

Decision **DRAFT DECISION OF ALJ ROSENTHAL** (Mailed 11/14/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Union Pacific Railroad Company for an Order Declaring and Adjudicating the Legal Status of the Cal Poly Crossing at Milepost 246.9 in the City of San Luis Obispo and County of San Luis Obispo, State of California, the Necessity for Keeping the Crossing Open, and the Need for Safety Improvements and Apportionment of Costs.

Application 02-08-006
(Filed August 7, 2002)

O P I N I O N**I. Summary**

This decision approves an unopposed settlement reached by a majority of the parties in this proceeding for safety improvement of the at-grade crossing at milepost 246.9 in the City and County of San Luis Obispo. The Commission also approves the proposed apportionment and assignment of the improvement costs.

II. Background

Union Pacific Railroad Company (UP) filed an application to adjudicate the status of this at-grade crossing and either close it or improve the safety of the crossing. The crossing (Crossing X) is between the California Polytechnic State University (CalPoly) campus on one side and private property owned by Carolyn and / or Paul Craig (Craigs), Glinda Services, Inc. (Glinda), The LDS Institute (LDS), and a housing project known as Mustang Village on the other

side. Nearby is Stenner Glenn, another housing project whose residents also use the crossing. Prepared testimony mailed in anticipation of evidentiary hearings indicates that there are approximately 3,000 pedestrians, 250 vehicles, and 275 bicycles per weekday using the crossing. Two passenger trains and approximately 11 freight trains move over the crossing daily. Three fatal accidents and two injury accidents have occurred at the crossing. Current protection is a stop sign in each direction. The crossing is currently listed as a private crossing.

The settlement resulted from mediation. The parties agreed that the mediation sessions would remain confidential. The settlement document discloses, however, that the Craigs did not participate in the mediation or settlement.

III. Submission of Proceeding

A public participation hearing (PPH) was held in San Luis Obispo on November 18, 2002. Approximately 150 persons attended. Thirty speakers addressed the Commission. A prehearing conference followed the PPH. It was attended by UP, CalPoly, the LDS Church (LDS), Glinda, representatives of the City of San Luis Obispo, Craigs, and the Rail Crossing Engineering Section of the Commission's Staff (Staff).

On March 26, 2003, the administrative law judge (ALJ) granted Staff's motion to join Mustang Village and Stenner Glenn, owners of student housing complexes in the vicinity of the crossing, as parties to this proceeding.

At the request of the parties, the Commission dispatched ALJ Thorson to San Luis Obispo on April 29 and May 5, 2003, to attempt to mediate a solution for this matter. Written notice of these mediations was sent to all parties on March 25 and 26, 2003. Staff also participated in the mediation sessions.

ALJ Thorson was successful in the mediation, and the Commission is in possession of a signed settlement agreement.

IV. Settlement

On May 5, 2003, ALJ Thorson contacted ALJ Rosenthal and informed him that an agreement had been reached. On that premise, the evidentiary hearings scheduled for May 7, 8 and 9, 2003 were cancelled. On August 28, 2003, the settling parties filed a motion with the Commission requesting approval of the settlement pursuant to Rule 51.1. The formal settlement, signed by the settling parties, accompanied the motion. The formal settlement is incorporated into this decision.

The motion and proposed settlement were served on all parties to the proceeding. No objection to or comment on the settlement was filed during the period allowed under Rule 51.4.

The settlement is by and among the following parties: UP; CalPoly; The Corporation of the Stake President of the East Los Angeles Stake of the Church of Jesus Christ of Latter-day Saints, a California Corporation Sole (LDS Institute); Glinda; SLO I University Housing Group, L.P., a Texas Limited Partnership and SLO II University Housing Group, L.P., a Texas Limited Partnership (Mustang Village); and Select Income Properties, VI, a California Limited Partnership (Stenner).

The settlement specifies that Crossing X will be determined to be a private crossing with access rights governed by a separate Private Crossing Agreement with UP. The settlement also requires \$191,000 of crossing and signal improvements and capitalized maintenance costs to be made at Crossing X. Of this amount, \$177,400 will be paid by UP, LDS Institute, Glinda, Mustang Village, and Stenner as specified in the settlement agreement.

The balance of \$13,600 is described as the “unfunded liability.” In their settlement, the settling parties assign this amount to the Craigs as their equitable share of the crossing improvements. The Craigs were notified in writing of the mediation and invited to participate, but they did not participate in the mediation or join the settlement. The parties request that the Commission allow the Craigs an additional opportunity to subscribe to the settlement within 60 days of this decision, pay UP the assigned \$13,600 share, and sign the Private Road Crossing Agreement with UP. In the event the Craigs fail to do so, the settling parties ask the Commission to assign the unfunded liability to the Craigs and bar their use of Crossing X.

The signal improvements at Crossing X also require signal improvements at another rail crossing known as Foothill Boulevard. In addition to the \$191,000 of improvements at Crossing X, UP, and the City of San Luis Obispo have agreed to make \$133,000 of signal improvements at the Foothill crossing. Thus, the overall settlement for both crossings totals in the amount of \$324,000.

V. Procedural Matters

Resolution ALJ 176-3093, dated August 22, 2002, preliminarily designated this proceeding as a ratesetting matter and preliminarily determined that a hearing would not be necessary. This resolution appeared on the Commission’s Daily Calendar on August 23, 2002. Commissioner Michael Peevey’s Scoping Memo dated January 7, 2003, affirmed the designation of ratesetting. Due to the interest shown in this application it was determined that a hearing would be necessary. Our order confirms the categorization of ratesetting and, absent a settlement, that hearings would be required.

The settlement is in the public interest in that not only does the crossing remain in use, but also public safety is increased by improvements at the subject crossing in addition to an additional crossing nearby.

In light of the settlement, it is not necessary to rule on Glinda's motion to determine the applicability of the California Environmental Quality Act (CEQA) to the relief requested in the original application. Based on our review of the settlement, however, we believe CEQA is applicable at this point in the proceeding because our approval of the contemplated safety improvements constitutes a "project" or action since the proposed fencing and, perhaps, some crossing grading improvements have "the potential for resulting in either a direct physical change...."¹ The proposed safety improvements are to an existing rail crossing, largely involve the replacement and reconstruction of existing structures with improved signals and gates, fencing, and minor grading and repaving of approaches. Our approval of a settlement contemplating this limited scope of work qualifies for several categorical exemptions including Class I (addition of safety or health protection devices in conjunction with existing structures; minor alteration of existing structures or facilities not expanding existing uses),² Class 2 (replacement or reconstruction of existing structures on

¹ CEQA Guidelines, CAL. CODE REGS, tit. 14, § 15378(a)(2003).

² Guidelines, CAL. CODE REGS. tit. 14, § 15301 (including road grading for public safety).

same site having substantially the same purpose and capacity,³ and Class 4 (minor land alterations not affecting sensitive resources).⁴

It is also unnecessary to rule on Mustang Village's motion for reconsideration of the ALJ's ruling making Mustang Village a party to this proceeding.

VI. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were received.

VII. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Sheldon Rosenthal is the assigned ALJ in this proceeding.

Findings of Fact

1. The at-grade crossing (Crossing X) in San Luis Obispo at milepost 246.9 is a private crossing over the tracks of UP.
2. Approximately 3,000 pedestrians, 250 vehicles, and 275 bicycles use this crossing every weekday. Most of these uses are by students at the CalPoly who are traveling between student housing and university-related activities and the campus.
3. There are two passenger trains and approximately 11 freight trains over the crossing every day.

³ *Id.* §§ 15301(f), 15302.

⁴ *Id.* § 15304.

4. There have been three fatal accidents and two injury accidents at the crossing.

5. Mediation efforts were successful in obtaining agreement on the type of warning devices needed, the cost of these devices, and the apportionment of this cost among the settling parties, as set forth in the settlement agreement filed on August 28, 2003.

6. UP will be in charge in constructing the actual improvements called for in the settlement. These improvements include the installation of a Standard No. 9s (flashing light signals with automatic gates) and signage at Crossing X (all pursuant to General Order 75-C) and an interconnection to the signals at the adjacent crossing at Foothill Boulevard. The improvements at Crossing X will replace the existing passive Standard No. 1-Cs. UP will also install fencing on one side of the rail line for 150 feet. Cal Poly will maintain this fence.

7. The other parties to the settlement have agreed to grade and resurface the roadway across Crossing X in replacement of the existing surface.

8. The settling parties have agreed to reimburse UP in accordance with the agreement.

9. Maintenance of the improvements has also been provided for in the agreement.

10. Staff has examined these safety measures and agrees that they are necessary and appropriate for the crossing.

11. The Craigs own property immediately adjoining Crossing X, and they and their agents and tenants use the crossing. The property is described as Lot No. 052-252-015, San Luis Obispo County.

12. The Craigs were notified in writing on March 25, 2003, by letter and March 26, 2003 by an ALJ Ruling of mediation in this proceeding that commenced on April 29, 2003. The parties and mediator also attempted by phone to invite the Craigs to participate in the mediation.

13. The settling parties have agreed among themselves to share a total budget of \$324,000 for crossing improvements.

14. The sum of \$13,600, which represents the unfunded liability under the settlement is a fair, reasonable, and equitable share to be allocated and assigned to the Craigs if they desire continued use of Crossing X.

15. The motion to approve the settlement contains factual and legal considerations adequate to advise the Commission and parties not expressly joining the settlement of the settlement's scope and the grounds on which adoption is urged.

16. No comments or protests to the settlement or motion to approve the settlement have been filed during the period permitted by Rule 51.4.

Conclusions of Law

1. Milepost 246.9, also known as Crossing X, is a private crossing.
2. Certain settling parties, as identified in the settlement filed with the Commission, have reached an agreement for construction and maintenance of necessary and appropriate safety measures to provide adequate warning to users of the crossing.
3. Notice of the proposed settlement and the motion to approve the settlement has been given as required by law.
4. Commission approval of the proposed settlement is a project under the CEQA. Commission approval of the settlement, however, is categorically exempt from any further review under CEQA.
5. The proposed settlement makes a fair, reasonable, and equitable apportionment of the crossing improvements and maintenance to adjoining property owners who use the crossing, including those property owners who have not joined the settlement. Other procedural requirements for the approval of the settlement have been satisfied.

6. All other procedural requirements for the approval of the settlement have been satisfied.

7. The proposed settlement is reasonable in light of the whole record, consistent with law, and in the public interest. The proposed settlement will improve safety conditions at a hazardous railroad crossing used daily by several thousand persons. These improvements will be made and maintained by the railroad and adjoining property owners.

O R D E R

IT IS ORDERED that:

1. Union Pacific Railroad Company's (UP) motion to approve the proposed settlement among various parties is granted.
2. The settlement, as filed with the Commission on August 28, 2003, is approved and its terms and conditions incorporated herein.
3. For a period of 60 days following the effective date of this decision, Paul and Carolyn Craig (Craigs), or any subsequent owner of Lot No. 052-252-015, San Luis Obispo County, may join the approved settlement agreement by agreeing in a writing filed in this proceeding to (1) be bound by the terms of the agreement, and undertake an obligation to be responsible as an "Owner," as defined by the agreement, for a portion of the maintenance obligations of the Owners; (2) execute a separate crossing agreement with UP; (3) execute the maintenance agreement regarding the Owner's maintenance obligation described in Section IV of the agreement and assume a portion of the liability of Glinda Services (Glinda), pursuant to an agreement with Glinda; and (4) remit to UP the unfunded liability under Section V of the agreement in the amount of \$13,600.

4. In the event the Craigs fail to satisfy the requirements of the immediately preceding Ordering Paragraph (O.P.) 3, the Craigs, their agents, tenants, successors, assigns, and any subsequent owner or user of Lot No. 052-252-015, San Luis Obispo County, shall be barred and prohibited from any use (except for emergency response vehicles) of Crossing X.

5. UP is authorized to modify the existing at-grade highway-rail crossing at milepost 246.9 in the City of San Luis Obispo, San Luis Obispo County.

6. UP shall undertake the agreed-upon work in the following fashion: (a) clearances and walkways will conform with General Order (GO) 26-D; (b) walkways will conform to GO 118 and walkways adjacent to any trackage subject to rail operations will be maintained free of obstructions and will be promptly restored to their original condition in the event of damage during construction; and (c) the new warning devices will be two Standard No. 9s (flashing light signals with automatic gates) as described in GO 75-C.

7. Within thirty (30) days after completion of the work under this order, UP shall notify the Commission's Rail Crossing Engineering Section, in writing, by submitting a completed standard CPUC Form G (Report of Changes at Highway Grade Crossings and Separations), that the authorized work is completed.

8. The authorization to proceed with the agreed-upon work will expire if not exercised within two years (unless time is extended) or if the conditions set forth in Ordering Paragraph 6 are not satisfied. The authorization may be revoked or modified if public convenience, necessity, or safety so require.

9. 9. This proceeding is closed. In the event the Craigs join the approved settlement agreement as provided in O.P. 3, this proceeding may be reopened upon motion to allow the filing of the Craigs' joinder and to request any necessary modification of this order.

This order is effective today.

Dated _____, San Francisco, California.