marine Office, Section IV, pages 17-19.

1 III. BECAUSE WE NOW KNOW THAT THE PETITIONS DO NOT MATCH THE
2 TESTIMONY IT IS UNREASONABLE TO CONCLUDE A MEANINGFUL
3 WAIVER COULD HAVE BEEN PROVIDED FOR THESE PETITIONS.

4 We cannot know the feasibility of the overcrossing or undercrossing – it could be either
5 as represented by the Petition, as represented in testimony, neither, both, or some hybrid.

6 This also doesn't yield confidence in any of the other information in the Petitions.

7
8 The Petitions which resulted in waiver by the City of Lakewood are no different in level
9 of detail and it is unreasonable to expect local jurisdictions to divine the details of a project and
10 hire experts to evaluate the representations made by WSDOT just to determine whether the
11 Petition is accurate.

12
13 **Steilacoom Boulevard, Docket No. TR 081229**

14 WSDOT claims construction of an over-crossing or under-crossing is not
15 feasible because “The existing site has multiple businesses near the
16 crossing, as well as nearby roadway intersections. The grades required for
17 the roadway approaches would not meet AASHTO guidelines for vertical
18 curvature unless the street grid in this area were significantly
19 reconfigured.”¹³

20
21 **108th Street, Docket No. TR 081230**

22 WSDOT claims construction of an over-crossing or under-crossing is not
23 feasible because “The existing site is in a largely residential area.
24 Combined with nearby roadway intersections, the grades required for the
25 roadway approaches would not meet AASHTO guidelines for vertical
26 curvature unless the street grid in this area were significantly
27 reconfigured.”¹⁴

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¹³ Petition to Modify a Highway-Rail Grade Crossing; Steilacoom Blvd.; WUTC Docket No. TR 081229 (later consolidated with WUTC Docket Nos. TR 081230, TR 081231 and TR 1001232).

¹⁴ Petition to Modify a Highway-Rail Grade Crossing; 108th Street.; WUTC Docket No. TR 081230 (later consolidated with WUTC Docket Nos. TR 081229, TR 081231 and TR 1001232).

1 **Bridgeport Way, Docket No. TR 081231**

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3 WSDOT claims construction of an over-crossing or under-crossing is not
4 feasible because "The existing site is very flat, and is very close to an
5 adjacent intersection, with several businesses in the vicinity. The grades
6 required for the roadway approaches would not meet AASHTO guidelines
7 for vertical curvature unless the street grid in this area were significantly
8 reconfigured."¹⁵

9 **100th Street, Docket No. TR 081232**

10 WSDOT claims construction of an over-crossing or under-crossing is not
11 feasible because "The existing site has multiple businesses near the
12 crossing, as well as nearby roadway intersections. The grades required for
13 the roadway approaches would not meet AASHTO guidelines for vertical
14 curvature unless the street grid in this area were significantly
15 reconfigured."¹⁶

16 We do not know what explanation would be given today as to why construction of an
17 over-crossing or under-crossing would not be feasible in these areas. Points to consider in
18 determining whether to take these Petitions on their face given the problems in the later
19 Petitions include the following: First, The theory seems to be that urban features (buildings,
20 nearby intersections, etc.) prevent construction of over-crossings or under-crossings. Using
21 this rationale the best place to build such a crossing might be a cow pasture where there are no
22 buildings in the way but there is also not enough traffic to justify the over-crossing or under-
23 crossing in the first place.
24

25 ¹⁵ Petition to Modify a Highway-Rail Grade Crossing; Bridgeport Way.; WUTC Docket No. TR 081231 (later
26 consolidated with WUTC Docket Nos. TR 081229, TR 081230 and TR 1001232).

27 ¹⁶ Petition to Modify a Highway-Rail Grade Crossing; 100th Street.; WUTC Docket No. TR 081232 (later
28 consolidated with WUTC Docket Nos. TR 081229, TR 081230 and TR 1001231).

1 Second, The reference to AASHTO is never explained, not in terms of what it stands for
2 and not in terms of what it means in the context of railroad safety. This begs the question of
3 what level of scrutiny the “notified” parties must engage just to understand the notice.
4

5 Adequacy of notice is settled law:
6

7 Notice is **adequate** if it discloses the nature of a proposed administrative
8 action and if there is no showing that anyone was actually misled by the
9 notice. Nisqually Delta Ass'n v. DuPont, 103 Wn.2d 720, 727, 696 P.2d
10 1222 (1985). The essence of proper notice is fairness to affected parties:
11 One of the basic touchstones of due process in any proceeding is notice
12 reasonably calculated under all the circumstances to apprise affected
13 parties of the pending action and afford them an opportunity to present
14 their objections. Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14
15 L.Ed.2d 62 (1965).¹⁷

16 The burden is on WSDOT to provide not only an adequate description of the project but
17 also file a Petition that does not mislead. Pictures of the envisioned improvements, attached to
18 each Petition, do not address why grade separation is not feasible. Perhaps WSDOT is not in a
19 position to provide a detailed explanation because one does not exist; the form is submitted
20 merely for purposes of getting to the next step rather than notifying the impacted community.
21 By affirmatively stating that grade separation cannot be done rather than explaining the
22 challenges of doing it, WSDOT creates the impression that arguments for grade separation are
23 pointless, not just for the City of Lakewood but for any concerned party wishing to intervene.
24 WSDOT’s argument that the Petition was sufficient in each case and that the City is changing
25 position appears increasingly disingenuous given the contradictions in WSDOT’s own words.
26

27 ¹⁷ Inland Asphalt Co. v. Benton Clean Air Authority, Pollution Control Hearings Board, PCHB No. 05-111, citing
28 Barrie v. Kitsap county et al., 84 Wn.2d 579, 585, 527 P.2d 1377 (1974).

1 The City has previously pointed out the timing of the first four waivers (concurrent with
2 the timing of Sounder). This was dismissed as irrelevant because the Bridgeport crossing is
3 not part of the Sounder route. Now we know that the notice, in addition to the timing, is
4 suspect and that the guidance used by WSDOT calls for comprehensive consideration for
5 exactly this type of project.¹⁸ The City is asking that WSDOT follow its own guidance:

6
7 A systems approach developed for crossings in a specified community or
8 political subdivision allows for a comprehensive analysis of highway
9 traffic operations. Thus, unnecessary crossings can be closed, and
10 improvements can be made at other crossings. This approach enhances
11 the acceptability of crossing closures by local officials and citizens.¹⁹

12 Any waiver signed by the city was signed without full disclosure of WSDOT's opinion
13 of feasibility – in fact, we now know that WSDOT has plans to build at least one over-crossing
14 that, according to the Petition, is not feasible.²⁰ In changing assertions contained in the
15 Petitions, which are designed to give proper notice, WSDOT has created a moving target. The
16 City is entitled to determine whether the assertions made in those Petitions are valid. An
17 Order based on an inaccurate Petition must be rescinded and the City given an opportunity to
18 consider WSDOT's real answers.

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22 ¹⁸ Railroad-Highway Grade Crossing Handbook – Revised Second Edition August 2007 – U.S. Department of
23 Transportation/Federal Highway Administration, Chapter III, Section D.

24 ¹⁹ Railroad-Highway Grade Crossing Handbook – Revised Second Edition August 2007 – U.S. Department of
25 Transportation/Federal Highway Administration, Chapter III, Section D.

26 ²⁰ See Petition to Modify a Highway-Rail Grade Crossing; North Thorne Lane SW; WUTC Docket No. TR
27 100129 (later consolidated with WUTC Docket Nos. TR 100127 and TR 100128) compared with Written Direct
28 Testimony of Kevin M. Jeffers, P.E., submitted April 16, 2010 by Staff of Washington State Department of
Transportation State Rail and Marine Office, Section IV, pages 17-19.

1 **CONCLUSION**

2
3 It is clear in light of recent testimony in related cases that the Petitions which resulted in
4 waivers from the City of Lakewood are nothing more than words on paper and do not provide
5 adequate notice upon which to base a waiver. The City requests reconsideration of the original
6 motion and rescission of the Final Order and full reconsideration of Consolidated Docket Nos.
7 TR 081229, TR 081230, TR 081231, and TR 081232 in light of new information that the
8 Petitions are flawed.

9
10 DATED this 23rd day of April, 2010.

11 CITY OF LAKEWOOD

12 By Heidi Ann Wachter
13 HEIDI ANN WACHTER
14 City Attorney, WSBA #18400

1 **DECLARATION OF SERVICE**

2 I, CHERYL THOMPSON, certify under penalty of perjury under the laws of the State of
3 Washington, that on APRIL 23, 2010, I served VIA ABC LEGAL MESSENGER, a true and
4 correct copy of the foregoing document entitled MOTION TO RECONSIDER ORDER
5 DENYING MOTIONS TO RESCIND FINAL ORDERS AND NEW MOTION TO
6 RESCIND FINAL ORDER on the following:
7

8
9 KEVIN JEFFERS
10 WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
11 310 NORTH MAPLE PARK AVENUE SE
12 PO BOX 47407
OLYMPIA, WA 98504-7407

13 L. SCOTT LOCKWOOD
14 ASSISTANT ATTORNEY GENERAL
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17 FRONDA WOODS
18 ASSISTANT ATTORNEY GENERAL
19 WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
20 1300 S. EVERGREEN PARK DRIVE SW
PO BOX 47250
OLYMPIA, WA 98504-7250

21 DATED this 23rd day of April, 2010

22
23 
24 CHERYL A. THOMPSON
25 Administrative Assistant
26
27
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MOTION TO RECONSIDER ORDER DENYING
MOTIONS TO RESCIND FINAL ORDERS