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utilities and transportation commission
state of washington

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| THE CITY OF WOODINVILLE, a political subdivision of the State of Washington,Petitioner,v.EASTSIDE COMMUNITY RAIL; and BALLARD TERMINAL RAIL,Respondents, | )))))))))))) | DOCKETS: TR-143902 and TR-143903petitioner city of Woodinville’s brief in support of PETITIONER’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING UNRESOLVED ISSUE |

# INTRODUCTION

This Brief along with the supporting Declarations of Thomas E. Hansen and Greg A. Rubstello are filed in support of the Petitioner City of Woodinville’s request that the sole remaining issue on the objection of Eastside Community Rail (“ECR”) and Ballard Terminal Railroad Company (“BTRC”) in opposition to Woodinville’s petitions docketed as TR-143902 and TR-143903, be determined in favor of Woodinville as a matter of law on uncontested material facts. Woodinville’s proposed bridge and road widening project on SR202 includes the modification of the highway-rail grade crossings as described in the petitions. The project is **partially federally funded** by a grant from the Federal Highway Administration (FHWA) administered by WSDOT (See Declaration of Hansen at paragraph #4). Maintenance of the new grade crossing arms included in the WSDOT approved revised channelization plan for Woodinville’s project should be the sole responsibility of the railroad.

On August 4, 2015 during mediation at WUTC offices the parties reached an accord on a revised WSDOT approved channelization plan with reduced length in the rail crossing arms. Agreement was also reach on use of asphalt instead of concrete crossing panels for the East Crossing, with the City agreeing to maintain the asphalt for 25 years. The City is installing concrete panels on the West Crossing to match what is already there. **The parties could not reach agreement on maintenance responsibility for the crossing arms, which the parties agreed would be resolved through a summary judgment procedure involving the filing of legal briefs supported by declarations of fact** (See Declaration of Hansen at paragraph #7). Should there be any contested material issue of fact arising out of the declarations, a contested hearing would be needed only for purposes of deciding the contested factual issue.

Woodinville believes that there well be no material fact being contested to prevent a summary determination of the cross arm maintenance issue without a contested hearing.

# LAW AND ARGUMENT

As stated in the FHWA Railroad-Highway Grade Crossing Handbook - Revised Second Edition August 2007, Chapter VII (Dec. of Rubstello, Exhibit A):

Maintenance Program

A. Railroad Responsibility

The highway-rail crossing is unique to other highway features in that railroads install, operate, and maintain the traffic control devices located at the crossing. Even though a large portion of the cost of designing and constructing crossings, including traffic control devices, is assumed by the public, **current procedures place maintenance responsibilities for devices located in the railroad right of way with the railroad**. The public agency having jurisdiction terminates its responsibility for the roadway at the crossing surface. (bold emphasis added)

Railroad responsibility for maintenance after installation on partially funded federal rail crossing projects is recognized by the BNSF Railway in their Grade Crossing Safety 2014 Publication (Dec. of Rubstello, Exhibit B at p.3):

Federal funds pay about 90 percent of the cost of a signal installation and the local government jurisdiction ­ city, county, etc. ­ pays the other 10 percent. **The railroad maintains the signals from that time forward.** These maintenance costs usually equal the cost of the initial installation in about 10 years. … (bold emphasis added)

Another BNSF publication explains the necessity of grade-crossing safety to the railroad (Dec. of Rubstello, Exhibit C):

Railroad Grade Crossings

Our network includes just over 28,800 grade crossings. Promoting grade-crossing safety is an essential part of our operation and culture.

Trains cannot stop quickly. A 100-car freight train traveling at 55 miles per hour will need more than a mile to stop once the train is set into emergency braking. When vehicle drivers or pedestrians violate traffic laws at grade crossings, or trespass onto railroad right of way, they are putting themselves and the train crews in danger.

In recent years, we’ve invested an average of $95 million annually on grade-crossing maintenance, improvements and safety programs. Our initiatives include community education and awareness, train crew education and testing, crossing closures, new safety technology, vegetation control, and track and signal inspection and maintenance.

Given, the ECR/BTRC is not the BNSF and their trains are not 100 cars traveling at 55 miles per hour through Woodinville, but the reason for the railroad operator to be responsible for the maintenance of crossing safety equipment remains the same.

Washington State in **Chapter 81.53 RCW** incorporates the responsibility of the railroad for maintenance where federal dollars fund or partially fund a project. RCW 81.53.261 in part provides that:

… The commission shall also at said hearing apportion the entire cost of installation and maintenance of such signals or other warning devices, other than sawbuck signs, **as provided in RCW 81.53.271**: PROVIDED, That upon agreement by all parties to waive hearing ,the commission shall forthwith enter its order. (bold emphasis added)

RCW 81.53.271 however, defers to RCW 81.52.295 for the apportionment of maintenance costs when as here, a federal-aid funding program is available to participate in the costs of installation of crossing signals and warning devices. RCW 81.53.295 in turn provides:

Whenever federal-aid highway funds are available and are used to pay a portion of the cost of installing a grade crossing protective device, and related work, at a railroad crossing of any state highway, city or town street, or county road at the then prevailing federal-aid matching rate, the grade crossing protective fund shall pay ten percent of the remaining cost of such installation and related work. **The railroad whose road is crossed by the highway, street, or road shall thereafter pay the entire cost of maintain the device**. (bold emphasis added)

Railroads pay for maintenance after construction of grade crossing protective devices absent an agreement by the state or a local jurisdiction in which the highway is located. This concept is further enunciated in **RCW 81.53.275** which states the following;

In the event funds are not available from the grade crossing protective fund, the commission shall apportion to the parties on the basis of the benefits to be derived by the public and the railroad, respectively, that part of the cost which would otherwise be assigned to the fund: PROVIDED, that in such instances the city, town, county or state shall not be assessed more than sixty percent of the total cost of installation on other than federal aid designated highway projects: **AND PROVIDED FURTHER, That in such instances the entire cost of maintenance shall be apportioned to the railroad**. (bold emphasis added)

Thus as here, when funds are not available from the grade crossing protective fund, the entire cost of maintenance shall be apportioned to the railroad.

# CONCLUSION

Since the City’s project is partially funded with federal aid funds and funds are not being contributed to the project from the grade crossing protective fund, the entire cost of maintenance must be apportioned to the ECR/BTRC (the railroad).

# RELIEF REQUESTED

Petitioner City of Woodinville requests an Order granting the City’s two Petitions incorporating the agreements on: (1) the revised channelization plan with reduced length in the crossing arms, and (2) the use of asphalt instead of concrete crossing panels for the East Crossing, with City maintenance of the asphalt for 25 years; AND FURTHER providing that the railroad share bear sole maintenance responsibility for the new grade crossing arms.

DATED THIS 4th day of September 2015

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|  | Ogden Murphy Wallace, P.L.L.C. |
|  | By |  |
|  |  | Greg A. Rubstello, WSBA #6271Attorneys for Appellant Woodinville  |

DATED this \_\_\_ day of August, 2015.

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|  | Ogden Murphy Wallace, P.L.L.C. |
|  | By |  |
|  |  | Greg A. Rubstello, WSBA #6271Attorneys for Appellant Woodinville  |