STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

November 13, 2002 **Agenda ID #1365**

TO: PARTIES OF RECORD IN APPLICATION 01-01-003

This is the proposed decision of Administrative Law Judge (ALJ) Walker, previously designated as the principal hearing officer in this proceeding. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Pursuant to Resolution ALJ-180, a Ratesetting Deliberative Meeting to consider this matter may be held upon the request of any Commissioner. If that occurs, the Commission will prepare and mail an agenda for the Ratesetting Deliberative Meeting 10 days before hand, and will advise the parties of this fact, and of the related ex parte communications prohibition period.

The Commission may act at the regular meeting, or it may postpone action until later. If action is postponed, the Commission will announce whether and when there will be a further prohibition on communications.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Carol Brown
Carol Brown, Interim Chief
Administrative Law Judge

CAB: avs

Decision **PROPOSED DECISION OF ALJ WALKER** **(Mailed 11/13/2002)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Application of the Santa Clara Valley Transportation Authority for an Order Authorizing Construction of an At-Grade Crossing of Hamilton Avenue (82D-5.6) by the Light Rail Transit Line of the Vasona Light Rail Project in the City of Campbell, County of Santa Clara. | Application 01-01-003 (Filed January 5, 2001) |

Suzanne B. Gifford, Richard A. Katzman, and Benjamin H. Scharf, Attorneys at Law, for Santa Clara Valley Transportation Authority, applicant.
Patrick S. Berdge, Attorney at Law, for Rail Crossings Engineering Section, Consumer Safety and Protection Division, protestant.
Jeffrey B. Hare, Attorney at Law, for the Borello Neighborhood Committee, protestant.

# OPINION

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# O P I N I O N

## 1. Summary

The Santa Clara Valley Transportation Authority (VTA) filed this application in January 2001 seeking Commission approval of an at-grade crossing for a light rail transit line in the City of Campbell. The application was protested by the Commission's rail staff on grounds that safety demands a separation of the rail tracks either above or below the roadway. After further study, VTA agreed to grade-separate the project, constructing an aerial crossing over the roadway. At the same time, however, it declined to amend its application and moved instead to withdraw it on grounds that the Commission lacks jurisdiction to approve the construction and placement of light rail crossings. This decision finds that the Commission has jurisdiction to approve the construction and placement of VTA's light rail crossings. It follows that the application for an at-grade crossing is denied, without prejudice to an amended filing by VTA.

## 2. Procedural History

VTA raised its jurisdictional argument at the first prehearing conference (PHC) in this matter on September 25, 2001. A briefing schedule was established. On November 19, 2001, VTA filed its motion to dismiss this and one other pending application (Application (A.) 01-03-038[1]) on grounds that the Commission's jurisdiction over light rail crossings is limited to regulation of

[1] The parties later stipulated approval of crossing devices and environmental review of the at-grade crossing in A.01-03-038 without prejudice to VTA's jurisdictional position challenging Commission authority as to placement of the crossing. Placement and construction of the crossing were not at issue in A.01-03-038.

safety appliances and procedures and post-construction safety review, and does not include the location, construction or separation of light rail crossings of roadways. The Commission's Rail Crossings Engineering Section, Safety and Enforcement Division (Staff) timely filed in opposition to the motion. On March 1, 2002, assigned Administrative Law Judge (ALJ) Walker issued a ruling that denied the motion to dismiss and held that the Commission has jurisdiction to review and approve VTA's light rail crossings.

A second PHC was conducted on April 23, 2002, at which time VTA filed a motion to withdraw its application and close the proceeding, asserting that it had a right to unilaterally withdraw an application and contending again that the Commission lacks jurisdiction to approve construction or separation of light rail crossings. The motion was opposed by Staff. By ALJ Ruling dated April 29, 2002, VTA's motion to withdraw was denied, and the application was scheduled for hearing on June 27, 2002. The ALJ Ruling also granted a motion to intervene by a neighborhood association, the Borello Neighborhood Committee.

Both ALJ Rulings encouraged VTA to amend its application to reflect its changed plans for an aerial crossing. VTA declined, arguing that to do so would cede jurisdiction to the Commission over placement and construction of light rail crossings. On May 29, 2002, Commissioner Lynch issued her Scoping Memo. She identified the issues to be decided in this proceeding as follows:

- Has VTA justified an at-grade crossing as described in the application?
- Has VTA rebutted the protest of Staff that a grade-separated crossing is the only safe method of constructing the crossing?
- Should the Commission affirm the ALJ Rulings denying the motion to dismiss for lack of jurisdiction and the motion to withdraw the application for the same reason?

- Should the Commission enjoin VTA from proceeding with this project absent Staff review and Commission approval?

The hearing was conducted on June 27, 2002. VTA presented no testimony and stated that its appearance was limited to cross-examination and to its legal argument on jurisdiction. Staff presented a single witness, a rail safety engineer, who testified that he had reviewed the proposed at-grade crossing and with his colleagues recommended that the crossing be grade-separated. Following hearing, VTA on August 6, 2002, presented its brief and various motions for official notice of documents.[2] Staff and the Borello Neighborhood Committee submitted their responsive briefs during the week of September 9, 2002. VTA filed its reply brief on October 3, 2002, at which time the application was deemed submitted for Commission decision.

## 3. Proposed Crossing Construction

The application before us seeks Commission approval for construction of an at-grade crossing of light rail transit tracks across Hamilton Avenue in the City of Campbell. In its diagnostic review of the proposal, Staff reported that 70,000 vehicles per day pass through the proposed Hamilton Avenue crossing and that light rail vehicles would use the crossing 200 times a day. The crossing also is used by Union Pacific Railroad freight trains, which make three roundtrips per week. Staff noted that the proposed crossing is near a highway

[2] Without opposition, VTA's three motions for official notice of documents are granted. The motions are dated August 5 and August 6, 2002, and deal with a decision of the United States Surface Transportation Board, a Commission staff exhibit in a 1990 proceeding, and a document on grade separation options on file with the VTA Board of Directors.

off-ramp, and that visibility of southbound trains approaching the intersection is obstructed by buildings around the tracks.

Because of the heavy traffic and limited visibility at the crossing, and because of the planned frequency of light rail operations, Staff concluded that VTA's proposal for an at-grade crossing presented a high risk of injury to motorists, pedestrians and transit passengers. Staff recommended that the transit agency construct its tracks to cross over or beneath Hamilton Avenue. At hearing, Senior Utilities Engineer Jesus Escamilla testified that VTA resisted the Staff recommendation because of cost. However, he said, it is his understanding that VTA now has decided to do an aerial crossing of the roadway, but it has not amended its application nor has it requested Commission review and approval of aerial crossing plans.

### 4. VTA's Case for Limiting Commission Jurisdiction

VTA contends that the Commission lacks jurisdiction to review or approve light rail crossings of streets and highways. The transit district concedes that the Legislature has conferred jurisdiction on the Commission to oversee certain aspects of VTA's operations. However, it argues that this statutory authority is limited to approval of safety appliances and procedures and to safety review following construction. VTA asserts that the only statutory expressions of Commission jurisdiction over VTA's light rail operations are found in Pub. Util. Code §§ 100168, 778 and 99152.[3]

Section 100168, part of the grant of authority for provision of transit service to the Santa Clara County District (§§ 100160-100169), states:

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[3] Unless otherwise noted, all section references in this decision are to the California Public Utilities Code.

> 100168. The district shall be subject to the regulation of the Public Utilities Commission relating to safety appliances and procedures, and the commission shall inspect all work done pursuant to this part and may make such further additions or changes necessary for the purpose of safety to employees and the general public. The commission shall enforce the provisions of this section.

Section 778, part of the Code's Chapter 4 dealing with the Commission's regulatory responsibilities, provides:

> 778. The commission shall adopt rules and regulations, which shall become effective on July 1, 1977, relating to safety appliances and procedures for rail transit services operated at grade and in vehicular traffic. The rules and regulations shall include, but not be limited to, provisions on grade crossing protection devices, headways, and maximum operating speeds with respect to the speed and volume of vehicular traffic within which the transit service is operated.
>
> The commission shall submit the proposed rules and regulations to the Legislature not later than April 1, 1977.[4]

Section 99152, included in miscellaneous provisions applicable to all transit districts, provides:

> 99152. Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures.
>
> The Commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.

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[4] The rules and regulations required by § 778 are set forth in General Order (G.O.) 143 (now G.O. 143-B). Section 9.08 of G.O. 143-B states that construction of crossings requires prior approval by the Commission.

> The Commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of those guideways. Existing industry standards shall be used where applicable.

The Commission shall enforce the provisions of this section.[5]

In contrast to what it sees as the limited authority of the Commission, VTA argues that its status as a transit district gives it authority to "acquire, construct, own, operate, control, or use right-of-way [for] ….any and all facilities necessary or convenient for transit service…underground, upon, or above the ground and under, upon, or over public streets." (Section 100161(a); *see also* §§ 100164, 100071(a).) Thus, it argues, it is solely responsible for the placement and construction of light rail crossings over public streets, and the Commission's statutory role is simply to monitor safety appliances and procedures and perform a post-construction safety review.

VTA recognizes that the Commission has expansive authority over public utilities under the State Constitution and statutes. It argues, however, that this rule of expansive authority is reversed when the Commission's jurisdiction is pitted against that of a local public agency. Under Cal. Const. Art. XII, § 8, "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission." VTA asserts that both

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[5] The oversight program required by § 99152 is set forth in G.O. 164 (now G.O. 164-B). An Order Instituting Rulemaking was opened in January 2002 to review safety

*Footnote continued on next page*

the courts and the Commission have interpreted this section to require express legislation for Commission jurisdiction to regulate local districts or municipalities. For example, in *People ex rel. Pub. Util. Com. v. City of Fresno* (1967) 254 Cal.App.2d 76, 80-81, the Appellate Court affirmed a city's power of eminent domain without interference by the Commission, stating:

> Admittedly, the commission fulfills a vital and significant role in the scheme of government. In fact, it is the only public agency which is constitutionally constructed to protect the public from the consequences of monopoly in public service industries. However, the primary function of the commission is to regulate private property dedicated to a public use and to exercise control over private companies engaged in public service. Moreover, as a regulatory body of constitutional origin it has only such powers as it derives from the Constitution and from the Legislature.
>
> Thus, in the absence of specific legislation to the contrary the commission has no jurisdiction to regulate public districts or municipalities.

VTA argues that this principle of denying Commission jurisdiction unless expressly provided by statute is supported by the cases of *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, and *Los Angeles Met. Transit Authority v. Public Utilities Com.* (1959) 52 Cal.2d 655.

In *County of Inyo,* the Commission dismissed the complaint of a county for review of water rates charged it by a municipality located outside the county. The Commission concluded that it had no jurisdiction over municipally owned water utilities unless expressly provided by statute. The Supreme Court

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certification requirements of G.O. 164-B. G.O. 143-B also is made applicable to § 99152 public transit guideways under sections 1.02 and 1.04.

affirmed the Commission's order, stating that the Legislature had plenary power to confer such authority on the Commission, but it had not done so by statute.

In *Los Angeles Met. Transit Authority*, the Supreme Court affirmed the Commission's jurisdiction to grant a charter-party carrier certificate in Los Angeles County despite 1957 legislation that gave the Los Angeles Metropolitan Transit Authority (the Authority) broad powers to establish an integrated mass rapid transit system in the county. The Court noted that special legislation in 1951 had given the Commission authority to regulate operations of the Authority, but the 1957 legislation had removed that regulatory authority, with the exception of certain safety regulations. The Court said:

> The 1951 Act gave the Authority some of the foregoing powers, but expressly provided that it could exercise its powers only under the regulatory control of the Public Utilities Commission. The Authority's routes and rates and contracts were also subject to control by the Public Utilities Commission. Under the 1957 Act the commission has no control over the Authority with respect to any of these matters. In the absence of legislation otherwise providing, the commission's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities. (*Los Angeles Met. Transit Authority*, 52 Cal.2d at 661 (footnotes and citations omitted).)

VTA argues that in order for the Commission to regulate VTA's construction and placement of light rail crossings, special legislation like that applicable in the Los Angeles case prior to 1957 would be required. VTA contends that no such statutory authority exists.

According to VTA, Commission decisions also support the principle that Commission jurisdiction is limited to that provided by the Constitution and by statutes. In *Rates, Charges and Practices of Water and Sewer Utilities Providing Service to Mobilehome Parks*, Decision (D.) 01-05-058 (2001), the Commission based

its conclusion that it had no jurisdiction over most water resale rates in mobilehome parks upon a strict construction of the term "water corporation," stating:

> [W]e cannot ignore the message of *Inyo County*. There the Supreme Court was clear that no matter how much the behavior of a municipal utility looks like that of a public utility, this Commission has no jurisdiction over the actions of the municipal entity unless and until such time as the Legislature says so….The fact that the Legislature has not expressly conferred such jurisdiction on the Commission is a strong indication that it does not intend that we have that authority. (D.01-05-058, at 22-23.)

The *Rates, Charges and Practices* case, according to VTA, serves to rebut the position of Staff that transit districts are subject to the requirements of §§ 1201[6] and 1202[7] as to rail and street crossings. These statutes subject a "railroad

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[6] In pertinent part, Section 1201 provides as follows:

> No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. . . . .

[7] In pertinent part, Section 1202 provides as follows:

> The Commission has the exclusive power:
>
> (a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street.
>
> (a) To alter, relocate, or abolish by physical closing any crossing set forth in subdivision (a).

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corporation," "street railroad corporation" and "street railroad" to exclusive Commission jurisdiction over placement and construction of rail/street crossings. VTA asserts that it is not a railroad corporation or a street railroad; it is a public agency. Therefore, it contends, these statutes cannot be construed to apply to a transit district.

### 5. Staff's Assertion of Commission Jurisdiction

Staff argues that the California Supreme Court has held that the State Constitution authorized Commission safety jurisdiction over all "transportation companies," and that this authority encompasses transit districts like VTA and light rail transit systems. Similarly, the Legislature has provided the Commission with statutory authority over safety practices of all transit agencies within California.

Staff further argues that when the Legislature provided the Commission with exclusive jurisdiction over rail crossings over streets, roads and highways under §§ 1201, *et seq.*, there were no transit districts or publicly owned transit guideways. Hence, the statutes spoke only to existing rail systems, *i.e.*, railroads, street railroad corporations and street railroads. Staff contends that the courts have subsequently recognized that entities and modes of transportation that evolved after those statutes were adopted also fall within the Commission's

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(a) To require, where in its judgment it would be practicable, a separation of grades at any crossing established and to prescribe the terms upon which the separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of crossings or the separation of grades shall be divided between the railroad or street railroad corporations affected or between these corporations and the state, county, city, or other political subdivision affected.

grant of authority over transportation entities. Staff reasons, therefore, that the Commission has exclusive jurisdiction over rail/street crossings constructed by transit districts or other public agencies, just as it does over crossings constructed by railroads and other privately owned rail companies.

In contending that the Legislature properly granted the Commission safety jurisdiction over transit agencies, Staff points to the Supreme Court's decision in *Los Angeles Met. Transit Authority v. Public Util. Com.* (1963) 59 Cal.2d 863. There, the transit authority challenged Commission jurisdiction on the basis of an earlier decision, *City of Pasadena v. Railroad Com.* (1920) 183 Cal. 526. The Court in *Los Angeles Met. Transit Authority* held:

> The observation was made in *City of Pasadena v. Railroad Com.* that the apparent intent of the framers of section 23 of article XII [of the California Constitution] was to provide for regulation by the commission of privately owned and operated public utilities, as opposed to publicly operated utilities. But section 23 plainly states that "Every private corporation…and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature…." Such clear constitutional language must be read according to its expressed, rather than possible intended meaning. Moreover, the provisions of our Constitution "'must receive a liberal, practical common-sense construction'" and be "construed where possible to meet changed conditions and the growing needs of the people." Thus "every common carrier" in section 23 includes the petitioner as a publicly owned transportation utility. This view necessitates disapproval of statements in *City of Pasadena v. Railroad Com.*, especially the observation at page 533 that

> regulatory jurisdiction under article XII includes only the subject of private utility corporations.[8]

Staff notes that the Legislature subsequently defined Commission safety jurisdiction over the successor to the Los Angeles Metropolitan Transit Authority (§ 30646), stating:

> The district shall be subject to regulations of the Public Utilities Commission relating to safety appliances and procedures, and the commission shall inspect all work done pursuant to this part and may make such further additions or changes necessary for the purpose of safety to employees and the general public.
>
> The district shall be subject to the jurisdiction of the Public Utilities Commission <u>with respect to safety rules and other regulations governing the operation of street railways.</u> (Emphasis added.)

The Commission was given similar authority over VTA in § 100168. According to Staff, these statutes and the Supreme Court's analysis set forth a clear legislative intent to delegate safety oversight of transit district rail systems to the Commission. In addition to statutes that specifically name transit agencies like VTA, Staff notes that the Legislature has enacted § 309.7, which makes the Commission's safety division responsible for "inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways…."

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[8] The Commission has followed this ruling in *Application of Cal Coast Charter, Inc.*, 1982 Cal. PUC LEXIS 1276, at 15 (1982), stating, "[T]he language [in *Los Angeles Met. Transit Authority*] unambiguously contradicts the contention advanced by SLT that Article XII, Section 3, restricts Commission jurisdiction over entities other than private corporations or persons in the absence of specific legislation except where those entities are common carriers."

Staff argues that §§ 100168 and 99152 are sufficiently broad to incorporate unsafe crossing conditions like those it alleges for an at-grade crossing of Hamilton Avenue, and it notes that the Commission has taken an aggressive view of its safety jurisdiction under this authority. (*Brown v. Santa Clara County Transportation Agency* (1994) 56 CPUC2d 554, 559.)

Staff contends that, in addition to the Commission's safety authority over VTA as a transit agency, the Commission has exclusive jurisdiction over VTA's rail/street crossing under the extensive crossings authority set forth in §§ 1201 and 1202. Under § 1202, the Commission has "the exclusive power" to determine and prescribe the manner, including the particular point of crossing, of a publicly used road or highway by a railroad or street railroad. Staff contends that VTA's rail transit system extension is in fact both a transit system and a street railroad.

The Borello Neighborhood Committee supports the position of Staff, asserting that the Commission has clear authority to "inspect all work" and to regulate the "design, construction, and operation" of the VTA system under § 99152 and has exclusive authority to regulate rail crossings under § 1202. The Committee also faults VTA for resisting full environmental review of its proposed elevated crossing, and it asserts that the Federal Transit Administration on July 23, 2002, ordered a full Environmental Assessment.[9]

The Committee contends that since VTA has filed no evidence in support of its plan for an elevated crossing of Hamilton Avenue, the Commission has no choice but to deny this unamended application for an at-grade crossing. The

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[9] Because the Vasona Light Rail Project is partially funded by the federal government, it is a joint project of the Federal Transit Administration and the VTA and subject to both

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Committee urges the Commission to enjoin VTA from proceeding with the crossing until VTA complies with the Commission's safety oversight.

## 6. Discussion

This is a jurisdiction case. More precisely, this case examines whether, as VTA argues, the Commission is strictly limited in its safety oversight of light rail transit, or, as Staff asserts, the Commission has broad authority that includes light rail crossings of streets and highways. Our analysis looks first to statutes that specifically refer to VTA or to public transit guideways like the one operated by VTA. We turn then to the question of whether the Commission's exclusive state jurisdiction to review and approve rail/street crossings should apply to VTA under §§ 2001, *et seq.*

### 6.1 Jurisdiction Under Statutes Specific to VTA

VTA admits, as it must, that it is subject to Commission jurisdiction under § 100168, § 778 and § 99152. We would add, as does Staff, that § 309.7 also specifically addresses the duties of the Commission and its safety division in reviewing public mass transit guideways. VTA acknowledges that, as in § 99152, its operation falls within the meaning of a public mass transit guideway.[10]

Sections 100168 and 778 deal primarily with the safety equipment required for light rail transit operations and with the safety appliances and other equipment required for at-grade crossings. Detailed requirements for these operations are set forth in G.O. 143-B (light rail transit) and G.O. 164-B (rail fixed

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the California Environmental Quality Act, Pub. Resources Code §§ 21000, *et seq.*, and the National Environmental Policy Act, 42 U.S.C. 4332.

[10] "Public Transit Guideway" is defined in Section 2.11 of G.O. 143-B as "A system of public transportation utilizing passenger vehicles that are physically restricted from discretionary movement in a lateral direction."

guideways), adopted in their original form pursuant to legislative directive in 1978 and 1991, respectively. While the majority of these regulations relate to safety equipment and operating procedures, G.O. 143-B since 1978 has required that rail/street crossings either at grade or at separated grade be approved in advance by the Commission.[11]

Section 99152, applicable to all transit districts, addresses safety appliances and procedures, but it also directs the Commission to "inspect all work done" on guideways and to "make further additions or changes necessary for the purpose of safety to employees and the general public." A 1986 amendment to the statute added a requirement that the Commission develop a safety oversight program employing safety planning criteria to be met by operators "in the design, construction, and operation of those guideways."[12] (Emphasis added.)

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[11] G.O. 143-B, Section 9.08 provides:

> No crossings or intersections of tracks of an LRT system and a public road, highway, street, or track of a railroad corporation either at-grade or at separated grade shall be constructed without having first filed an application and pursuant to the Public Utilities Commission Rules of Practice and Procedure, California Administrative Code, Title 20, and secured the permission of the Commission.

[12] Section 99152 states:

> The Commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of those guideways.
>
> The Commission shall enforce the provisions of this section.

In contrast to the position taken by VTA,[13] we have interpreted our safety authority under § 99152 broadly. In an earlier case involving VTA, *Brown v. Santa Clara County Transportation Agency* (1994) 56 CPUC2d 554, we denied the motion of the City of San Jose to limit our authority under the statute, stating:

> For our jurisdiction over safety to be meaningful under § 99152, we must be able to issue orders over the entire public transit guideway system. We cannot agree to compromise, frustrate, and fragment our safety regulation of public transit guideways by allowing any owner or operator of a public transit guideway to avoid our safety orders. Any dispute over facilities and defendants must be resolved such that we have a direct and comprehensive – not indirect or piecemeal – regulatory approach to implement our safety responsibilities in furtherance of the overall public interest. (56 CPUC2d at 559.)

As to placement and construction of grade crossings, VTA contends that § 99152 authorizes the Commission only to perform a post-construction safety review. That view misreads the statute. In the first place, § 99152 states that the Commission "shall" inspect all of the work done on a proposed guideway and to make changes necessary for public safety. If our inspection of the engineering plans for an at-grade crossing determines that the proposed crossing will be unsafe, we are compelled under this statute to order changes in that work.[14]

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[13] VTA describes the 1986 amendment to § 99152 as "somewhat vague and expansive" and limited to an oversight program applicable to light rail systems, not crossings. (Opening Brief, at 19.)

[14] In its reply brief, VTA makes a strained argument that the phrase "all of the work done" means all work "completely finished" or "accomplished," and thus the Commission's inspection jurisdiction does not apply until VTA is ready to begin revenue service. We believe a more sensible interpretation of the phrase is that the

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Moreover, § 99152 also requires that the Commission "shall" develop a safety oversight program for a guideway project that an operator must meet before, during and after construction of the guideway system. In arguing that this requirement applies only to a post-construction safety review, VTA ignores the Commission's responsibility to give safety approval to the "design" of a guideway system. Had the Legislature not intended that we exercise our crossings jurisdiction from the beginning, it would not have instructed us to develop an oversight program to be met by VTA in "the design [and] construction" of its guideways. On the facts before us in this case, VTA would have us believe that it was the intention of the Legislature that VTA could on its own construct an at-grade crossing at Hamilton Avenue, with this Commission's authority limited after the fact to ordering VTA to tear down the at-grade facility and reconstruct it as a separated crossing. Familiar principles of statutory construction preclude so absurd an interpretation of the clear words of the statute. (*Younger v. Superior Court* (1978) 21 Cal.3d 102.)

Finally, the Legislature in § 309.7 has again enunciated the Commission's broad authority to regulate rail systems, including those operated by transit districts. That statute, part of the enabling legislation for organization and function of the Commission, states:

> The safety division of the commission shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads <u>and public mass transit guideways</u>, and for enforcing state and federal laws, regulations, orders, and

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Commission is charged with inspecting <u>all</u> of the work as such work is completed, including, for example, the completed engineering plans for street crossings.

> directives relating to transportation of persons or commodities, or both, of any nature or description by rail. (Emphasis added.)

In the face of this explicit safety authority of the Commission over rights-of-way, facilities, equipment and operations of public mass transit guideways, we find no merit in VTA's contention that, as a publicly owned transit district, it has sole authority to determine placement and construction of rail/street crossings. Under Art. XII, § 8 of the California Constitution, "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."

As noted by Staff, the definition of a "transit system" is "a public district organized pursuant to state law and designated in the enabling legislation as a transit district or a rapid transit district." (Section 99213; emphasis added.) By definition, therefore, VTA's authority is that designated by the Legislature. There are no statutory provisions that support VTA's contention that it has "paramount" responsibility for construction of light rail transit street crossings, or that it has "plenary authority over the planning, construction and operation of transit facilities." (VTA Brief, at 16-17.) On the contrary, statutory authority for safety oversight of design, construction and operation of transit system guideways is specifically vested in the Commission.

The Legislature reserved to the Commission safety oversight in the enabling legislation for each of the 13 transit districts it has authorized since 1955.[15] That extensive reservation of our safety oversight over transit agency rail

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[15] The Legislature has authorized transit districts for Alameda and Contra Costa Counties (§§ 24561, *et seq.*), San Francisco Bay Area Rapid Transit District (§§ 28500, *et seq.*), Southern California Rapid Transit District (§§ 30000, *et seq.*), Orange County

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operations, combined with the authority granted to us in such statutes as § 99152 and § 309.7, are persuasive evidence that our safety jurisdiction over transit system guideways, including inspection and approval of rail/street crossings, rests on firm statutory ground.

### 6.2 Exclusive Rail Crossings Jurisdiction

As noted earlier,[16] § 1202 provides that the Commission has the exclusive power to prescribe the manner of each crossing of one railroad by another railroad or street railroad, and of each crossing of a street by a railroad or street railroad. VTA contends that the Commission's exclusive authority over rail/street crossings does not apply to a transit district because it does not operate as a "street railroad."

A street railroad is commonly understood to be a streetcar system that operates at-grade or at separated grade on streets in a manner that does not exclude the public from using the streets, and which carries passengers from one part of a district to another in a city and its suburbs.[17] It is defined at § 231 of the Code as follows:

> "Street railroad" includes every railway, and each branch or extension thereof, by whatsoever power operated, being

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Transit District (§§ 40000, *et seq.*), Stockton Metropolitan Transit District (§§ 50000, *et seq.*), Marin County Transit District (§§ 70000, *et seq.*), San Diego County Transit District (§§ 90000, *et seq.*), Santa Barbara Metropolitan Transit District (§§ 95000, *et seq.*), Santa Cruz Metropolitan Transit District (§§ 98000, *et seq.*), Santa Clara Transit District (§§ 100000, *et seq.*), Golden Empire Transit District (§§ 101000, *et seq.*), Sacramento Regional Transit District (§§ 102000, *et seq.*), and San Mateo County Transit District (§§ 103000, *et seq.*).

[16] *See* note 7.

[17] *Simoneau v. Pacific Elec. Ry. Co.* (1911) 159 Cal. 494; *see also* 52A Cal.Jur.3d, Public Transit § 2.

> mainly upon, along, above or below any street, avenue, road, highway, bridge, or public place within any city or city and county, together with all real estate, fixtures, and personal property of every kind used in connection therewith, owned, controlled, operated, or managed for public use in the transportation of persons or property, but does not include a railway constituting or used as a part of a commercial or interurban railway.

As Staff notes, at the time § 1202 was enacted in 1911, street railroads were operated by private street railroad corporations. Following the Second World War, most street railroad corporations became municipally owned and operated. Beginning in the 1950s, the California Legislature created transit districts to operate local transit systems, including street railroads.

Section 1202 does not cease to apply because a street railroad is operated by a transit agency over which the Commission has safety jurisdiction. Applying the statutory definition of the term, VTA clearly operates a "street railroad." The VTA light rail transit system is a "railway" powered by electric overhead catenary lines "operated mainly upon, along, above or below" streets and "operated, or managed for public use in the transportation of persons or property." Put simply, § 1202 applies to street railroads; VTA operates street railroads; the Commission has safety jurisdiction over VTA; hence, § 1202 applies to VTA. As California courts have maintained, "If it looks like a duck, if it walks like a duck and if it quacks like a duck, it should be treated as a duck."[18]

While acknowledging that its operations resemble those of a street railroad, VTA argues that it is not subject to §§ 1201 or 1202 because those

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[18] *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202 Cal.App.3d 921, 929, fn. 5.

statutes are intended to apply only to the rail/street crossings of privately owned railroads and privately owned street railroad corporations, not those of public entities like a transit district. It cites the cases of *People ex rel. Pub. Util. Com. v. City of Fresno, supra,* and *County of Inyo, supra,* as standing for the proposition that the Commission cannot regulate transit district rail crossings without express legislation granting it the jurisdiction to do so.

*City of Fresno* and *County of Inyo* are distinguishable from the case before us here. Neither is a transportation case. *City of Fresno* dealt with a city's power of eminent domain, over which the Commission was deemed to have no jurisdiction. *County of Inyo* concluded that the Commission had no jurisdiction to review rates of a municipal water company. In the case before us, however, we are considering the Commission's jurisdiction over rail/street crossings, jurisdiction which flows from authority granted to the Commission in transportation matters by the State Constitution.

In considering §§ 1201 and 1202, it is important to note that the Commission, unlike other state agencies, derives much of its jurisdiction by direct grant from the Constitution itself. The Legislature is without power to modify, curtail, or abridge this constitutional grant of power.[19] As pertinent here, that constitutional authority includes jurisdiction over railroads "and other transportation companies." In *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, the California Supreme Court reasoned that (prior to federal preemption) airline carriers, motor trucks and automobile stages were subject to Commission jurisdiction as "other transportation companies." The Court stated:

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[19] *Western Assn. v. Railroad Comm.* (1916) 173 Cal. 802.

> The argument of the defendant that the specific references in Article XII to "railroads and other transportation companies" must for certainty limit the "other transportation companies" mentioned to ground carriers, is without merit. Airline carriers, like motor trucks and automobile stages, are forms of transportation unknown at the time the Constitution was adopted, and whether or not the Legislature has since that time acted with reference to them, they are within the regulatory powers of the commission…." (42 Cal.2d at 641.)

The Commission's original jurisdiction under former section 23 of the Constitution applied to "all persons engaged in the business of transportation, whether as corporations, joint-stock companies, partnerships, or individuals,"[20] and that original grant of jurisdiction is preserved by the savings clause of today's Article XII, section 9. Staff contends and we agree that if airline carriers, unknown at the time of the Constitution's grant of jurisdiction to the Commission over transportation companies, have been held to fall within that original grant of Constitutional authority, then the streetcars of a transit agency (a kind of transportation entity also unknown at the time of passage of the State Constitution) must likewise fall within the Commission's original grant of Constitutional power.

Moreover, VTA's contention that the Commission lacks authority to review rail/street crossings of a public entity like a transit district is refuted by the Supreme Court's decision in *City of San Mateo v. Railroad Commission of California* (1937) 9 Cal.2d 1. In *City of San Mateo*, as here, the issue was whether the Commission may direct government agencies to comply with Commission orders regarding the closure or separation of at-grade crossings. The cities of

San Mateo, Redwood City and San Carlos sought review of the Commission's order requiring closure or separation of grades at crossings in each of the three cities, arguing that the cities had primary jurisdiction over such crossings within their city limits. Concluding that elimination of unnecessary grade crossings was in the public interest, and that physical closing of crossings is germane to the Commission's regulation of rail safety matters, the Supreme Court held:

> In these days of heavy automobile traffic the hazards to life and limb by reason of the numerous railroad crossings at grade is a matter of great public concern. To eliminate unnecessary grade crossings and to minimize the hazards created thereby has become a definite governmental state policy. To effectuate the desired results it is necessary that some public authority be vested with power to compel compliance with regulatory orders. The Constitution and statutes have vested that power in the Railroad Commission. (9 Cal.2d at 9-10.)

Since a plain reading of § 1202 makes it clear that the Commission has exclusive jurisdiction over street crossings by street railroads like those operated by VTA, the Commission is required to review and approve the proposed Hamilton Avenue crossing before that crossing can be constructed. That jurisdictional imperative, both as to § 1201 and § 1202, derives from the Constitution and has been broadly interpreted to apply in the case of public agencies. We conclude that VTA is subject to the rail crossing authority of this Commission.

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[20] *Moran v. Ross* (1889) 79 Cal. 159, 163.

### 6.3 Commission Decisions

We take official notice that this Commission has consistently asserted jurisdiction over the placement and construction of light rail crossings of streets and highways, most recently in *Los Angeles to Pasadena Metro Blue Line Construction Authority*, Decision (D.) 02-05-047 (May 16, 2002). There, the Commission considered 14 consolidated public agency applications for approval of light rail street crossings. The project consisted of 28 at-grade street crossings and 41 grade-separated crossings in the Pasadena-Los Angeles area.

In *Blue Line*, applicants sought authority to construct the crossings pursuant to §§ 1201-1205. The Commission's jurisdiction over such crossings was not challenged. Nevertheless, the Commission was asked to note the differences between light rail and heavy rail in determining whether grade-separated crossings are "practicable" within the meaning of § 1202. The Commission commented:

> Blue Line argues that a "one-size-fits-all" approach to practicability does not make sense. It urges us to consider the differences between light and heavy rail. In considering this approach we first look to Public Utilities Section 1202(c) and Rules 38(d) and 40 [of the Rules of Practice and Procedure]. None of these distinguish between heavy or light rail operations over a crossing. None require that there be a heavy rail operation over the proposed light rail crossing before practicability is to be considered. Certainly the safety of the proposed crossing is influenced by the characteristics of heavy versus light rail, as noted by [the] Commission's approval for separate general orders for each type system, [with] General Order (GO) 143 specifically for light rail operations. (D.02-05-047, at 9.)

To the extent that the Commission's decision asserts the same jurisdiction over light rail crossings as it does in heavy rail crossings, VTA

contends that *Blue Line* was wrongly decided. It distinguishes the cases relied upon in that decision as applying to railroad corporations, not to light rail systems.

VTA believes that the Commission correctly decided the jurisdictional question in a 1990-91 decision[21] dealing in part with whether light rail crossings were eligible for funding in the same manner as railroad crossings under Streets and Highways Code §§ 2450, *et seq.* Commission staff took the position in that case that exclusive light rail crossings did not qualify for grade separation funding under the Streets and Highways Code because the code referred only to grade separations of "railroads" and "railroad tracks." Staff argued that the term "light rail" has a meaning separate and apart from the term "railroad." The Commission agreed with staff's position, stating:

> Opponents argue that the tracks of an LRT are included in the term "railroad" and one respondent, San Diego, contents that it qualifies to be a railroad corporation. We think not. The term "railroad" used in § 2450 does not under its general and plain meaning include LRT systems. Nor is an LRT system generally defined as a railroad corporation. A railroad corporation is a private entity providing transportation services for profit to the public and is regulated by this Commission. LRT systems participating in these proceedings are publicly owned transportation systems which govern themselves but are subject to CPUC safety oversight under the Public Utilities Code. Thus, LRT systems cannot be interpreted as being

[21] *Investigation for the Purpose of Establishing a List for the Fiscal Years 1990-91 and 1991-92 of Existing and Proposed Crossings at Grade of Streets, Roads or Highways Most Urgently in Need of Separation,* D. 90-06-058 (Interim Opinion), 36 CPUC2d 606 (no text) (1990), D.91-06-016 (Final Opinion (1991).

> included in the terms "railroad" or "railroad corporation." (D.90-06-058 at 22-25; citation omitted.)

VTA errs in its interpretation of the crossings upgrade decision. The Commission's decision in that case was not that light rail crossings are excluded from Commission jurisdiction, but rather that transit agencies were not entitled to Grade Separation Program funds under Streets and Highways Code § 2450, *et seq.*, because they were provided with alternative means of funding. Staff in that case argued and the Commission agreed that:

> …it is incongruous to allow LRT to receive funds under the Grade Separation Program when other funds for LRT grade separations are provided under other public transit programs, such as the Transportation Planning and Development Account [§§ 99310, *et seq.*] (D.90-06-058, at 25.)

The manner in which grade separation projects are funded is irrelevant to the issue of whether the Commission has safety jurisdiction over street crossings of light rail tracks. As the Commission noted in D.90-06-058, light rail train systems "are publicly owned transportation systems which govern themselves <u>but are subject to CPUC safety oversight under the Public Utilities Code.</u>" (*Supra;* emphasis added.)

## 7. Conclusion

For the reasons that we have stated, we find that our jurisdiction to review and approve VTA's proposed rail crossing at Hamilton Avenue in the City of Campbell is firmly rooted in the State Constitution and explicitly supported by statute and by the courts. Judicial decisions have established that the subject of rail/street grade crossings is a matter of statewide concern within the jurisdiction

of this Commission.[22] The engineering and safe configuration of the crossing is more than a local concern; it is a statewide matter to be supervised by state agencies in a consistent and uniform manner throughout California.[23]

The California Legislature has declared that:

> Public transportation is an essential component of the balanced transportation system which must be maintained and developed so as to permit the efficient and orderly movement of people and goods in the urban areas of the state. Because public transportation systems provide an essential public service, it is desirable that such systems be designed and operated in such a manner as to encourage maximum utilization of the efficiencies of the service for the benefit of the total transportation system of the state and all the people of the state, including the elderly, the handicapped, the youth, and the citizens of limited means of the ability to freely utilize the systems. (§ 99220.)

And further,

> The Legislature declares that Sections 1201 to 1205, inclusive, are enacted as germane and cognate parts of and as aids to the jurisdiction vested in the commission for the supervision, regulation, and control of railroad and street railroad corporations in this State, and the Legislature further declares that the authority and jurisdiction thus vested in the commission involve matters of state-wide importance and concern and have been enacted in aid of the health, safety, and welfare of the people of this State. (§ 1219.)

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[22] *City of Union City v. Southern Pacific Company* (1968) 261 Cal.App.2d 277; *City of San Mateo v. Railroad Com., supra*; *City of San Bernardino v. Railroad Com.* (1923) 190 Cal. 562; *City of San Jose v. Railroad Com.* (1917) 175 Cal. 284; *Constantine v. City of Sunnyvale* (1949) 91 Cal.App.2d 278.

[23] *City of San Mateo, supra*, 9 Cal.2d at 9-10.

Accordingly, VTA's motions challenging the jurisdiction of this Commission to review and approve construction of a rail crossing of Hamilton Avenue in the City of Campbell are denied.

We rule as follows on the issues identified in Commissioner Lynch's Scoping Memo for this proceeding:

1. VTA has failed to justify an at-grade crossing at Hamilton Avenue as set forth in the application before us, and the application is denied without prejudice to refiling.
2. VTA has failed to rebut the protest of Staff that a grade-separated crossing is the only safe method of constructing the crossing at Hamilton Avenue.
3. Because his reasoning reflects our own, we affirm ALJ Walker's Ruling dated March 1, 2002, denying VTA's motion to dismiss the application on jurisdictional grounds, and his Ruling dated April 29, 2002, denying VTA's motion to withdraw its application and close the proceeding.
4. We do not at this time enjoin VTA as to the Hamilton Avenue project. We assume that, as a responsible public agency, VTA will not begin construction of its Hamilton Avenue crossing without complying with the law, and that compliance includes the prior safety review by our rail engineers and approval by this Commission. Should construction begin without that prior approval, we will entertain a request by Staff or by the Borello Neighborhood Committee for immediate issuance of a stop-work order.

## 8. Change in Categorization

In Resolution ALJ 176-3051, dated November 21, 2000, the Commission preliminarily categorized this proceeding as ratesetting and preliminarily determined that no hearings were required. In her Scoping Memo of May 29, 2002, Commissioner Lynch determined that a hearing would be

required. Our order today confirms the categorization of ratesetting but changes the determination to state that a hearing was required.

## 9. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. Comments were received _____.

## 10. Assignment of Proceeding

Loretta Lynch is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

## Findings of Fact

1. VTA in 2001 applied to the Commission for authority to construct an at-grade crossing at Hamilton Avenue in the City of Campbell of a light rail transit line extension.

2. Staff in its diagnostic review of the application determined that 70,000 vehicles per day pass through the proposed crossing site, that the site is near a highway off-ramp, and that light rail vehicles would use the crossing 200 times a day.

3. The Hamilton Avenue crossing is used for three roundtrips per week of Union Pacific Railroad freight trains.

4. Visibility of southbound trains approaching the Hamilton Avenue site is obstructed by buildings around the tracks.

5. Based on its investigation, Staff protested VTA's application for approval of an at-grade crossing and recommended that the crossing be grade-separated.

6. After further study, VTA agreed to grade-separate the Hamilton Avenue site for its light rail transit operations.

7. VTA refused to amend its application for Commission approval of the proposed crossing, arguing for the first time that the Commission lacks jurisdiction to review and approve rail/street-crossing projects involving light rail trains operated by a public transit district.

8. VTA's motion to dismiss this proceeding on jurisdictional grounds was denied by ALJ Ruling dated March 1, 2002.

9. VTA's motion to withdraw its application and close the proceeding based on lack of Commission jurisdiction was denied by ALJ Ruling dated April 29, 2002.

10. At hearing on the application on June 27, 2002, VTA limited its appearance to cross-examination and to legal argument on jurisdiction.

11. Briefing by the parties was completed on October 3, 2002, at which time this matter was deemed submitted for decision.

## Conclusions of Law

1. VTA is subject to Commission jurisdiction under statutes promulgated within the Public Utilities Code, including but not limited to § 100168, § 778, § 99152, and § 309.7.

2. Among other things, these statutes direct the Commission to inspect all work done on public guideway systems, to make changes necessary for the public safety, and to perform safety oversight of the design, construction and operation of guideway systems.

3. Under § 1202, the Commission has the exclusive power to prescribe the manner of rail/street crossings for railroads and street railroads within California.

4. The light rail system operated by VTA is a "street railroad" within the definition of § 231.

5. The Commission's jurisdiction over rail/street crossings is germane to the authority granted to the Commission in transportation matters by the State Constitution.

6. Transit districts, like municipalities, are subject to the Commission's rail crossing jurisdiction pursuant to Art. XII, § 8 of the California Constitution.

7. VTA's objection to the jurisdiction of the Commission to review and approve its light rail crossing of Hamilton Avenue in the City of Campbell should be denied.

8. The Commission should affirm the ALJ Rulings of March 1, 2002, and April 29, 2002, denying VTA's motion to dismiss the application and motion to withdraw the application and close the proceeding.

9. VTA's application for approval of construction of a light rail at-grade crossing of Hamilton Avenue in the City of Campbell should be denied without prejudice to an amended filing by VTA.

## O R D E R

**IT IS ORDERED** that:

1. The application of the Santa Clara Valley Transportation Authority (VTA) for an order authorizing construction of an at-grade crossing of Hamilton Avenue by the light rail transit line of the Vasona Light Rail Project in the City of Campbell, County of Santa Clara, is denied, without prejudice to an amended filing by VTA.

2. We affirm the Administrative Law Judge (ALJ) Ruling of March 1, 2002, denying VTA's motion to dismiss this application for lack of jurisdiction, and the ALJ Ruling of April 29, 2002, denying VTA's motion to withdraw the application and close the proceeding based on lack of Commission jurisdiction.

3. We find that this Commission has jurisdiction to review and approve the construction and placement of VTA's light rail/street crossing.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.