

SERVICE DATE

JUL - 3 1996

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

UNION PACIFIC RAILROAD COMPANY,)	DOCKET NO. TR-950176
)	
Petitioner,)	
)	
v.)	COMMISSION ORDER CLOSING
)	ASHTON ROAD CROSSING,
SPOKANE COUNTY,)	ON CONDITION
)	
Respondent.)	
)	
.....)	

The Commission consolidated this docket for hearing with Docket Nos. TR-950175 and TR-950177. A hearing in the consolidated dockets was held January 30, 1996, pursuant to due and proper notice to all interested persons, at Spokane, Washington.

Nature of Proceeding: This is a petition by Union Pacific Railroad Company for closure of the crossing at grade of Ashton Road by tracks of the Union Pacific Railroad in Spokane County, Washington.

Initial Order: Administrative Law Judge John Prusia entered an initial order that would grant the petition, on condition that frontage roads be constructed to permit access to properties now served by the crossing.

Post-hearing process: No party petitioned for administrative review. Spokane County petitioned to reopen the record for evidence that, it contends, would demonstrate that it is unable financially to construct the frontage roads that would satisfy the conditions of closure. The Railroad and Commission Staff answer the petition, opposing reopening, contending that the information sought to be presented was reasonably available to the County at the time of the hearing. They also contend that, in any event, if accepted as true, the information as represented in the petition would not change the result of the initial order because the Ashton Road crossing would not be closed without satisfaction of the condition, construction of the frontage roads. One non-party submitted a petition for administrative review alleging flaws in process.

Commission: The motion to reopen is denied and the initial order is affirmed and adopted. The non-party's petition is rejected; the Commission reviews on its own motion the issues raised and determines that the process is not flawed.

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Appearances: Petitioner Union Pacific Railroad Company appeared by Carolyn L. Larson, attorney, Portland, Oregon. Respondent Spokane County appeared at the hearing by Ross Kelley, Assistant County Engineer and in post-hearing process by Jim Sweetser, Deputy Prosecuting Attorney, Spokane. Commission Staff appeared by Shannon Smith, Assistant Attorney General, Olympia.

[1] The Commission will deny reopening when it is sought in order to present information that was available at the time of the hearing and is not essential to the result of the initial order. WAC 480-09-820.

[2] Because at some point, changing circumstances overtake the findings and conclusions of a conditional order based on the facts and laws at the time the order was entered, the Commission will limit the effect of the order conditionally requiring closure of a grade crossing to three years from the date of its entry. After that period, if the condition is not satisfied, the order will be considered null and void and of no effect.

[3] A citizen who testified at the hearing, and did not seek to intervene, does not have party status and has no right to petition for administrative review. WAC 480-09-390; WAC 480-09-820.

[4] When issues are raised in an imperfect or impermissible pleading that could affect the public interest, the Commission may on its own motion consider matters raised in the pleading.

[5] When a citizen alleges that a governmental body's representative at a hearing, who had apparent authority to appear for the governmental body, had no actual specific authority to appear on its behalf, but the governmental body had notice of the hearing and the initial order resulting from the hearing and has made no objection to process at any point, the Commission has no jurisdiction to determine whether a specific person lawfully acts as agent for the governmental body.

MEMORANDUM

This matter involves a petition for closure of a crossing at grade in Spokane County, Washington. A consolidated hearing was held in this matter on Docket Nos. TR-950175 and TR-950177 in Spokane, Washington on January 30, 1996. The initial order finds that closure of the crossing would be appropriate upon construction of frontage roads to serve properties near the crossing. No party has challenged that result, which the Commission believes to be appropriate and will affirm and adopt as its own decision.

Reopening.

In the time allowed for filing petitions for administrative review, Spokane County petitioned for reopening. It contends that certain information is lacking from the record -- specifically, information as to the cost of providing frontage roads and the County's inability to fund that investment. Commission Staff and the Union Pacific both answered the petition, opposing it. They contend that the information was not unavailable at the time of the hearing and that it is not essential to a decision, two criteria for reopening that are set out in WAC 480-09-820.¹

[1] The Commission denies the request to reopen the hearing. The cost information clearly was available at the time of the hearing, but the County determined to defer calculating costs until after the hearing. Neither is the information essential to the result of the order. As noted above, the order proposes to grant the petition for closure on condition that the frontage roads are constructed; in the absence of that construction, the crossing will not be closed. The County has not stated a sufficient reason to reopen the proceeding. WAC 480-09-820.

[2] The Commission does observe that it is undesirable to have an order in effect for an indefinite period containing a condition that might never be fulfilled. At some point, circumstances overtake the findings and conclusions of the order that reflect the facts and the laws as of the time the order was entered. Consequently, the Commission will specify that its order will be effective for three years from the date of its entry. During that period, and such further time as may be needed to complete reasonably diligent construction of frontage roads begun before the specified date, changes to reflect changed conditions or legal circumstances may be sought through a petition for rehearing. After that period, if construction of the frontage roads has not commenced, the order will be considered null and void and of no effect. After that date, any petition for action falling within the subject of the order must be filed as an original petition.

Citizen Participation.

One of the citizens who testified at the hearing, Lisle Smith, filed a petition for administrative review. Commission Staff and the Railroad oppose the petition, contending that Mr. Smith does not have standing to participate as a party in the post-hearing process.

¹The regulation reads in part as follows:

WAC 480-09-820 Rehearing or reopening. * * *

(2) Reopening. A petition for reopening may be filed with the commission by any party to a proceeding at any time after the close of the record and before entry of the final order. * * *

(b) In contested proceedings, a petition may be granted to permit receipt of evidence which is essential to a decision and which was unavailable and not reasonably discoverable at the time of the hearing with due diligence, or for any other good and sufficient cause.

(Emphasis added.)

[3] Mr. Smith does not have party status in this proceeding² and therefore has no right to petition for administrative review.³

[4] The Commission understands the concern of persons who would be directly and immediately affected by closure of a railroad crossing. In this proceeding, because of the nature of the issues raised and potential questions affecting the public interest, the Commission will on its own motion consider a matter advanced by Mr. Smith.

He contends that the proceeding is flawed because Mr. Kelley, the County Engineer who represented the County at the hearing, had no authority to appear on the County's behalf. Mr. Smith contends that he has verified that conclusion with a deputy prosecuting attorney and with County staff. He contends that had this been known at the hearing then he, as an elected precinct committeeperson, could have represented the County.

[5] The County was served with a notice of the hearing and had every opportunity to designate a representative to appear. The County and the Prosecuting Attorney have also been served with a copy of the initial order and have raised no objection to the process. They have through the order received legal notice of Mr. Kelley's participation. They have raised other matters to the Commission involving this proceeding. By raising no objection, they indicate either that Mr. Kelley did have the County's authority to appear or that the County has in effect ratified his participation. Mr. Kelley announced his participation at the hearing; no party then objected to it. Because of the nature of the issues in this matter and the nature of Mr. Kelley's employment with the County, his participation is not unusual or inappropriate on its face. It is not the Commission's responsibility, nor is it the Commission's right, to determine for the County who may represent it.

²WAC 480-09-390 provides, in part,

(2) Party status - appearances - service of final order. No person who fails to enter an appearance as prescribed by WAC 480-09-720, will be entitled to party status to a proceeding under RCW 81.53.060 after the close of the period for the taking of appearances if a hearing is held, even though such person may have filed an objection to a proposed crossing closure under the provisions of subsection (1) of this section, and no such person will be entitled to service of the final order of the commission in the matter unless party status is reestablished through intervention under the provisions of WAC 480-09-430, although such person may be sent a courtesy copy of the proposed or final order.

(3) Interested persons who lack party status, as defined herein, shall be provided an opportunity to be heard and offer evidence as required by RCW 81.53.060. They may not call witnesses, cross-examine witnesses or otherwise participate as a party. Interested persons who lack party status lack standing to file petitions for administrative review of initial orders or to file petitions for reconsideration of final orders.

³WAC 480-09-780 provides, in part,

(2) Petitions for administrative review - time for filing - who may file - required copies.

(a) Any party may within twenty days after entry of the initial order file a petition for administrative review.

The Commission does have the right within some general limitations to determine who may practice before it; here, no objection was made to Mr. Kelley's participation on that ground and allowing his participation was within the presiding officer's discretion and within the Commission's rules. RCW 34.05.449(1).

Mr. Kelley makes other process-related allegations and asks for further hearing sessions. The Commission has examined each of the concerns he raises and finds that the process followed is fully lawful and proper, that it allowed full participation of all who wished to participate, and that it gathered sufficient evidence to allow the Commission to make a knowledgeable decision.

Conclusion.

It is apparent from the record that all parties had ample notice of the hearing and ample opportunity to participate. There is no need to reopen the proceeding. The result of the initial order is proper and the Commission affirms and adopts it as the Commission's own, subject to the qualification that the order will be null and void unless construction of frontage roads as specified in the initial order begins within three years from the date this order is entered.

FINDINGS OF FACT

1. On January 30, 1995, Union Pacific Railroad Company ("Union Pacific") petitioned the Commission for closure of the Ashton Road crossing at Milepost 14.28 on the Union Pacific Railroad in the Otis Orchards area of Spokane County, east of the city of Spokane. The petition states that during the project development stage for proposed signalization of this crossing, the Commission and the Washington Department of Transportation recommended closure and the construction to adjacent crossings of frontage roads paralleling the tracks, that the company has agreed to construct these frontage roads on railroad right of way, and that this proposal will provide the necessary motor vehicle traffic circulation in the area.

2. John Turnbull testified for Union Pacific in support of the petition. Mr. Turnbull is Manager of Industry and Public Projects for the company. He has held the position for five years. He is based in Nampa, Idaho. His job responsibilities encompass the states of Washington, Oregon, Idaho, and Montana, working with states and local governments on crossing, safe projects, and also working with new industrial customers. There are approximately 40 road crossings along a 20 mile stretch in this part of Spokane County, more than half of which have only passive signalization such as crossbucks and stop signs. Putting lights and gates on all of them would be expensive. Mr. Turnbull is on a team that is working to consolidate crossings and close unnecessary crossings.

3. Mr. Turnbull is familiar with the Ashton Road crossing. The roads in the Ashton Road crossing area are shown in Exhibit 3. The tracks run in an east-west direction. Ashton road runs in a north/south direction, midway between and parallel to Campbell Road (to the west) and Kenney Road (to the east). There are crossings also at Campbell and Kenney. The Campbell crossing has signal lights and gates. Only a few blocks separate the three roads. If the Ashton Crossing is closed, frontage roads would be built to access Campbell (on the north side of the tracks) and Kenney (on the south side of the tracks) along Union Pacific's right of way. Union Pacific advocates the closure of the Ashton Road crossing because it is located within a few blocks of the Campbell and Kenney crossings, and eliminating the crossing will remove one more hazardous crossing. Ashton Road is particularly hazardous because trees on each side obstruct the view of the tracks when they are in foliage, and houses near the tracks also make it difficult to see in either direction. With the frontage roads constructed, there is no need for a crossing at Ashton.

4. Ray McDeid testified for Union Pacific in support of the petition. Mr. McDeid is a contract employee of the Union Pacific. He worked for the Union Pacific for 38 years, until retiring from the claims agent position in Spokane two years ago. In his job as a claims representative he investigated, handled, and settled liability claims resulting from grade crossing accidents and employee injuries. He is familiar with the the Union Pacific crossings in the Spokane area.

5. The track is a mainline track from Spokane to Eastport, Idaho, where the Union Pacific interchanges with the Canadian Pacific. The track presently is used by freight trains. At the Ashton Road crossing, the trains operate at a maximum speed of 40 miles per hour. A train of 100 cars would take 2,000 feet to stop at that speed. Approximately four heavy tonnage trains, usually consisting of 100 cars or more, travel over the crossing at variable times each night, seven days a week. In addition, five days a week a switch engine train of approximately ten cars moves over the crossing twice a day, and the Coeur d'Alene local, also with about ten cars, moves over the crossing twice a day. In addition, two extra trains carrying grain or ores move over the crossing each week.

6. The Ashton Road crossing has crossbucks and stop signs. There has been no vehicle/train accident at the Ashton crossing within the past 20 years. However, every crossing is dangerous. There was a fatal accident at a nearby crossing in 1991. That crossing also only had crossbucks and stop signs.

7. Robert Brueggeman testified for Spokane County in support of the petition. Mr. Brueggeman is the traffic engineer for Spokane County. He represents the county in dealings with the railroad and state agencies for funding of rail protection projects. He is familiar with the Ashton Road crossing. If closure of the Ashton crossing is approved, the frontage roads would be funded through ISTEA, the federal rail safety protection act. The frontage roads would be constructed upon Union Pacific's right-of-way. The county is asking that closure of the crossing be contingent on construction of the access roads, that is, that the frontage roads would have to be built prior to Union Pacific having the authority to

actually close the crossing. Kenney Road presently is protected with stop signs, but the county has an application in for approval to upgrade the protection to shoulder mounted signals and crossing gates. Campbell Road already has those protections. Traffic circulation to the neighborhoods along Ashton will be adequate with the frontage roads. The county's 1995 traffic figures show that 237 vehicles per day use the crossing, on average.

8. Gary Harder testified for Commission Staff in support of the petition. Mr. Harder is a rail carrier compliance specialist with the Commission in Olympia. He enforces statutes, rules, and standards dealing with railroad grade crossing safety and railroad employee safety, clearance rules, track standards, and equipment standards. Mr. Harder is familiar with the Ashton Road crossing. He last visited it in the fall of 1995.

9. One of the Commission's railroad inspectors, Jerry Buxton, did a field analysis of the closure petition. As part of the investigation, he prepared a report (Exhibit 10). Photographs taken as part of the report show that Ashton Road is a wide gravel road that runs northerly-southerly at the crossing. The crossing has both crossbuck signs (crossbucks) and stop signs. South of the crossing, there are a number of residences along the east side of Ashton. North of the crossing, there are a number of residences along the west side of Ashton. There are many trees and bushes along the tracks on both sides, which obstruct the view of the tracks, particularly the view to the right when approaching the tracks from either direction on Ashton. The roadway is nearly flat across the railroad right of way. Commission Staff believes that the Ashton Road crossing should be closed, because adequate access can be provided to the residents along Ashton with little inconvenience by construction of the two access roads.

10. Crossing accidents usually happen to local people who use the crossing regularly, who become familiar with it and used to not seeing a train coming, and are in a hurry at some time when there is a train.

11. Karl Bold testified as a public witness, representing the Spokane Valley Fire Department. Mr. Bold has been the assistant fire chief for nine years. The department serves the area of the Ashton Road crossing. The department will not have problems accessing properties along Ashton after construction of the access roads. However, the department is concerned that a fire protection need be addressed. The only fire hydrant that serves the whole of Ashton Road is located just to the north of the tracks. If the crossing is closed, the department will not have access to that hydrant from the south side. The department requests that if the crossing is closed, a hydrant be installed on the south side of the railroad tracks at a location that the department would find acceptable.

12. Tony Lazanis testified as a public witness in opposition to closure of the crossing. Mr. Lazanis lives in the Spokane Valley east of Spokane. He opposes closure of any crossings. They are convenient and make fire response easier. Gates would make the crossings safer.

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13. Lisle Swift, Otis Orchards, testified as a public witness in opposition to closure of the crossing. Mr. Swift lives on Ashton Road near the existing crossing. As a precinct committeeman for his political party, he goes door to door in the precinct and has a feel for what is desired by the community. While he appreciates the railroad's desire to protect lives by closing as many crossings as possible, he believes that closing the Ashton crossing would be too costly to the community. He believes that it would be safer to maintain the crossing as it is or with a signal, than it would be to run access roads to the other crossings. He uses the Ashton crossing at least three times a day and does not find it visually obstructed. He fears that snow would not be timely plowed from the access roads, and that having to use them would increase response time for emergency vehicles arriving from near Wellesley and Harvard. Three deaths have occurred at the Kenney crossing, and it has a hump whereas the Ashton crossing is flat. It would be better to close it rather than Ashton. The Campbell crossing is busy. Mr. Swift also believes that construction of the access roads would not be a good use of taxpayer money. He does not believe that the residents should be inconvenienced for four to eight trains a day. There are farmers north of the tracks with land south of the tracks who may have difficulty getting their equipment down the access roads. Mr. Swift also is concerned that the turning radius from frontage access roads onto the crossings will not be workable.

14. Subsequent to close of the record, the Commission received a letter from Karl Bold dated February 1, 1996. The letter is a follow-up to Mr. Bold's testimony. The letter is rejected as untimely and will not be considered.

15. Subsequent to close of the record, the Commission received a letter from Gary E. Fyre, N. Ashton Road, Otis Orchards. The letter is rejected as untimely and will not be considered.

16. The Commission has made a determination of non-significance for this closure under the State Environmental Protection Act.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties to this petition.

2. Communications regarding the subject of adjudications may not be considered by the deciding official unless they are properly filed by a person entitled to participate or are received in evidence after opportunity for comment by parties.

3. The grade crossing at Ashton Road and the Union Pacific tracks in Spokane County is dangerous and is not required by the public convenience and safety if access roads first are constructed on the railroad right-of-way to connect Ashton Road to Campbell Road on the north side of the tracks, and Ashton Road to Kenney Road on the south side of the tracks, and if the concerns expressed by the Spokane Valley Fire

Department about the need for a fire hydrant on the south side of the tracks are first satisfied. The public safety requires that the crossing be closed if these conditions are satisfied.

4. The petition of Union Pacific Railroad Company to close the Ashton Road crossing should be granted, as conditioned above, with the further condition that the order herein will be deemed null and void if no action is taken to begin construction of frontage roads as specified in this Order within three years after the date of this Order.

ORDER

THE COMMISSION ORDERS That

1. The documents filed by Lisle Smith, Karl Bold, and Gary Frye are rejected;

2. The petition of Union Pacific Railroad Company for closure of the Ashton Road crossing at Milepost 14.28 on the Union Pacific Railroad in the Otis Orchards area of Spokane County, east of the city of Spokane, is granted,

A. Conditioned upon the prior construction of access roads on the railroad right-of-way to connect Ashton Road to Campbell Road on the north side of the tracks, and Ashton Road to Kenney Road on the south side of the tracks;

B. Further conditioned upon the Commission receiving prior notification from Union Pacific that the concerns expressed by the Spokane Valley Fire Department about the need for a fire hydrant on the south side of the tracks have been satisfied; and

C. Further conditioned upon commencement of construction of frontage roads as specified herein within three years after the entry of this Order.

DATED at Olympia, Washington and effective this 3rd day of July, 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Sharon L. Nelson

SHARON L. NELSON, Chairman

Richard Hemstad

RICHARD HEMSTAD, Commissioner

William R. Gillis

WILLIAM R. GILLIS, Commissioner

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NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, 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 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).