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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the Exposition Metro Line Construction Authority for an order authorizing the construction of a two-track at-grade crossing for the Exposition Boulevard Corridor Light Rail Transit Line across Jefferson Boulevard, Adams Boulevard, and 23rd Street, all three crossings located along Flower Street in the City of Los Angeles, County of Los Angeles, California;

Application No. 06-12-005  
(Filed December 6, 2006)

Application No. 06-12-020  
(Filed December 19, 2006)

Application No. 07-01-004  
(Filed December 2, 2007)

Application No. 07-01-017  
(Filed January 8, 2007)

Application No. 07-01-044  
(Filed January 24, 2007)

And Consolidated Proceedings.

Application No. 07-02-007  
(Filed February 7, 2007)

Application No. 07-02-017  
(Filed February 16, 2007)

Application No. 07-03-004  
(Filed March 5, 2007)

Application No. 07-05-012  
(Filed May 8, 2007)

Application No. 07-05-013  
(Filed May 8, 2007)

**MOTION FOR RECONSIDERATION OF ALJ'S DENIAL OF MOTION TO STRIKE PORTIONS OF EXPOSITION METRO LINE CONSTRUCTION AUTHORITY'S AMENDMENT TO APPLICATION NO. 07-05-013, JOINTLY FILED BY UNITED COMMUNITY ASSOCIATION, INC. AND NEIGHBORS FOR SMART RAIL**

Pursuant to Rule 11.1 of the of California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, United Community Associations, Inc. (“UCA”) and Neighbors for Smart Rail (“NFSR”) respectfully submit this motion for reconsideration of their joint motion to strike portions of Exposition Metro Line Construction Authority’s (“Expo Authority”) Amendment to Application Number 07-05-013 (the “Amended Application”), which was denied by Administrative Law Judge Maribeth Bushey on September 30, 2009. This application is made on the grounds that ALJ Bushey erroneously failed to consider the Commission’s February 25, 2009 Decision 09-02-031 a final decision, and that she erroneously failed to apply *res judicata* in order to bar consideration of the at-grade crossing proposals in the Amended Application.

Also, UCA and NFSR respectfully request oral argument on this motion for reconsideration because ALJ Bushey’s September 30, 2009 decision, if maintained, would present an exceptionally controversial legal issue by permitting applicants, like Expo Authority, to re-apply for authority to build an at-grade rail crossing without regard to time, money or efforts spent by protestants or other members of the public in opposing such an application in the first instance. Also, oral argument on this application is appropriate because ALJ Bushey’s decision significantly departs from this Commission’s precedent regarding the burden of proof in determining when grade-separation is required.

## **I. INTRODUCTION AND BACKGROUND**

### *Expo Authority’s Original Application*

In May 2008, Expo Authority filed an application seeking the Commission’s authority to build an at-grade rail crossing at Farmdale Avenue adjacent to Dorsey High School (the “Original Application”). (*See* Opening Brief of Exposition Metro Line Construction Authority, September 30, 2008, pp. 4, 13.) On June 5, 2008, then-assigned Administrative Law Judge,

Kenneth Koss, made UCA a protestant to this proceeding. (Administrative Law Judge’s Ruling Addressing the Procedural Schedule and Status of the Parties, June 5, 2008.) Also, in order to asses the safety of Expo Authority’s proposed at-grade crossing at Farmdale, he ordered “Expo Authority [to] present a full analysis of design options for the following: (1) a fully grade-separated light-rail aerial overcrossing, leaving Farmdale Ave. open to both vehicles and pedestrians; and, (2) a grade-separated pedestrian overcrossing (pedestrian bridge), with Farmdale Ave. closed to vehicle traffic.” (*Id.* at pp. 4-5.)

Subsequently, on June 20, 2008, then-assigned Commissioner, Timothy Simon, ruled that “an evidentiary hearing is necessary with respect to the issues raised in Application (A.) 07-05-013, for an at-grade crossing at Farmdale Ave.,” and set forth those issues. (Amended Scoping Memo and Ruling of Assigned Commissioner Determining the Further Scope and Procedural Schedule, June 20, 2008, pp. 12-13.) Among the issues set forth in the scoping memo were Expo Authority’s analysis of the following two options: “(1) a fully grade-separated light-rail aerial overcrossing, leaving Farmdale Ave. open to both vehicles and pedestrians; and (2) a grade-separated pedestrian overcrossing (pedestrian bridge), with Farmdale Ave. closed to vehicle traffic.” (*Id.* at p. 4.)

#### *The Evidentiary Hearing and Subsequent Order*

The evidentiary hearing lasted a total of eight days (August 11, September 2-5, and September 8-9, 2008), involved twenty-four witnesses and 73 exhibits, and was followed by post-hearing briefing. The matter was finally submitted on October 10, 2008. (*Id.*, p. 16-17.)

By Decision 09-02-031, which was rendered and became effective on February 20, 2009 (the “February 2009 Decision” or “Decision”), the Commission concluded, “[Expo’s Application] 07-05-013, for an at-grade crossing at Farmdale Avenue, is denied.” (*Id.*, p. 2.) As the Commission explained:

We find it is practicable to construct a grade-separated pedestrian bridge and close the roadway to traffic at Farmdale Avenue, because the grade-separated pedestrian bridge will eliminate the potential safety hazards of large number of school age pedestrians crossing the road at-grade. Further, we find that closing Farmdale Avenue will not cause adverse unmitigable impacts and is therefore feasible. We also find that the cost of constructing the pedestrian bridge (closed at Farmdale) is cost-effective. Therefore, **we deny Expo Authority's request to construct an at-grade crossing at Farmdale.**

(*Id.*, p. 29) (emphasis added).

*Expo Authority's Amended Application*

On July 28, 2009, Expo Authority filed a document entitled Amendment to Application Number 07-05-013 (the "Amended Application"). In it, Expo Authority proposed four design options for a crossing at Farmdale. Three of the four options were for an at-grade crossing:

- Option 2 for An At-Grade Crossing Subject to a "Stop and Proceed" Procedure (Amended Application at 4-5);
- Option 3 for An At-Grade Crossing Subject to Construction of a Station with "Near-Side" Platforms (Amended Application at 5); and
- Option 4 for An At-Grade Crossing Subject to a "Stop and Proceed Rule" Pending Construction of a Station with "Near-Side" Platforms (Amended Application at 5-6).

*The Joint Motion to Strike*

On September 2, 2009, UCA and NFSR filed a joint motion to strike the three at-grade crossing alternatives proposed in the Amended Application on the basis that *res judicata* bars their consideration. ALJ Bushey heard the joint motion to strike on September 30, 2009. In denying the motion, she observed as follows:

Here we have an unusual decision. A final grade crossing decision says you, applicant, build this. There is a definitive directive, and that definitive directive is not here. One of the preliminary determinations, practicality, is in the decision; but the definitive final decision as to what will go there is not there. . . . [¶] I don't think at this very early stage we can lop them off and say anything that isn't a pedestrian separated vehicular closed crossing is not

what the Commission had in mind. But if that is what they had in mind, they wouldn't have invited the amendment and ordered Expo to build that. [¶] So for those reasons, I'm going to deny the motion to strike.

(Transcript from September 30, 2009 Hearing "Hearing Tr." at 256:9-257:4.)

## II. ARGUMENT

The Commission's February 2009 Decision denying Expo Authority's request to construct an at-grade crossing at Farmdale should, as a matter of law under *res judicata*, bar any consideration of the at-grade rail crossing proposals in the Amended Application. An administrative determination by the Commission has *res judicata* effect on subsequent proceedings where the Commission "act[s] in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).

At the September 30, 2009 hearing on the joint motion to strike, neither Expo Authority nor ALJ Bushey disputed that decisions made by the Commission in adjudicatory proceedings have *res judicata* effect on subsequent proceedings. Rather, ALJ Bushey denied the joint motion to strike because, in her view, the Commission's February 2009 Decision was not a "final" one. As discussed below, this conclusion is wrong. ALJ Bushey should have analyzed the "Sims" factors *in order* to determine whether the Commission's Decision was, in fact, final with respect to those issues contained therein. Instead, she assumed the conclusion of the "Sims" analysis without actually applying it.

Furthermore, ALJ Bushey's conclusion that the February 2009 Decision is not final because it left open these proceedings is wrong; a decision denying authority to construct an at-grade crossing is no less final or effective than a decision granting such authority. Finally, though ALJ Bushey noted that the Commission's February 2009 Decision did find grade

separation at Farmdale practicable, she incorrectly determined that the Commission has discretion to allow an at-grade crossing despite such a finding.

Because ALJ Bushey's denial of the joint motion to strike was premised on various legal errors, the Commission should grant this motion for reconsideration.

**A. ALJ Bushey Erroneously Failed to Apply the "Sims" Factors Before Concluding That the February 2009 Decision is not "Final" as to the Issues Contained Therein.**

The crux of ALJ Bushey's decision denying the joint motion to strike is that *res judicata* cannot apply absent a final decision, and that the Commission's February 2009 Decision is not final because it left open these proceedings. The fact that these proceedings were left open, however, does not determine the finality of the issues contained in the Commission's Decision. Rather, the finality of such issues is determined by applying the "Sims" factors. Because ALJ Bushey failed to do so, her decision denying the joint motion to strike is premised on the erroneous conclusion that the February 2009 Decision is not final as to the Commission's denial of Expo Authority's request to build an at-grade crossing at Farmdale.

An administrative determination has *res judicata* effect on subsequent proceedings where the agency "act[s] in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). "[W]hen th[is] commission exercises its judicial power, **its orders or decisions have 'the conclusive effect of *res judicata*** as to the issues involved where they are again brought into question in subsequent proceedings between the same parties.'" *Camp Meeker Water Sys v. Public Utils. Com.*, 51 Cal. 3d 845, 852 n.3 (1990) (emphasis added) (citing *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954)). In order to determine whether an agency has acted in a "judicial capacity," one must consider the presence of factors indicating that the administrative proceedings and

determination possessed a “judicial” character. *Imen v. Glassford*, 201 Cal. App. 3d 898, 906 (1988) (citing *People v. Sims*, 32 Cal. 3d 468 (1982)) (affirming summary judgment for plaintiffs on issue of fraud based on real estate commission’s finding of fraud in administrative hearing). Such factors include whether:

(1) the administrative hearing was conducted in a judicial-like adversary proceeding; (2) the proceedings required witnesses to testify under oath; (3) the agency determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial hearing officer; (5) the parties had the right to subpoena witnesses and present documentary evidence; and (6) the administrative agency maintained a verbatim record of the proceedings. [citation] Additional factors include whether the hearing officer’s decision was adjudicatory and in writing with a statement of reasons. Finally, was that reasoned decision adopted by the director of the agency with the potential for later judicial review. [citation]

*Imen*, 201 Cal. App. 3d at 906-07 (the “Sims” factors).

As the Commission is well aware, and as the February 2009 Decision itself summarizes, the evidentiary hearing that preceded the Decision had *all* of these elements. Because all elements were present, the Commission clearly acted in a *judicial* capacity when it rendered the February 2009 Decision. And because it acted in a *judicial* capacity, the Commission’s Decision has “the **conclusive effect** of *res judicata* as to the issues involved where they are again brought into question in subsequent proceedings between the same parties.” *Camp Meeker Water Sys*, 51 Cal. 3d at 852 n.3.

At the September 30, 2009 hearing on the joint motion to strike, ALJ Bushey failed to even consider the “Sims” factors despite argument by UCA’s counsel:

[MR. SAMSON:] The fact is under the cases set forth, particularly *Sims*, the *Sims* criteria, this was an adjudicatory proceeding. All the benefits of cross-examination and due process were provided all parties and then a decision was rendered. . . . [T]he viability of an at-grade crossing where the Commission determined that something other than at-grade was practicable. . . . Having litigated

that, having met all the requirements of Sims in terms of due process and the procedural requirements, collateral estoppel does apply. (Hearing Tr. at 245:24-246:8.)

As shown by her remarks throughout the course of the hearing, though, ALJ Bushey had already assumed that the February 2009 Decision was not final because it left these proceedings open:

ALJ BUSHEY: You can see the decision invites amendments to the application? (Hearing Tr. at 247:15-16.) . . . [¶] The legal standards you want to apply require finality. The Commission has to make a final decision. (Hearing Tr. at 249:20-22.) . . . [¶] A final grade crossing decision says you, applicant, build this. There is a definitive directive, and that definitive directive is not here. One of the preliminary determinations, practicality, is in the decision; but the definitive final decision as to what will go there is not there. (Hearing Tr. at 256:10-15.)

The very purpose of the “Sims” factors is to guide inquiries into the conclusiveness or finality of an administrative decision. ALJ Bushey committed legal error by assuming the conclusion of this inquiry without actually making the inquiry. Had she applied the “Sims” factors, she would have found that the Commission acted in a judicial capacity and that its resulting Decision denying Expo Authority’s request to build an at-grade crossing at Farmdale was final. Because she did not, the Commission should grant this motion for reconsideration of the joint motion to strike.

**B. The Commission’s February 2009 Decision is Final With Respect to its Denial of Authority to Construct an At-Grade Crossing at Farmdale.**

1. ALJ Bushey was Required to View the Commission’s February 2009 Decision in Context and as a Whole.

In addition to failing to make the proper legal inquiry as to the finality of the Decision’s denial of an at-grade crossing at Farmdale, ALJ Bushey’s denial of the joint motion to strike erroneously focused on the Decision’s ordering paragraphs to the exclusion of the rest of the Decision. By ignoring its context and explanatory language, ALJ Bushey’s interpretation of the Decision is inconsistent with its whole.

At the hearing on the motion to strike, counsel for UCA and NFSR urged ALJ Bushey to consider language in the February 2009 Decision explaining that the Commission was leaving this proceeding open to allow Expo Authority to amend its application *consistent with the findings and conclusions* made therein:

MR. HELLER: The decision goes and talks about what they [the Commission] feel is most practicable earlier on, which is that a pedestrian overcrossing is perhaps the most practicable way to grade-separate. Clearly what they are inviting is amended applications for a grade-separated crossing.

ALJ BUSHEY: Where does it say that?

MR. HELLER: “As described herein,” I think makes it quite clear. (Hearing Tr. at 248:27-249:6.)

ALJ Bushey, however, continually focused on the ordering paragraphs beginning on page 44:

ALJ BUSHEY: I’m looking at Decision 09-02-031. I’m looking at the ordering paragraphs which are the Commission’s directives. And the only ordering paragraph that addresses it says that these proceedings are to remain open. It doesn’t say anything about it as herein. I don’t want to play hide the ball here. (Hearing Tr. at 250:15-20.)

ALJ Bushey erroneously focused on the ordering paragraphs to the exclusion of other explanatory language contained in the Decision. For one, it makes no sense to ignore 43 pages of a 45-page decision. If the ordering paragraphs on pages 44 and 45 of the Decision were all the Commission intended to adopt, then it would have issued a two-page decision. It did not. Secondly, as a matter of law, the 45-page Decision *must* be read in context and in its entirety. *See Southern California Edison Co. v. PUC*, 140 Cal. App. 4th 1085, 1101-1102 (2006) (holding, “[a]lthough the decision does not expressly state that prevailing wages shall be the minimum wages paid, it so implies” when the order is construed in context and as a whole).

Viewing the Decision as a whole, it is clear that the Commission left these proceedings open so that Expo Authority may amend its application to flesh out the proposed grade-separated options at Farmdale. Beginning with the Commission's summary, it plainly states:

[Expo's Application] A.07-05-013, for an at-grade crossing at Farmdale Avenue, is denied. Grade-separated crossings provide a higher level of safety than at-grade crossings and we find here that it is practicable to construct a grade-separated pedestrian crossing at Farmdale Avenue. . . . **This consolidated proceeding remains open to allow the applicant to amend its application regarding Farmdale Avenue, as described herein.** (February 2009 Decision, pp. 2-3, emphasis provided.)

Elsewhere in the Decision, the Commission explained:

**Though we deny the application for the proposed crossings at Farmdale, we cannot authorize the construction of any of the alternative design options.** The analysis provided by Expo Authority of the various design options for Farmdale was an integral and helpful part of our review . . . However, **these analyses and reports do not include all of the necessary information required by our rules for application of a rail crossing at Farmdale.**

In order to expedite the processing of any future requests for crossing at Farmdale, **this proceeding will remain open to allow Expo Authority to file any amendments or a new application for that purpose.** (February 2009 Decision, p. 36, emphasis provided.)

. . .

It is reasonable to keep this proceeding open to allow Expo Authority to file necessary amendments or new applications, **as described herein.** (February 2009 Decision, p. 42, emphasis provided.)

The above passages make clear that the Commission left these proceedings open to provide Expo Authority the opportunity to request authority for a railroad crossing at Farmdale *consistent with*

the findings and conclusions in the February 2009 Decision. Nowhere in its 45 pages does the Decision contemplate subsequent reconsideration of an at-grade crossing.<sup>1</sup>

Additionally, viewing the Decision in context of the *proceedings* as a whole, it is all the more clear that the Commission left these proceedings open for this limited purpose. As ALJ Koss noted in his June 5, 2008 ruling, “[t]he Commission’s overall concern here is the safety of the [] proposed crossing[ and] Expo Authority must show that the proposed crossing[] at Farmdale Ave. [] meet[s] the Commission’s standards for crossing safety . . . and consider[s] the traffic volumes and the special needs for student populations at both crossings.” (*Id.* at p. 4.) To that end, Expo Authority was ordered to present a full analysis of certain grade-separated design options. (*Id.* at pp. 4-5.) The scope of Expo Authority’s analysis was confirmed in Commissioner Simon’s June 20, 2009 scoping memo, which ordered that the evidentiary hearing cover, among other things, Expo Authority’s analysis of “(1) a fully grade-separated light-rail aerial overcrossing, leaving Farmdale Ave. open to both vehicles and pedestrians; and (2) a grade-separated pedestrian overcrossing (pedestrian bridge), with Farmdale Ave. closed to vehicle traffic.” (*Id.* at p. 4.) Undoubtedly, ALJ Koss and Commissioner Simon ordered such analyses because of the gravity of issues at stake -- i.e., the safety of hundreds of school children interfacing with 24 train crossings per hour with no protection other than “gates and other warning devices at the Farmdale crossing,” none of which “would [] eliminate all potential safety hazards.” (February 2009 Decision, p. 20.)

The bottom line is that the Commission ordered Expo Authority to present analyses of grade-separated alternatives in order to better evaluate the relative safety of its previous at-grade

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<sup>1</sup> As discussed in the joint motion to strike, if Expo Authority wanted to seek reconsideration of the Commission’s denial of its Original Application for an at-grade crossing at Farmdale, it was several months too late. Expo Authority very well could have sought a rehearing on the matter within 30 days, which then would have permitted it to seek judicial review of the Commission’s decision. *See* Cal. Pub. Util. Code §§ 1731, 1756. Yet Expo Authority did nothing of the sort.

proposal. On June 30, 2008, when Expo Authority served its table of design options at Farmdale, it could have included any other at-grade design it felt satisfactorily mitigated the risks at issue. It did not. Expo Authority could have, during any of the Workshops, Mitigation meetings, or at any other point during these proceedings before the February 2009 Decision, offered design changes to the proposed at-grade crossing at Farmdale. With the exception of offering to slow the trains down, which was found in and of itself to present additional safety issues (Commission Decision, p. 26), it did not. In any event, since Expo Authority's Original Application did not actually seek authority to construct a grade-separated crossing, the Commission could not grant such authority. In other words, the Commission could not grant an application that was not actually before it. When thus contextualized, it is clear that the Commission invited Expo Authority to amend its application with *grade-separated* alternatives.

2. ALJ Bushey's Denial of the Joint Motion to Strike Erroneously Confuses A "Final" Decision With one that Effectively Terminates These Proceedings.

During the hearing on the joint motion to strike, ALJ Bushey said, "[a] final grade crossing decision says you, applicant, build this. There is a definitive directive, and that definitive directive is not here." (Hearing Tr., 256:10-12.) Thus, according ALJ Bushey's decision, a "final" Commission decision can only be that which approves and authorizes a grade crossing. This logic, however, is plainly inconsistent with the Commission's charge to either approve *or* deny an application in accordance with all applicable standards. *See* Cal. Pub. Util. Code § 1201 ("The commission may refuse its permission or grant it upon such terms and conditions as it prescribes."). A denied application for a railroad crossing is no less effective or final than an approved application for a railroad crossing. Hence, ALJ Bushey's understanding of what it means to be a "final" decision is wrong.

3. The Commission's Denial of "An" At-Grade Crossing at Farmdale is a Denial of Any At-Grade Crossing at Farmdale.

Finally, in addition to ALJ Bushey's failure to consider the Decision in context, her semantic construction of Ordering Paragraph 1 is, at best, strained. Essentially, she concluded that, by its express terms, the Commission's Decision denied only the at-grade crossing proposed in Expo Authority's Original Application, and not every subsequent application for an at-grade crossing: "Ordering Paragraph 1 says for an at-grade crossing. It doesn't say all, it says one." (Hearing Tr., 249:18-19.) While it is true that "an" may connote "one," it may also connote "any." In other words, denial of "an at-grade crossing" semantically *can* be construed as a denial of "any" at-grade crossing. Indeed, if the Commission intended to limit the effect of its Decision as ALJ Bushey suggests, it could have expressly stated that "this and *only* this" application for an at-grade crossing is denied. It did not do so. Indeed, as discussed above, at no time in these proceedings was either the assigned ALJ or Commissioner unclear or imprecise in defining the scope of their deliberations. ALJ Bushey erroneously relied on an equivocal construction of "an at-grade" crossing. She should have considered the Decision in context and as a whole.

**C. ALJ Bushey Incorrectly Determined That the Commission has Discretion to Permit an At-Grade Crossing Despite Finding it Practicable to Grade-Separate.**

Though ALJ Bushey agreed that the Final Decision determined that grade separation at Farmdale is practicable, she determined that the Commission was not required to order grade-separation. As she noted, "[i]f the Commission finds that something is practicable, it has a discretion to order that. Here the Commission did not. It went through the first step, but didn't

take the second step.” (Hearing Tr. at 259:6-10.) This statement regarding the Commission’s discretion flies in the face of the Commission’s own long-standing precedent.<sup>2</sup>

As the Commission is well aware, it has the exclusive power “[t]o require, where in its judgment it would be practicable, a separation of grades at any crossing established . . .” Cal. Pub. Util. Code § 1202(c). As the Commission has elaborated in its decisions, “[t]he reason for this [] requirement is that railroad grade separations constitute ultimate protection, since all grade crossing accidents and delays then are eliminated.” *City of San Mateo* (D.82-04-033), 8 CPUC 2d 572, at \*21 (1982). Thus, an applicant seeking to build an at-grade rail crossing “must convincingly show both that a separation is impracticable and that the public convenience and necessity absolutely require a crossing at grade.” *City of Oceanside* (D.92-01-017), 43 CPUC 2d 46, at \*10-\*11 (1992) (denying application for at-grade crossing where evidence established practicability of grade separation) (*citing City of San Mateo* (D.82-04-033)).

Under the Commission’s own precedent, it was Expo Authority’s burden to show *impracticability* in order to obtain authority for an at-grade crossing. The Commission’s Final Decision, however, concluded that grade separation at Farmdale *is* practicable:

**We find it is practicable to construct a grade-separated pedestrian bridge and close the roadway to traffic at Farmdale Avenue**, because the grade-separated pedestrian bridge will eliminate the potential safety hazards of large number of school age pedestrians crossing the road at-grade. Further, we find that closing Farmdale Avenue will not cause adverse unmitigable impacts and is therefore feasible. We also find that the cost of constructing the pedestrian bridge (closed at Farmdale) is cost-effective. Therefore, **we deny Expo Authority’s request to construct an at-grade crossing at Farmdale**. (February 2009 Decision, p. 29) (emphasis added).

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<sup>2</sup> According to Rule 16.3(a) of the Commission Rules of Practice and Procedure, a request for oral argument on an application for rehearing should be granted where the challenged decision departs from existing Commission precedent without adequate explanation.

In reaching this conclusion, the Commission weighed seven criteria: (1) public need for the crossing, (2) a convincing showing that all potential safety hazards have been eliminated, (3) the concurrence of local community and emergency authorities, (4) the opinions of the general public and specifically those who may be affected by an at-grade crossing, (5) the comparative costs of an at-grade crossing with grade separation, (6) staff recommendations, and (7) Commission precedent in factually similar crossings. (February 2009 Decision, pp. 20-23.) In so weighing, the Commission already exercised its discretion as established by this guiding criteria. In other words, the Commission's discretion with respect to authorizing a crossing at Farmdale is *built into* the practicability standard.

Because the Commission already determined that grade separation at Farmdale is practicable, it has *already* exercised its discretion. The Commission cannot now authorize an at-grade crossing without making an arbitrary and capricious decision. Thus, contrary to ALJ Bushey's belief, it would be an abuse of discretion by the Commission to permit an at-grade crossing despite its prior determination that grade separation at Farmdale is practicable. *See Cohen v. Herbert*, 186 Cal. App. 2d 488, 493 (1960) (explaining that "judicial discretion" is bounded by fixed legal principles, and is not intended to be capricious or arbitrary in nature).

### **III. CONCLUSION**

ALJ Bushey's decision denying UCA and NFSR's joint motion to strike is premised on a number of legal errors and faulty conclusions. The proper legal inquiries should have led her to determine that the Commission's February 2009 Decision is, in fact, conclusive as to its denial of an at-grade crossing at Farmdale, and that the at-grade proposals contained in Expo Authority's Amended Application are barred from further consideration. These would have been the correct conclusions and, more importantly, would have expedited this proceeding by focusing the parties

on actually unresolved issues.<sup>3</sup> Instead, the Commission and the parties are on the verge of waking up to Groundhog Day. In order to prevent such a result, UCA and NFSR respectfully ask the Commission to grant this motion for reconsideration of their joint motion to strike.

Dated: October 30, 2009

Respectfully submitted,

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Dated: October 30, 2009

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<sup>3</sup> By its own Monthly Project Status Update dated September 3, 2009, Expo Authority reports that the Exposition Light Rail Transit Project is 50 weeks behind schedule for reasons unrelated to this proceeding. Thus, any notion that this proceeding is delaying the whole rail project is inaccurate. In any event, issues of agency delay cannot take priority over the Commission's mandate to ensure the safety of a proposed crossing before authorizing its construction.

Dated: October 30, 2009

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## CERTIFICATE OF SERVICE

I, Nancy E. Jordan, hereby certify that on November 2, 2009, I served the foregoing document entitled **MOTION FOR RECONSIDERATION OF ALJ'S DENIAL OF MOTION TO STRIKE PORTIONS OF EXPOSITION METRO LINE CONSTRUCTION AUTHORITY'S AMENDMENT TO APPLICATION NO. 07-05-013, JOINTLY FILED BY UNITED COMMUNITY ASSOCIATION, INC. AND NEIGHBORS FOR SMART RAIL** by electronic mail, first class U.S. Mail or Federal Express on the following parties to Application No. 06-12-005 *et al.*:

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Executed on November 2, 2009 in San Francisco, California.

/s/ Nancy E. Jordan

Nancy E. Jordan