

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

CENTRAL PUGET SOUND REGIONAL
TRANSPORTATION AUTHORITY, CITY
OF LAKEWOOD, and TACOMA RAIL

Respondents.

DOCKETS TR-081229, TR-081230,
TR-081231, and TR-081232
(consolidated)

COMMISSION STAFF ANSWER
TO CITY OF LAKEWOOD'S
MOTION TO RECONSIDER
ORDER DENYING MOTIONS TO
RESCIND FINAL ORDERS

1 Pursuant to WAC 480-07-850(3) and the Notice of Opportunity to File Answers that
the Washington Utilities and Transportation Commission ("Commission") issued on April
26, 2010, Commission Staff oppose the City of Lakewood's Motion to Reconsider Order
Denying Motions to Rescind Final Orders ("Motion to Reconsider"). Lakewood's Motion
to Reconsider raises no issues that could not have been raised before. It should be denied.

I. ARGUMENT

2 Lakewood appears to make two arguments. First, Lakewood maintains that the
highway-rail crossings along the Point Defiance Bypass Project route have improperly been
considered as separate and independent from each other. Second, Lakewood says that
newly-discovered evidence demonstrates that WSDOT did not give Lakewood sufficient
notice to contest the petitions that initiated these four dockets in 2008. Both arguments
should be rejected.

A. **The Commission Has Properly Considered the Crossings Along the Point
Defiance Bypass Route Individually and as a Whole.**

3 Lakewood asserts that the Federal Highway Administration (FHWA) prefers a

“systems approach” when a segment of rail line is to be upgraded.¹ Though that may be true, Lakewood fails to note that FHWA regulations also require an individual evaluation of each grade crossing proposed to be upgraded.² So does Washington State law.³ As noted in Paragraph 10 of each of the orders Lakewood seeks to rescind, a diagnostic team that included “all major stakeholders,” including Lakewood, visited each crossing in question and made specific recommendations for each, as called for by federal and state law.⁴ The petitions that WSDOT filed contained detailed design drawings and notes for each crossing.⁵

4 Lakewood maintains that the Commission considered each crossing in isolation, and did not examine how they relate to each other. The record demonstrates otherwise. As described in Paragraph 3 of the September 24, 2008 order in Docket TR-081229:

Safety improvements will be made at nine public highway-rail grade crossings in phases over several years. This petition represents safety improvements at one of four grade crossings in phase one. Related petitions are TR-081231, Bridgeport Way Southwest; TR-081230, 108th Street Southwest; and TR-081232, 100th Street Southwest, all crossings are located within the city of Lakewood.

The other three orders that Lakewood seeks to rescind contain substantially similar language.

¹ Motion to Reconsider at 2-3.

² 23 C.F.R. §§ 646.214, 646.218.

³ RCW 81.53.261; RCW 81.53.271.

⁴ Docket TR-081229, Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at Steilacoom Boulevard SW ¶ 10 (Sept. 24, 2008); Docket TR-081230, Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at 108th Street SW ¶ 10 (Sept. 24, 2008); Docket TR-081231, Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at Bridgeport Way SW ¶ 10 (Sept. 24, 2008); Docket TR-081232, Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at 100th Street Way SW ¶ 10 (Sept. 24, 2008).

⁵ The initial filings are available online as follows: TR-081229

<http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/0d82efd46b9dd6318825747f005ddfdc!OpenDocument>, TR-081230

<http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/10f09a1d01abb00a8825747f005de968!OpenDocument>, TR-081231

<http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/cd2ecabf7758f7488825747f005df1a8!OpenDocument>, TR-081232

<http://www.utc.wa.gov/rms2.nsf/vw2005OpenDocket/0B12EDEC2893B0FE8825747F005C863E>.

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Publicly available documents show that WSDOT has used a systems approach for the Point Defiance Bypass Project as a whole. Posted on WSDOT's web site is a wealth of information about the project.⁶ It demonstrates that WSDOT has used a systems approach for the project as well as for long-term planning of improvements in Amtrak *Cascades* service from Canada to Oregon.⁷ The fact that Lakewood disagrees with the outcome is not evidence that a systems approach has not been used.

B. The City of Lakewood Had Adequate Notice.

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Lakewood says it did not have adequate notice of what the Point Defiance Bypass Project was about or what were the true conditions at the crossings when WSDOT filed the petitions that initiated these dockets in 2008. Lakewood's own documents suggest otherwise. In January 2010, the Lakewood City Council adopted Resolution 2010-03 opposing the Point Defiance Bypass Project.⁸ As the resolution describes, Lakewood had plenty of notice about the project well before WSDOT filed the 2008 petitions:

WHEREAS, in November 2006, the Lakewood City Council received a briefing from WSDOT staff on the Point Defiance Bypass project and questioned impacts of the project upon Lakewood and means of mitigation; and

WHEREAS, in late 2007, the City learned that WSDOT was considering abandonment of the development of an Environmental Assessment under the National Environmental Policy Act (NEPA) in favor of utilizing a Documented Categorical Exclusion (DCE) for the Point Defiance Bypass project; and

WHEREAS, in November 2007, the Lakewood City Manager expressed concerns to the Transportation Secretary that the NEPA DCE instrument was inadequate to mitigate expected impacts; and

⁶ http://www.wsdot.wa.gov/projects/rail/pnwrc_ptdefiance/.
⁷ <http://www.wsdot.wa.gov/freight/passengerrail/>; <http://www.wsdot.wa.gov/NR/rdonlyres/AE671CC5-6633-4BF2-9041-FB328ADB1F31/0/LongRangePlanforAmtrakCascades.pdf>. See 49 U.S.C. §§ 26101 – 26106 (high-speed rail assistance).
⁸ Lakewood City Council Resolution No. 2010-03 is available online at http://councilmtg.cityoflakewood.us/index.php?option=com_content&view=article&id=2645:resolution-no-2010-03&catid=67:resolution&Itemid=45.

WHEREAS, WSDOT disagreed with the City Manager's concerns about the NEPA DCE approach; and

WHEREAS, pursuant to an agreement between WSDOT, the Federal Highway Administration (FHWA) and the Federal Railroad Administration (FRA/USDOT) to act as co-leads on the Point Defiance Bypass project, a NEPA DCE was issued in June 2008 for the Point Defiance Bypass project under the FHWA's authority;

7 In arguing that Lakewood did not have adequate notice in 2008, the City also refers to the form that the Commission asks people to fill out when filing petitions to modify highway-rail grade crossings. One of the questions on the 12-page form is "Is it feasible to construct an over-crossing or under-crossing at the proposed location as an alternative to an at-grade crossing?"⁹ Lakewood suggests that the form does not give enough room for a detailed answer, and that the answers WSDOT gave on the forms were inadequate or incomplete, leaving Lakewood in the dark about whether grade separation was actually possible at the crossings along the Point Defiance Bypass route.¹⁰

8 Lakewood had an opportunity to investigate the conditions at each crossing and in fact represented in 2008 that it had done so. Each of the waivers that Lakewood signed in September 2008 states as follows:

We have investigated the conditions at the crossing proposed for modification. We are satisfied the conditions are the same as described by the Petitioner in this docket.

9 In arguing now that it was misled by the petitions that WSDOT filed, Lakewood misconstrues the purpose of Section 7 of the Commission's form. The objective of the questions about the feasibility of grade separation and whether safer crossings are nearby is not to make people prove they cannot construct a grade-separated crossing. Commission

⁹ See, e.g., WSDOT's initial filing in Docket TR-081229 at 6, available at <http://www.utc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/0d82efd46b9dd6318825747f005ddfdc!OpenDocument>.

¹⁰ Motion to Reconsider at 3-5, 7-9.

Staff use the questions on the forms to gather information they need to help implement the federal policy encouraging “elimination of at-grade crossings through consolidation of crossings and grade separations.”¹¹ Commission Staff use the answers to identify at-grade crossings that could be candidates for closure. The objective is to relocate motor vehicle traffic, not to relocate train traffic as Lakewood wants to do.

C. Federal Law Preempts State Laws Governing Amtrak Routes.

10 Lakewood is opposed to the Point Defiance Bypass Project and wants Amtrak trains to stay where they are. Lakewood cannot get that relief from the Washington Utilities and Transportation Commission. The Commission does not have the authority to say whether Amtrak trains may use the Point Defiance Bypass route or not. With respect to Amtrak routes, federal law expressly preempts state law. 49 U.S.C. § 24301(g) provides:

A State or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation.

The United States Supreme Court has construed similar language in other federal statutes as preemptive of state laws having even an indirect effect on carrier routes.¹² The federal district court in Pennsylvania recently ruled that a local weed control ordinance could not be enforced against Amtrak because it would have an adverse effect on Amtrak’s resources for the Keystone Route, and was therefore preempted under 49 U.S.C. § 24301(g).¹³

¹¹ 49 U.S.C. § 20161(a)(2). Federal highway safety laws also contain state reporting requirements concerning highway-rail grade crossings. 23 U.S.C. § 130; 23 C.F.R. § 924.15. See generally *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347-49, 120 S. Ct. 1467, 146 L.Ed.2d 374, 379-81 (2000) (describing program created under 23 U.S.C. § 130). The information Commission Staff get from the completed petitions helps them to satisfy those requirements.

¹² *Rowe v. New Hampshire Motor Transp. Ass’n*, 552 U.S. 364, 128 S. Ct. 989, 169 L.Ed.2d 933 (2008) (federal statute prohibiting States from enacting any law “related to a price, route, or service of any motor carrier” preempted state law regulating delivery of tobacco to customers); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) (federal statute prohibiting States from enacting any law “relating to rates, routes, or services” of any air carrier preempted state law regulating airline fare advertising).

¹³ *Nat’l R.R. Passenger Corp. v. Caln Twp.*, No. 08-5398, slip op. (E.D. Pa. Jan. 8, 2010), 2010 WL 92518, available at <http://www.paed.uscourts.gov/documents/opinions/10D0023P.pdf>.

11 Congress has directed that Amtrak shall “provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation” and “implement schedules based on a systemwide average speed of at least 60 miles an hour that can be achieved with a degree of reliability.”¹⁴ The Commission should not accept Lakewood’s invitation to erect barriers to the achievement of those federal goals.

II. CONCLUSION

12 If the City of Lakewood truly wants to achieve grade separation on the crossings that are not already grade-separated along the Point Defiance Bypass Route, the City is free to file its own petitions under RCW 81.53.060. It has not done so. If Lakewood’s objective is to prevent the completion of the Point Defiance Bypass Project, the Washington Utilities and Transportation Commission is not the proper forum.

13 The Commission should deny Lakewood’s motion for reconsideration for the reasons stated above, and for the reasons described in WSDOT’s Answer in Opposition to the City of Lakewood’s Motion to Reconsider Order Denying Motions to Rescind Final Orders.

DATED this 30th day of April 2010.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General

FRONDA WOODS, WSBA #18728
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

¹⁴ 49 U.S.C. §§ 24101(a)(1), 24101(c)(6).