

Decision PROPOSED DECISION OF COMMISSIONER SIMON (Mailed 5/27/08)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation for the purpose of establishing a list for the fiscal years 2008-2009 and 2009-2010 of existing and proposed crossings at grade of city streets, county roads or state highways in need of separation, or projects affecting the elimination of grade crossings by removal or relocation of streets or railroad tracks, or existing separation in need of alterations or reconstruction in accordance with Section 2452 of the Streets and Highways Code.

Investigation 07-07-006
(Filed July 12, 2007)

(See Appendix A for Appearances.)

**INTERIM DECISION ESTABLISHING GRADE SEPARATION
FUND PRIORITY LIST FOR 2008 – 2009 FISCAL YEAR**

Summary

This Interim Decision establishes the California Grade Separation Priority List for Fiscal Year 2008-2009, as required by section 2452 of the Streets and Highways Code. In accordance with our adopted procedure, we order Investigation 07-07-006 to remain open until we issue our final decision establishing the Grade Separation Priority List for Fiscal Year 2009-2010.

Background and Introduction

We initiated this proceeding by issuing Order Instituting Investigation (OII) 07-07-006 on July 12, 2007, to create the Grade Separation Program Priority

List (List) for Fiscal Years 2008-2009 and 2009-2010. The List establishes the relative priorities for allocation of funds to qualified projects for eliminating or altering hazardous railroad crossings under Streets and Highways Code section 2450 *et seq.* These projects include construction of new grade separations, alteration of existing grade separations, or elimination of grade crossings by removal or relocation of streets or railroad tracks. Section 190 of the Streets and Highways Code requires the State's annual budget to include \$15 million for funding these projects.

Section 2450 *et seq.* set out the procedure for administering these funds. Section 2453 gives the California Transportation Commission (CTC) responsibility for allocating (distributing) the funds to qualified projects, but the CTC has delegated this responsibility to the Department of Transportation (Caltrans). Section 2452 requires this Commission to establish the priority list for projects and furnish it to the CTC by July 1 of each year for use in the fiscal year beginning on that date.

The procedure we have adopted is to promulgate the list for the first fiscal year by interim decision issued before that fiscal year begins, and then to revise the list for the following fiscal year by deleting projects for which funds were actually allocated in the first, adopting the revised list by final decision before the second fiscal year begins. The two-year funding cycle begins again with the issuance of an OII for the creation of a new list for the following two fiscal years.

Our procedure requires local agencies to furnish planned grade separation project nominations to this Commission in response to an announcement made early in the first year of the cycle. The Commission reviews each nominated project to ensure that it is eligible for the Grade Separation Program, and holds a series of hearings so that nominating agencies may present each proposal,

answer questions about its content, and confirm its accuracy. Attendance and participation in these hearings is mandatory for any project proponent. The Commission's Consumer Protection and Safety Division (CPSD) staff (Staff) adjusts the draft priority list in accordance with evidence adduced at the hearings, and the list is presented to the Commission for adoption by interim decision. That is the task we undertake today.

Procedural History

After OII 07-07-006 was issued, CPSD notified railroads, light rail transit agencies, cities, counties, and other interested parties that nominations for grade separation projects proposed to be included in the current priority list were due by October 19, 2007. CPSD received a total of 119 timely nominations for projects to be included in the current list.¹ By ruling issued on December 10, 2007, the assigned Administrative Law Judge (ALJ) established a procedural schedule for concluding the FY 2008-2009 part of the proceeding. After evaluating each nominated project, Staff produced a preliminary priority list on January 25, 2008, from the data furnished in the written nominations.

The ALJ held hearings in San Francisco and Los Angeles between March 3 and 6, 2008. At the conclusion of the hearings the list was adjusted to reflect the withdrawal of certain nominations and the receipt of updated information.²

¹ Two additional nominations were subsequently accepted at the time of the hearings.

² Three nominations were withdrawn by parties at the hearings. On April 3, after the hearings, Imperial County furnished blocking delay information which was missing from its original nomination, and the ALJ granted leave to amend its nomination to include this information.

CPSD issued a revised priority list incorporating the updates on April 15, 2008, and the matter was submitted as of that date.

Specific Issues Affecting the Calculation of Project Priorities

Two issues relating to the determination of project priorities were raised at the hearing. These issues, and their resolution, are discussed here.

First, the Greater Bakersfield Separation of Grade District (District) questioned the standing of the Port of Stockton (Port) to submit its project nomination for a new grade separation at Daggett Road (Port of Stockton Expressway). The basis for the District's concern is that the statutory description in Streets and Highways Code section 2451 of "local agency," the type of entity that may receive allocations under this program, does not expressly include port agencies. Following the hearings the District, by letter dated March 12, 2008, expanded its inquiry, calling to the ALJ's attention the circumstance that a number of other project nominations were made by proponents that are not identified as local agencies by section 2451, specifically San Diego Association of Governments (SANDAG), Orange County Transportation Authority, Port of Los Angeles, Alameda Corridor-East Construction Authority, and San Bernardino Association of Governments (SANBAG).

Subdivision (a) of section 2451 states:

For purposes of this chapter, 'local agency' includes a city, a county, a separation-of-grade district, and any public entity that provides rail passenger transportation services.

Although this provision specifically identifies four types of entities as "local agencies," it does not exclude others expressly or by implication. The statute

contains no language of limitation that would exclude a public entity, and there is no legitimate purpose to be served by reading limitations into this provision.

The purpose of the Grade Separation Program is to make allocations from the Grade Separation Fund available to entities that are planning the construction or improvement of grade separations. The ultimate purpose is to encourage the completion of these construction projects, consistent with priority of need, to promote the safety of the public. Restricting nominations to the four types of entities enumerated in section 2451(a) would defeat this purpose. A more likely explanation for the legislature's express mention of the four types of entities in the statutory definition of "local agency" is that it sought to eliminate any doubt that they have standing to propose projects for funding. However, it is reasonable to assume that the legislative intent is carried out when any public agency with jurisdiction to construct such projects proposes a project for inclusion in the List.

The second issue concerns a series of proposed projects to be built in connection with conversion of the former BNSF Railroad Escondido branch line for use by North San Diego County Transit District (NCTD) "Sprinter" service, which began operation early in March 2008. Sprinters are an entirely new technology in California. They are diesel-driven multiple-unit transit cars (DMUs) that are operated both on street tracks and on private right-of-way, much as light-rail cars operate on lines elsewhere in the State. The essential difference is that instead of utilizing electric power drawn from overhead wires to drive electric motors on the cars' axles, Sprinters are self-propelled, driven by onboard diesel engines much like buses.

The City of Vista's (Vista's) project nominations counted each Sprinter as a passenger train, rather than a light-rail vehicle, for purposes of computing

project priorities. Because passenger train locomotives and cars are larger and heavier than light-rail vehicles, passenger trains are given a higher value in the formulas used to compute project priorities. Consequently, Vista's project priorities were increased in some measure by categorizing the Sprinter in this fashion.

Certain attendees at the hearing suggested that this categorization was justified, because Sprinters are similar to an earlier version of self-propelled rail diesel passenger cars that were utilized during the early 1950s on what is now NCTD's main commuter rail line. However, reliance upon this superficial similarity is misplaced. The earlier Budd Rail Diesel Cars (RDCs) were full-sized heavy rail passenger cars of very different weight and construction than the Sprinter cars. More importantly, they had heavy rail braking characteristics that require much longer stopping distances at any given speed than Sprinters.

In Resolution ST-68. Granting North County Transit District an Exemption to General Order 143-B, Section Nos. 4.03 Brake Rates, 5.02 Stop Lights, 6.01 Anti Climber, and 6.02 Corner Post Requirements (December 18, 2003), the Commission addressed several NCTD requests for authority to deviate from light rail safety requirements. These requests were predicated upon the assumption that Sprinters are light rail vehicles. This assumption was consistent with the braking and other characteristics of the Sprinter, which we discussed at some length in the Resolution. Vista cannot now seize upon the nature of the Sprinter's propulsion system to inflate the priorities of its projects, and Staff accordingly has revised the nominations to show the passenger train count as light rail train operations.

The Fiscal Year 2008–2009 Priority List

The statutory procedure for creating the fiscal year 2008-2009 List was properly followed, and all corrections to the draft were properly made. We will adopt the final List without change for purposes of allocating funds in the Grade Separation Fund.³

Categorization and Hearings

This proceeding has been categorized as quasi-legislative. Hearings were held in accordance with our adopted procedure for establishing the biennial Grade Separation Priority List.

Comments on Proposed Decision

The proposed decision of Commissioner Simon in this matter was mailed to the parties in accordance with section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were received.

Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Victor D. Ryerson is the assigned Administrative Law Judge in this proceeding.

³ We also note that additional funds are currently available as a result of the recent passage of Proposition 1B. That measure makes funding of \$150 million available to improve highway-rail crossings and construct grade crossings. These funds are to be allocated in accordance with the List established in this proceeding. See Highway-Railroad Crossing Safety Account guidelines at http://www.catc.ca.gov/programs/HRCSA/HRCSA_guidelines_040908.pdf. The application form is available at http://www.catc.ca.gov/programs/HRCSA/ppr_newprojects101007.xls.

Findings of Fact

1. Written notification of the opportunity to submit nominations for separation or elimination of existing or proposed railroad grade crossings pursuant to Streets and Highways Code section 2451 was given to railroads, light rail transit agencies, cities, counties, and others on the service list compiled at the conclusion of the previous Grade Separation Priority List proceeding, and the notice advised them of the deadline to file a nomination for each grade separation project they sought to include in the Fiscal Year 2008-2009 priority list.

2. Staff ranked all nominations accepted in this proceeding in priority, and the methodology utilized by CPSD to rank the nominations in priority order is that which we have adopted in I.07-07-006.

3. The Grade Separation Priority List attached as Appendix B consists of projects that were received for the record, properly supported, and put in priority order by Staff in accordance with our adopted methodology in this proceeding.

Conclusions of Law

1. Appendix B should be adopted as the Fiscal Year 2008-2009 Grade Separation Priority List in this proceeding.

2. The effective date of the Interim Order must be no later than June 30, 2008, in order to comply with Streets and Highways Code section 2452.

3. This proceeding should remain open for the purpose of creating the Fiscal Year 2009-2010 Grade Separation Priority List.

INTERIM ORDER

IT IS ORDERED that:

1. Pursuant to California Streets and Highways Code section 2452, the Grade Separation Priority List attached as Appendix B is established for Fiscal Year 2008-2009 as the list, in order of priority, of projects which the Commission determines to be most urgently in need of separation or alteration.

2. The Executive Director shall furnish certified copies of this decision to the California Department of Transportation and the California Transportation Commission by not later than July 1, 2008.

3. Investigation 07-07-006 shall remain open until we issue our final decision.

4. Staff shall take all necessary actions to establish the Grade Separation Priority List for Fiscal Year 2009-2010 in a timely manner, as required by law.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

***** SERVICE LIST *****

Last Updated on 14-MAY-2008 by: AMT
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(END OF APPENDIX A)