BEFORE THE WASHINGTON STATE

UTILITIES AND TRANSPORTATION COMMISSION

|  |  |
| --- | --- |
| WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,  Petitioner,v.CENTRAL PUGET SOUND REGIONAL TRANSPORTATION AUTHORITY (SOUND TRANSIT); CITY OF LAKEWOOD; and TACOMA RAIL,  Respondents. | DOCKETS TR-081229, TR-081230, TR-081231, and TR-081232*(Consolidated)*WSDOT’S ANSWER IN OPPOSITION TO THE CITY OF LAKEWOOD’S MOTION TO RECONSIDER ORDER DENYING MOTIONS TO RESCIND FINAL ORDERS |

1. The Washington State Department of Transportation (hereafter “WSDOT”) responds to the Washington Utilities and Transportation Commission’s (hereafter “WUTC” or “Commission”) Notice of Opportunity to File Answers to Motion for Reconsideration issued April 26, 2010, and respectfully requests that the Commission deny the City of Lakewood’s (“City”) Motion to Reconsider Order Denying Motions to Rescind Final Orders.
2. The City argues two grounds in support of reconsideration: (1) the “Systems Approach” endorsed by the Federal Highway Administration (“FHWA”) requires the WUTC to consider the proposed safety modifications for all seven city crossings together; and (2) the petitions filed in TR-081229, TR-081230, TR-081231, and TR‑081232 were misleading and failed to provide adequate notice. Neither ground is supported by facts nor the authorities cited.

## The FHWA recommendation regarding a “Systems Approach” was used to design the project as a whole, including the proposed crossing safety modifications.

1. The systems approach advocated by the FHWA considers a railroad highway grade crossing to be part of, or a component of, a larger transportation system, with the objective to improve both safety and operations of the system. For example, to improve operating efficiency and safety over a specified segment of a rail line, all crossings would be considered in the evaluation. Modifications of train speeds may require the installation of active traffic control devices.[[1]](#footnote-2)
2. While consolidation of a number of related crossing modification proposals for consideration together is perhaps one way to help ensure they are coordinated in a systems approach, it is certainly not the only way. Even a cursory review of the department’s development process demonstrates that WSDOT did in fact take a systems approach in its design of the Point Defiance Bypass Project, both as part of its Long‑Range Plan for the Amtrak *Cascades*,[[2]](#footnote-3) as well as in the coordinated design of the proposed warning signals and devices described in the TR-081229, TR-081230, TR‑081231, and TR-081232 petitions. The systems approach is clearly demonstrated by the proposed modifications which include upgrade to the railroad warning devices to modern constant warning time units; interconnection between grade crossings control equipment; and roadway signal equipment with new circuitry to allow additional advanced pre-emption time, as well as modifications to the roadway configurations and approaches. One can easily see that the proposed modifications take into consideration both train and motor vehicle traffic throughout the affected corridor. The City’s concern that separate consideration of any single crossing could result in a disparity between crossings that are all part of the same urban area is simply not supported by the facts in this case.
3. Nor is it required by law. RCW 81.53.060, RCW 81.53.261, RCW 81.53.271, and WAC 480-62-150 anticipate filing a separate petition for each crossing where modifications are proposed. Neither State law nor the FHWA Railroad-Highway Grade Crossing Handbook compel multiple crossings be consolidated into a single petition for approval. The City’s systems approach argument fails to demonstrate error, and should not be grounds to reconsider the Commission’s Order denying rescission of these final orders.

## The petitions provided notice adequate to disclose the nature of proposed safety modifications and the City was not misled.

1. As the City notes, adequacy of notice is settled law. Notice is adequate if it discloses the nature of a proposed administrative action and if there is no showing that anyone was actually misled by the notice.[[3]](#footnote-4)
2. The petitions in these cases unambiguously state that the administrative action sought is the Commission’s approval of the proposed crossing modifications described in detail in the petitions.
3. The City is incorrect in its assertion that the pre-hearing testimony of Kevin Jeffers[[4]](#footnote-5) regarding feasibility of grade separation at those different crossings is “contradictory,” “at odds with,” or differs in any material way from the explanations provided in the those petitions. The City argues that listing the various construction challenges that impact the feasibility of grade separation[[5]](#footnote-6) at the crossings is somehow inconsistent with Mr. Jeffers’ subsequent testimony. The perceived inconsistency apparently relates to the fact that, in his testimony, Mr. Jeffers expressly states what is only implicit in the petitions: in order for a construction project to be feasible, there must be available funds to cover the costs.
4. The City’s perceived contradiction simply ignores the reality that if one were to assume unlimited funds, no grade separation would ever be impossible, and separating every crossing would be feasible.[[6]](#footnote-7) The main reason that barriers, such as proximity to businesses or wetlands, right of way acquisition, or the other construction challenges listed in the petitions impact feasibility is because they can render a project too costly to construct within available funds. Thus, the reasons set forth in the various petitions outlining why grade separation is not feasible are entirely consistent with Mr. Jeffers’ subsequent testimony regarding grade separation, in part, because it would cost hundreds of millions of dollars in excess of available funding.
5. More to the point, however, these petitions contain nothing that could have misled a reasonable person to believe that the modifications proposed for any of the crossings in these cases would include grade separation. Each petition plainly states that WSDOT considered grade separation not feasible. As WSDOT pointed out in its Response in Opposition to City of Lakewood’s Motion to Rescind Final Order, each of these petitions relate to existing grade crossings. Contrary to the City’s assumption, the burden imposed on a party who petitions for a new crossing pursuant to RCW 81.53.020—to show that grade separation is not practicable—simply does not apply to the modification of an existing grade crossing.
6. Neither RCW 81.53.060 nor RCW 81.53.261 requires a petitioner seeking to improve safety devices at an existing grade crossing to show that grade separation is not feasible—and for good reason. If the Legislature had imposed the same burden that applies to the creation of a new grade crossing on every party who merely wishes to upgrade safety devices at existing grade crossings, such a burden would have a chilling effect on any entity otherwise willing to petition to construct public safety improvements. The cost of a grade separation feasibility study alone, that the City’s argument assumes is part of the petitioner’s burden in these cases, would frequently exceed the cost of the proposed modifications. Few parties would be willing to file a modification petition if to do so could result in an order to construct a grade separation at the cost of hundreds of millions of dollars rather than to construct the modifications to the existing crossing for which funds actually exist.

# Conclusion

1. The Commission’s Order Consolidating Dockets and Denying Motions to Rescind Final Orders entered on April 15, 2010, notes that it does “not lightly disturb orders previously entered where no party or person can demonstrate patent error or prejudicial violation of process.” The City fails to demonstrate error or violation of process. WSDOT used a systems approach to design the proposed modifications. It was not WSDOT’s burden to establish that grade separation is not feasible. Nevertheless, WSDOT’s testimony on the feasibility of grade separation is entirely consistent, and the City has made no showing that it was misled as to the nature of the action sought in the petitions filed in TR‑081229, TR-081230, TR-081231, and TR-081232. Each petition provided very clear and detailed notice of the precise modifications proposed for each crossing, and which the Commission ultimately ordered.
2. WSDOT respectfully requests the Commission deny the City’s request for reconsideration.

 DATED this \_\_\_\_\_ day of April, 2010.

ROBERT M. MCKENNA

Attorney General

L. SCOTT LOCKWOOD, WSBA No. 19248

Assistant Attorney General

Attorneys for Defendant

1. Railroad-Highway Grade Crossing Handbook – Revised Second Edition August 2007, Chapter III, Section D. *See* relevant pages attached to this Answer as Attachment 1. [↑](#footnote-ref-2)
2. http://www.wsdot.wa.gov/NR/rdonlyres/AE671CC5-6633-4BF2-9041-FB328ADB1F31/0/LongRangePlanforAmtrakCascades.pdf [↑](#footnote-ref-3)
3. *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985). [↑](#footnote-ref-4)
4. *See* Written Direct Testimony of Kevin Jeffers, P.E., filed April 16, 2010, in WUTC Dockets TR-100127, TR-100128, TR‑100129, and TR-100131 *(Consolidated).* [↑](#footnote-ref-5)
5. These challenges include proximity to businesses, wetlands, a golf course, Interstate 5, alteration of highway and/or rail grades, acquisition of right of way, and roadway reconfiguration. [↑](#footnote-ref-6)
6. And, since the City further argues that a petitioner must always establish that grade separation is not feasible before the Commission can approve an upgrade to an existing crossing, then no at- grade crossing could ever be upgraded so long as grade separation could be achieved at some cost. [↑](#footnote-ref-7)