

**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 03
)	
Central Puget Sound Regional)	
Transportation Authority (Sound)	FINAL ORDER DENYING MOTION
Transit), City of Lakewood and)	FOR RECONSIDERATION
Tacoma Rail)	
)	
Respondents.)	
)	
.....)	

1 *Synopsis. The Commission denies the City of Lakewood’s motion to reconsider an order denying the City’s motions to rescind final orders entered in September 2008 which authorized safety improvements at four highway-railroad grade crossings in Lakewood. The Commission previously considered the City’s repeated assertion that it waived its right to a hearing based on insufficient, incomplete, or incorrect information. The Commission denies reconsideration.*

BACKGROUND¹

2 In summer 2008, the Washington State Department of Transportation (WSDOT) filed four petitions seeking approval from the Washington Utilities and Transportation Commission (Commission) to modify four existing public highway-railroad grade crossings, all located in Lakewood, to support implementation of daily passenger train traffic at up to 79 miles per hour (mph) through the City. After several months of consideration, the City of Lakewood waived its rights to a hearing on the matters and

¹ Order 02 sets out detailed background information on this matter. Therefore, we only summarize the most basic facts here and incorporate by reference those contained in Order 02.

the Commission subsequently granted each of WSDOT's requests, with conditions, and approved various safety modifications at each existing grade crossing.

- 3 Earlier this year, WSDOT filed five additional petitions seeking Commission approval to upgrade safety features at five more existing highway-rail grade crossings, including three in Lakewood, to further plans for passenger rail service on the Point Defiance Bypass route. The City of Lakewood has objected to these petitions and the Commission is scheduled to commence an evidentiary hearing on the proposed modifications to those crossings on June 7, 2010.
- 4 On March 30, 2010, the City of Lakewood filed motions seeking that we rescind our prior approvals from September 2008 and expand the scope of next month's hearing to include all seven grade crossings within Lakewood's city limits. For reasons more fully explained in Order 02, on April 15, 2010, we declined the City's requests.

MOTION TO RECONSIDER

- 5 On April 23, 2010, Lakewood filed a motion to reconsider Order 02. Lakewood relies on testimony filed on April 16, 2010, by WSDOT's Rail Engineering Manager, Kevin Jeffers, in Dockets TR-100127, TR-100128, TR-100129, and TR-100131 (*consolidated*) which purportedly shows that WSDOT has never given adequate consideration to the feasibility of building under- or over-crossings. According to Lakewood, the WSDOT petitions for modification filed in July 2008 failed to provide adequate notice to the City of Lakewood regarding the feasibility of grade separation, without which the City could not make a meaningful waiver of its hearing rights.
- 6 Lakewood also contends that WSDOT's individual petitions to modify existing grade crossings violate a preferred "systems approach" endorsed by the Federal Highway Administration (FHWA).
- 7 WSDOT's response rebuts Lakewood's assertions on both grounds. First, WSDOT argues that the City was provided clear and adequate notice that WSDOT did not believe grade separation to be practicable at any of the existing crossings. Further, WSDOT points out that it did approach the Point Defiance Bypass project with a systems approach, even though no applicable state law or regulation so requires.

- 8 Commission Staff concurs with WSDOT, citing to a Lakewood City Council resolution which chronicles several years of WSDOT briefings to City staff and noting that each of our September 2008 orders acknowledged the Point Defiance Bypass project would involve multiple crossings and would be implemented in phases. Commission Staff also points out that Lakewood’s motion to reconsider raises no new issues that could not have been argued before.
- 9 ***Commission Decision.*** We are satisfied that the City of Lakewood was fully informed of WSDOT’s intentions with regard to the Point Defiance Bypass project. WSDOT made several presentations to City staff going back years before it petitioned to upgrade the four crossings at issue in these dockets. In each case, WSDOT’s petitions explained that it did not intend to pursue grade separation.² If Lakewood had disagreed, it could have voiced its concern in September 2008 or sought out a more complete project description.
- 10 Lakewood cites *Nisqually Delta Association v. DuPont*³ for the premise that the law favors applications which reference a “complete project description”. The City contends that WSDOT’s petitions were incomplete and deficient for failure to explain the financial component of WSDOT’s determination on the feasibility of constructing over- or under-crossings.
- 11 Lakewood’s reliance on *Nisqually Delta* is misplaced. In that case, the Supreme Court held that even when the location of a proposed dock had been changed *after* completion of a final environmental impact statement, the City of DuPont adequately complied with the statutory notice requirements contained in the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA). Indeed, in *Nisqually Delta*, the Court noted the purpose of such notice “is to apprise fairly and sufficiently those who may be affected of the nature and character of an action so they may intelligently prepare for the hearing.”⁴ The Court then looked to the actual notice and compared it with the realities of the challenged project and found “no showing

² See Section 7 (page 6), Questions 5 and 6, for each of WSDOT’s petitions in these matters.

³ 103 Wn.2d 720, 696 P.2d 1222 (1985).

⁴ 103 Wn.2d at 727.

anyone was actually misled.”⁵ The same is true here. As we stated in Order 02, the petitions themselves contained adequate notice of the overall scope of the project.⁶

- 12 Further, Lakewood fails to challenge the adequacy of the type of notice specifically required by RCW 81.53.060 and does not cite to any other law or regulation requiring the broader notice it apparently desires. Lakewood’s argument that WSDOT’s petitions did not fairly and sufficiently apprise the City of the nature and character of the proposed modifications to the at-grade crossings is absurd. We fail to see how the City could claim to be misled by the documents contained in the record of these cases.
- 13 Finally, we note that the “systems approach” now advocated by Lakewood is not directly applicable to the Commission’s statutory role in ensuring public safety at highway-railroad crossings. We recognize that programmatic environmental review of public projects is the best practice and may be required by law when a government agency undertakes multiple related development ventures. However, under RCW 81.53, the Commission does not approve or deny such proposals. Instead, the Commission focuses its evaluation on what public safety requires on a crossing-by-crossing basis.⁷
- 14 We conclude that the City of Lakewood’s motion to reconsider must be denied.

⁵ *Id.*

⁶ See Order 02 ¶16, where we noted “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” and suggested that by itself “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.”

⁷ This is another reason we distinguish the decision in *Nisqually Delta*.

ORDER

15 THE COMMISSION ORDERS That the City of Lakewood's motion to reconsider Order 02, *Order Consolidating Dockets and Denying Motions to Rescind Final Orders* is denied.

Dated at Olympia, Washington and effective May 14, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner