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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for
Approval to Construct a Public Pedestrian
and Bicycle At-Grade Crossing of the
Sonoma-Marin Area Rail Transit
("SMART") Track at Jennings Avenue
Located in Santa Rosa, Sonoma County,
State of California.

A1505014

OPENING COMMENTS ON PROPOSED DECISION

8 August 2016

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

Application No. 15-05-014

OPENING COMMENTS ON PROPOSED DECISION

Pursuant to Rules 14.3(a) and 1.15, James L. Duncan (Duncan) a party in this proceeding, A1505014, respectfully submits the following Opening Comments on Proposed Decision.

INTRODUCTION

Throughout this proceeding, Duncan has consistently urged the California Public Utilities Commission (CPUC) to act within the scope of its limited, ministerial, jurisdiction over safety appliances and procedures, pursuant to Public Utilities Code § 99152,¹ to approve the Application of the City of Santa Rosa (City) to improve the historic 112-year-old at-grade rail crossing at Jennings Avenue (Jennings crossing). (See Duncan's Response, at p. 11.) The Proposed Decision finds that the safety appliances and procedures proposed for the Jennings crossing meet all applicable standards; therefore, that part of the Proposed Decision is consistent with the limited, ministerial, jurisdiction granted to the CPUC by § 99152. (See Proposed Decision, section 4.3, pp. 20-21.) Accordingly, the City's Jennings crossing application should now be approved.

However, the Proposed Decision does not resolve fundamental issues Duncan has raised in this proceeding regarding the scope of the CPUC's statutory jurisdiction over rail crossings, such as the Jennings crossing, in transit districts, such as SMART, the transit district in this proceeding. The CPUC has claimed exclusive jurisdiction over the Jennings crossing; Duncan has

¹ All following Code citations are to the Public Utilities Code unless indicated otherwise.

consistently disputed this claim, asserting that it is contrary to statutory and decisional law. Duncan contends that the scope of the CPUC's statutory jurisdiction over the Jennings crossing, which is located in a transit district, is limited and ministerial – extending only to safety appliances and procedures, and not to any issues related to crossing placement, construction, and grade separation.

The Proposed Decision, notwithstanding Issue #5 raised in the Scoping Memo, ignores the holding in *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* 124 Cal. App. 4th 346 (2004) (*Santa Clara*) that Public Utilities Code §§ 1201 and 1202, which grant the CPUC exclusive jurisdiction over crossings in privately owned railroads, are not applicable to publicly owned transit districts. The Safety and Enforcement Division (SED), which filed the Protest in this proceeding, concedes that §§ 1201 and 1202 are not applicable to any transit district. Although § 99152 is applicable to all transit districts, it expressly grants the CPUC limited, ministerial, jurisdiction only over safety appliances and procedures. The Proposed Decision ignores that the court in *Santa Clara* relied on long established law that the CPUC's jurisdiction over public agencies, such as transit districts, is limited to only that which is expressly provided by statute.

The Proposed Decision incorrectly attempts to distinguish this proceeding from the *Santa Clara* holding, asserting that the CPUC has exclusive jurisdiction over the Jennings crossing pursuant to §§ 1201 and 1202 because there is freight train service that passes through the Jennings crossing. The Proposed Decision also incorrectly asserts that this freight train service is provided by a “rail [sic] corporation” even though there is no statutory definition of such, but a “Railroad corporation” is defined by § 230 as a privately owned railroad. The freight train service at issue here, however, is not privately owned; it is provided by a state-owned and funded public agency, the North Coast Railroad Authority (NCRA). The NCRA has statutory authorization to employ an qualified private company, the Northwestern Pacific Railroad, to operate its trains, and has a permanent easement to use the rail line which is owned by SMART, not by the NCRA.

Even if the freight train service within the transit district were provided by a privately owned railroad corporation, rather than a public agency, that would not provide the CPUC with exclusive jurisdiction over the Jennings crossing. The Proposed Decision ignores that there was freight train service within the Santa Clara Valley Transportation Authority (VTA) transit district throughout the CPUC proceeding which was ultimately reviewed by the court in *Santa Clara*. Although that freight train service was provided by a privately owned railroad corporation, the Union Pacific Railroad Company, SED did not raise any issues regarding that in *Santa Clara* and it is also without relevance in this proceeding. (See Duncan's Opening Issue Brief at pp. 1-3.) No matter how broad the scope of CPUC jurisdiction over privately owned public utilities; it is established law that the CPUC has jurisdiction over a public agency only to the extent expressly provided by statute. The Proposed Decision does not cite any statute which expressly grants the CPUC jurisdiction over transit districts based on freight train service within the transit district.

The City first contacted the CPUC in September 2011 regarding improving the Jennings crossing. In January 2012, the CPUC responded, asserting exclusive jurisdiction over the Jennings crossing, and called for the City, as a matter of CPUC policy, to close one or more unrelated, existing, safe, at-grade rail crossings in conjunction with the improvement of the Jennings crossing.² Later, SED described this crossing closure requirement as an aspect of an unwritten CPUC policy imposing a state-wide freeze on the number of at-grade rail crossings.³ When the City subsequently applied in 2015 to the CPUC for approval of the Jennings crossing improvements without any closures of other crossings, SED filed a Protest, once again asserting exclusive jurisdiction over the Jennings crossing and requiring either the construction of an elevated crossing at Jennings or crossing closures elsewhere.⁴

It may be hoped that, with this Proposed Decision, the City's Jennings crossing Application will finally be approved by the Commission, after a delay by now of approximately five years. The CPUC's incorrect assertion of exclusive jurisdiction over the Jennings crossing is the basis of this extended delay and the associated unnecessary costs to the taxpayers. Additionally, the City's pedestrians and bicyclists have lost the use of the Jennings crossing for over eight months

² See Exhibit 1 in Response of James L. Duncan, filed on June 12, 2015.

³ Transcript, Evidentiary Hearing, March 14, 2016, page 178, lines 19-28 and page 179, lines 1-12.

⁴ Protest of the Safety and Enforcement Division, filed June 4, 2016, pp. 2-3.

now since the CPUC ordered it barricaded with a fence during the course of this proceeding. If the CPUC had initially acted within its limited statutory ministerial jurisdiction, the construction work to improve the Jennings crossing would have long since been expeditiously and economically completed with a minimum of disruption to the City's residents and to SMART.

SED agrees that this jurisdictional issue is not only a local issue for this specific crossing, but is an issue of statewide interest likely to recur in other communities.⁵ This jurisdictional issue has been fully briefed by the parties with a considerable investment of time and attention, but this Proposed Decision, as discussed below, ignores the extensive briefing and does not provide a resolution that is consistent with statutory and decisional law.

DISCUSSION

The Proposed Decision does not address Issue #5 in the Scoping Memo:

5. In view of the holding in *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California*, does the Commission have jurisdiction over the Jennings Avenue crossing? (Scoping Memo, at p. 4.)

Only one correct ruling is possible on the jurisdictional issue questioned in Issue #5. As Duncan has repeatedly asserted, expressly citing and relying upon *Santa Clara*, the CPUC's limited, ministerial, jurisdiction over the Jennings crossing is only regarding safety appliances and procedures pursuant to § 99152. Most importantly, the CPUC does not have jurisdiction pursuant to §§ 1201 and 1202, or any other California statute, regarding any issues of crossing placement, construction, and grade separation at the Jennings crossing or any other crossing in any transit district. In other words, the CPUC has no statutory jurisdiction in any transit district regarding whether crossings are to be built or not, where they are to be located, and specifically whether they are to be built grade-separated or not. (See discussion and citations in Duncan's Response at p. 1-5; Duncan's Opening Brief on Jurisdictional Issues, p. 1-7, p. 15; Duncan's Reply Brief on Jurisdictional Issues, p. 12-15.)

⁵ Transcript, Evidentiary Hearing, March 14, 2016, page 194, lines 9-28.

The Proposed Decision does not even consider, much less analyze in view of *Santa Clara*, Duncan’s assertion that although § 99152 applies to all public rail transit, including SMART, it grants the CPUC a limited ministerial jurisdiction only over safety appliances and procedures, but not over placement, construction, and grade separation of rail crossings. SED has conceded that § 99152 “... does not provide the Commission with exclusive jurisdiction over the [Jennings] crossing” (SED Rebuttal Brief on Issue #5, at p. 8.) Further, neither SED nor any other party has made any specific argument to controvert Duncan’s assertion that, in view of *Santa Clara*, the CPUC’s jurisdiction pursuant to § 99152 is only a limited, ministerial, jurisdiction over safety appliances and procedures. (See Duncan’s Reply Brief on Jurisdictional Issues, pp. 1-2.)

The Proposed Decision incorrectly states, at p. 12, that “In his Response, and throughout this proceeding, Duncan has asserted that the Commission does not have jurisdiction over the [Jennings] crossing”. The record shows that Duncan has at all times presented the issue as being that the CPUC has no jurisdiction over the Jennings crossing pursuant §§ 1201 and 1202, and that the CPUC’s jurisdiction over the Jennings crossing pursuant to § 99152 is limited and ministerial in view of the holding in *Santa Clara*. (See Duncan’s Reply Brief on Jurisdictional Issues, section III, at p. 2.) The issue is not, and has never been, that the CPUC has no jurisdiction at all over the Jennings crossing, and the record clearly shows that Duncan has never made such an assertion.

The Proposed Decision ignores the extensive briefing in this proceeding citing established law that CPUC has no jurisdiction over public agencies, such as SMART, except as expressly provided by statute. (See Duncan’s Opening Issue Brief at pp. 4-6.) In *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California* (2016) 62 Cal.4th 693, 698 (*Monterey Peninsula Water*), the Supreme Court reaffirmed its holding in *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154:

Created by the California Constitution, the Public Utilities Commission has exclusive jurisdiction to supervise and regulate public utilities. (Pub. Util. Code, §§ 701-853, 1001, 1002, 2101.) It has no authority, however, to regulate public agencies ..., absent a statute expressly authorizing such regulation. (See *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 166-167 (*County of Inyo*).)

The overarching law, cited above, is that the CPUC does not have fundamental, general jurisdiction over any public agencies, including transit districts, it has jurisdiction only as

expressly provided by statute. Because they are public agencies, even if the VTA, SMART, or any other transit district were without any specific enabling legislation, the CPUC still would not have any jurisdiction unless it was expressly granted by statute.

The Proposed Decision incorrectly states, at p. 13, that “The *Santa Clara* VTA [sic] holding is specific to [the] VTA and cannot be directly applied to SMART.” The *Santa Clara* court’s opinion is clear that §§ 1201 and 1202 are not applicable to transit districts, and the specific language in the opinion indicates that its holding applies to all transit districts. (See discussion, with citations to *Santa Clara* in Duncan’s Opening Brief on Jurisdictional Issues, section VII and VIII at p. 5.) SED does not dispute the holding of the *Santa Clara* court that the CPUC’s jurisdiction under §§ 1201 and 1202 does not apply to transit districts, nor does SED dispute that the *Santa Clara* court’s holding applies to all transit districts. (See SED’s Opening Brief on Jurisdictional Issue #5, p. 2.) Further, the CPUC’s own attorneys, in CPUC briefs in the recent California Supreme Court case, *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California*, (2016) 62 Cal.4th 693, expressly note that the *Santa Clara* court’s holding is authority that §§ 1201 and 1202 do not apply to transit districts. (See discussion and citations in Duncan’s Opening Brief on Jurisdictional Issues at XI, p. 7.)

The Proposed Decision states, at p. 13, that “The *Santa Clara* VTA [sic] court based its decision on [an] analysis of VTA’s enabling legislation. Based upon this review, the Court found that the enabling legislation altered the scope of the Commission’s jurisdiction over VTA.” Indeed, the *Santa Clara* court did base its decision that the CPUC had no jurisdiction over the VTA’s crossings pursuant to §§ 1201 and 1202 on an analysis of the VTA’s enabling legislation: the court found that “When the Legislature passed the VTA’s enabling legislation, it included an express provision subjecting the VTA to PUC regulation ‘relating to safety appliances and procedures.’ (§ 100168).” But the *Santa Clara* court clarified: “However, the VTA’s enabling legislation did not and does not contain any provision similar to section 1202 that would expressly provide the PUC with exclusive jurisdiction over the VTA’s ... crossings.” (*Santa Clara* at p. 358.) In other words, although the CPUC’s jurisdiction over the VTA was indeed “altered” by the inclusion of an “express provision” (§ 100168), the CPUC still had no jurisdiction pursuant to §§ 1201 and 1202 because the VTA’s enabling legislation did not contain

any similar provisions. Neither does SMART’s enabling legislation contain any provisions similar to §§ 1201 and 1202. As the *Santa Clara* court held, “ ... [I]n the absence of an express provision, we will not infer a legislative intent to confer [CPUC] jurisdiction over a transit district.” (*Santa Clara* at p. 365.)

The Proposed Decision incorrectly states, at p. 13, that “No party has provided an analysis of how or why SMART’s enabling legislation enacted in 2002, should be subject to the court’s interpretation of the 1969 VTA enabling legislation.” This is not supported by the record; Duncan submitted such an analysis with citations from *Santa Clara* and supporting citations to sections of the Public Utilities Code. (See Duncan’s Opening Brief on Jurisdictional Issues, sections VI, at p. 4; IX, at p. 6; X at p. 7.) Section VI, in Duncan’s Opening Brief, at p. 4, contains the same quotation from *Santa Clara* cited above and, further, states that, “SMART’s enabling legislation makes no reference to the CPUC and does not grant the CPUC any express jurisdiction over SMART.”

The Proposed Decision incorrectly states, at p. 12:

Clearly, crossings involving freight service provided by a rail corporation are subject to Sections 1201 and 1202. It is not logical for the addition of a new service, such as the SMART passenger train, to remove the crossing from the Commission’s jurisdiction.

The Proposed Decision ignores the extensive briefing submitted by Duncan regarding the NCRA’s freight service within the SMART transit district. (See Duncan’s Opening Brief on Jurisdictional Issues, p. 12; Duncan’s Opening Issue Brief, p. 7.) Duncan’s briefing on the NCRA provided discussion and citations to statutory authority; in contrast, the Proposed Decision makes statements which are unsupported by the record and provides no citations to relevant authority.

The Proposed Decision, at p. 12, refers to the NCRA as a “rail [sic] corporation” even though there is no statutory definition of such. In § 230, there is a definition of “Railroad corporation” as a privately owned railroad.⁶ However, there is no evidence, citation to the record or citation to

⁶ § 230. “Railroad corporation” includes every corporation or person owning, controlling, operating, or managing any railroad for compensation within this State.

any authority provided to support that the NCRA is a “Railroad corporation.” Both as a matter of fact and as a matter of law, the freight service through the Jennings crossing is not provided by a privately owned “rail [sic] corporation” – it is provided by the NCRA, a public agency, which has an easement to use the SMART rail line. Further, as discussed above, there cannot be any inference of an underlying CPUC jurisdiction over the Jennings crossing which is “removed” by the “addition” of SMART; CPUC jurisdiction over public agencies cannot be inferred but must be expressly provided by statute. There is no evidence in the record that any privately owned entity, rather than SMART, owns the rail line at the Jennings crossing.

As discussed previously, SMART and the NCRA are required by statute to work together to “achieve safe, efficient, and compatible operations of both passenger rail and freight service along the [SMART] rail line”⁷ Beyond that statutory directive, however, there is no statutory authorization or relationship in which SMART provides any freight train service or customers for the NCRA’s freight train service, nor in which the NCRA provides passenger rail service on the SMART rail line or provides riders for SMART. The NCRA is authorized by statute to select a public or private entity to operate a rail transportation system⁸ but that entity has no status to operate freight or passenger train service independent of the public agency governance of the NCRA or of SMART.

The Proposed Decision incorrectly states, at pp. 11-12:

The basis of the Commission’s jurisdiction is not limited to Sections 1201 and 1202. Section 229 defines railroad to include any “commercial, interurban, and other railway, other than a street railroad.” Under Section 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.” *These statutes, when read together, give the Commission jurisdiction over railroad crossings in California.* (Italics added.)

However, §§ 1202 and 1202, § 99152, and § 229 cannot be “read together” to justify the inference of an all-encompassing CPUC jurisdiction over transit district rail crossings. As discussed above, the court’s holding in *Santa Clara* establishes that §§ 1202 and 1202 do not apply to any transit district. Section 99152, which is in a separate section of the Public Utilities

⁷ Duncan’s Opening Brief on Jurisdictional Issues, p. 4.

⁸ Government Code § 93020(f).

Code,⁹ applies only to “public transit,” not to privately owned railroads. Section 229 provides only a general definition of “Railroad” and has no relevance to CPUC jurisdiction –it does not mention the CPUC nor does it expressly provide the CPUC with any jurisdiction at all, much less any over transit districts. (See Duncan’s Opening Issue Brief at pp. 5-6.)

The Proposed Decision incorrectly concludes that “ *Santa Clara* VTA [sic] does not impact the Commission’s jurisdiction over the proposed Jennings crossing.” (Conclusions of Law #1, p. 38.)

As Duncan has previously asserted, based on the court’s holding in *Santa Clara*:

The impact of the *Santa Clara* court’s ruling on CPUC jurisdiction over rail crossings in transit districts, such as SMART, is profound. Under *Santa Clara*, any, but not limited to, of the following which are based on §§ 1201 and 1202 do not apply to rail crossings in transit districts: California case law; all CPUC General Orders; CPUC Rules of Practice & Procedure; and CPUC Policies as well as CPUC ALJ case law. (Duncan’s Opening Brief on Jurisdictional Issues, p. 3.)

The Proposed Decision incorrectly states in the Findings of Fact, at p. 35-36, that:

- #1. Jennings Avenue ... has historically been used as an unofficial railroad crossing.
- #2. The Commission has never authorized a crossing at Jennings Avenue.
- #5. There has been an informal unauthorized crossing at Jennings Avenue for over 100 years.

However, the evidentiary record confirms that Jennings crossing was officially accepted and dedicated to public use by the Sonoma County Board of Supervisors in 1904. The Jennings crossing did have a CPUC official crossing number, No. 5-55.0. At an undetermined date in the early 1960’s, Jennings crossing was closed to motor vehicles but remained open to pedestrian and bicycle use until 2015, when it was closed by order of the CPUC. No record of any final official action vacating the 1904 public right of way has been located.¹⁰ (See Duncan’s Opening Issue Brief at p. 2.)

⁹ Section 99152 is located in the Public Utilities Code at Division 10, Transit Districts, Part 11, Provisions Applicable to all Public Transit, Chapter 3, Miscellaneous, §§ 99150-99172. 99152 and only applies to Public Transit.

¹⁰ See Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdleough, June 16, 2015, Exhibit C, Jennings Ave., History.

CONCLUSION

For the reasons set forth above, James L. Duncan respectfully urges the Commission to approve the City of Santa Rosa's Application, A1505014, and to revise the Proposed Decision to acknowledge the limits to the Commission's jurisdiction in transit districts such as SMART, consistent with *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* 124 Cal. App. 4th 346 (2004), other authorities cited, and argument submitted by James L. Duncan.

Dated this 8th day of August, 2016, at Santa Rosa, California.

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APPENDIX OF PROPOSED CONCLUSIONS OF LAW AND PROPOSED FINDINGS OF FACT

PROPOSED CONCLUSIONS OF LAW

- 1) Proposed Conclusion of Law: Public Utilities Code §§ 1201 and 1202 grant the Commission express exclusive jurisdiction over the placement, construction, and grade separation of rail crossings in privately owned railroads, but do not apply to transit districts.
- 2) Proposed Conclusion of Law: Under *Santa Clara*, all law based on §§ 1201 and 1202 is inapplicable to rail crossings in transit districts.
- 3) Proposed Conclusion of Law: Public Utilities Code § 99152 applies to all public rail transit, including SMART, granting the Commission limited ministerial jurisdiction only over safety appliances and procedures but not over placement, construction, and grade separation of rail crossings.
- 4) Proposed Conclusion of Law: Sections 1201-1205 grant the Commission jurisdiction only over privately owned railroads; SMART is a transit district, a public agency which is publicly owned and governed.
- 5) Proposed Conclusion of Law: the Commission has no jurisdiction over publicly owned transit districts, such as SMART, except as expressly provided by statute.
- 6) Proposed Conclusion of Law: SMART's enabling legislation makes no reference to the Commission and does not grant the Commission any express jurisdiction over SMART.
- 7) Proposed Conclusion of Law: The *Santa Clara* court could not discern any legislative intent to impose the Commission's §§ 1201 and 1202 exclusive jurisdiction on transit districts.

8) Proposed Conclusion of Law: The holding of the *Santa Clara* court provides guidance on the issue of the Commission's jurisdiction over all transit districts.

9) Proposed Conclusion of Law: The statutes which authorize SMART and all transit districts in the state form a statutory scheme within the Public Utilities Code.

10) Proposed Conclusion of Law: The statutory scheme for transit districts grants them broad authority over the design, location, and construction, including grade separation, of their rail transit systems.

11) Proposed Conclusion of Law: The Commission has jurisdiction over transit districts only to the extent expressly provided by statute; the specific type of rail vehicle operated by or in a transit district is irrelevant to the scope of Commission jurisdiction.

12) Proposed Conclusion of Law: Transit districts, such as SMART, have very broad statutory authority over the rail vehicles they operate.

13) Proposed Conclusion of Law: The Commission has no statutory jurisdiction in the SMART transit district to enforce General Order 75-D, paragraph 2, Policy on Reducing Number of At-grade Crossings.

14) Proposed Conclusion of Law: Commission Rule 3.7(c) is expressly based on §§ 1201 and 1202 and does not apply to transit districts such as SMART.

15) Proposed Conclusion of Law: No statute expressly grants the Commission any jurisdiction over rail crossings in the SMART transit district because of the freight rail service provided by the North Coast Railroad Authority, a publicly owned and governed public agency.

16) Proposed Conclusion of Law: General Orders 143-B and 164-D are based on § 99152 but by the definitions given in those orders are not applicable to SMART.

PROPOSED FINDINGS OF FACT

1) Proposed Finding of Fact: Jennings crossing was officially accepted and dedicated to public use by the Sonoma County Board of Supervisors in 1904.

2) Proposed Finding of Fact: Jennings crossing had CPUC crossing number No. 5-55.0.

3) Proposed Finding of Fact: At an undetermined date in the early 1960's, Jennings crossing was closed to motor vehicles.

4) Proposed Finding of Fact: Jennings crossing remained open to pedestrian and bicycle use from the early 1960's until 2015.

5) Proposed Finding of Fact: No record has been located of any final official action vacating the 1904 Jennings crossing public right of way.