Decision **PROPOSED DECISION OF ALJ WALKER** **(Mailed 6/11/2007)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the San Luis Obispo County Public Works Department for an order authorizing construction of an at-grade pedestrian crossing in San Miguel, California, crossing Union Pacific Railroad in the vicinity of 16th Street, County of San Luis Obispo.	Application 04-07-001 (Filed July 1, 2004)

Patrick J. Foran, Attorney at Law, for San Luis Obispo County, applicant.
Carol A. Harris, Attorney at Law, for Union Pacific Railroad Company, protestant.

OPINION APPROVING APPLICATION FOR RAIL CROSSING PURSUANT TO SETTLEMENT AGREEMENT

1. Summary

This decision approves a settlement agreement permitting the San Luis Obispo County Public Works Department (the County) to construct an at-grade pedestrian crossing over the tracks of the Union Pacific Railroad Company (Union Pacific) in the vicinity of 16th Street in the community of San Miguel. The crossing will be at a location that now is a dirt path across the tracks, used daily by children to get to and from an elementary school. As one condition of this approval, our order today requires that, before constructing the new crossing, the County must close or facilitate the closing of one of the 108 active crossings of Union Pacific tracks in San Luis Obispo County, with a second closing to follow

before any other new at-grade crossings are permitted. This proceeding is closed.

2. Procedural Background

The County filed this application on July 1, 2004, seeking to construct an at-grade pedestrian crossing of Union Pacific tracks, primarily to serve the 70 to 80 children who live near 16th Street[1] and who on weekdays go to and from their homes and the Lillian Larson Elementary School. According to the County, rapid growth of housing west of the proposed crossing has caused more and more children to use a dirt path across the tracks as a direct route to the school. The application was protested by Union Pacific, which maintained that children could be routed to an existing road crossing at 14th Street, which could be improved for pedestrians at less cost than building the new crossing.

Following the protest, this proceeding was reassigned from the Consumer Protection and Safety Division (CPSD) to the Administrative Law Judge (ALJ) Division on September 3, 2004. No prehearing conference was conducted, but the parties in informal telephone conferences with the assigned ALJ sought and were given additional time to negotiate a settlement with the help of CPSD's Rail Crossings Engineering Section (RCES). When those efforts failed, the parties exchanged written testimony and participated in a public participation hearing in the community on April 19, 2006, followed by two days of hearing on April 20 and 21, 2006. The Commission heard from 10 witnesses and received 38 exhibits into evidence. Briefs were filed on June 12, 2006, and reply briefs

[1] The 16th Street does not cross over the Union Pacific railroad tracks. The 16th Street ends at the Union Pacific right-of-way, and pedestrians are on Union Pacific property when they cross the railroad tracks. The use of the term "16th Street crossing" in the application and in this decision refer to the crossing in the vicinity of 16th Street.

were filed on June 26, at which time the matter was deemed submitted for Commission consideration.

3. Proposed Rail Crossing

The County's application summarizes the need for the at-grade crossing as follows:

> School children have been crossing the UPRR track in the vicinity of 16th Street in San Miguel to travel to and from the Lillian Larson Elementary School westerly of the site of the proposed crossing. There is no official crossing provided at that location resulting [in] an undesirable condition of random crossing of the tracks. The County desires to install an at-grade pedestrian crossing of the railroad tracks in that location to enhance safety by channeling pedestrians to an official crossing. The proposed crossing shall be designed in accordance with appropriate design requirements of the CPUC and UPRR to achieve an acceptable crossing. (Application, at 1.)

Union Pacific's traffic engineering witness suggested an alternative – blocking the 16th Street dirt path, fencing the track between 14th and 16th Streets and to the north of 16th Street to prevent trespassing, and enhancing the existing 14th Street crossing to include sidewalks and a traffic light at the nearby 14th Street/Mission Street intersection. Many children already use 14th Street to reach the school, but that crossing would require an extra walk of six or seven blocks for the children who live north of that area and now use the path at 16th Street. The County's witnesses testified that Union Pacific's proposal would be less safe, since children would cross a number of intersections to reach 14th Street, cross the tracks and walk back to the school. Moreover, the 14th Street crossing has no dedicated public walkway, forcing pedestrians to share the road with vehicles.

Union Pacific also proposed an above-ground crossing at 16th Street, but its witnesses acknowledged that the cost ($2.7 million) would be difficult to justify for a relatively limited use. They also acknowledged that it would be difficult to prevent children from bypassing the structure, even with fencing, and crossing the tracks as they do now. Dean Smith, school superintendent, testified that children frequently climb or create holes in the fencing around the school's playfield.

County Supervisor Harry Ovitt testified that the problem will get worse, since San Miguel is experiencing rapid growth as a lower-cost bedroom community for nearby Paso Robles and San Luis Obispo. He estimated that about 750 new housing units will be built in the community within the next 10 years.

The Lillian Larson School is attended by 380 children, but it also serves many teenagers and adults with after-school programs. The athletic fields adjoining the school are the main recreational fields in San Miguel.

Union Pacific's witnesses testified that the need for a new rail crossing was never established in any traffic study and is not contemplated in the County's General Plan or in the San Miguel Community Design Plan. They added that the County has made no investment in studying the gates and safety devices proposed for the new rail crossing, and that its suggestion for a locking gate device is untested and dangerous (since children could accidentally be locked on the tracks inside the gates). The County's witnesses admitted that they had no firm plans for fencing the tracks to prevent trespassing, and they may have to wait until they can impose fencing requirements on developers who seek permits for work on parcels adjacent to the tracks. The County expects to seek funding to build the crossing, but it had not done so at the time of the hearing.

Union Pacific notes that new public at-grade rail-pedestrian crossings over its tracks are rare. During the past 10 years, only one at-grade pedestrian crossing open to public use has been authorized on a mainline route of the Union Pacific system in California. That one, at Morgan Hill, serves rail passengers crossing the tracks from a parking lot and downtown businesses. One other pedestrian crossing was authorized in 2005 in the City of Mendota, but the crossing there is over a branch line that serves only three trains per week, all operated at a maximum speed of 10 miles per hour. The County cites an additional at-grade pedestrian crossing in *Application of County of Santa Barbara* (1997) 75 CPUC 2d 853.

The proposed at-grade crossing here is located on Union Pacific's "Coast Line," which provides a north/south route connecting the Los Angeles Basin with the San Francisco Bay Area and east to Union Pacific's Roseville yard. Union Pacific averages 10 through freight trains per day on this line operating at a maximum speed of 40 miles per hour. Amtrak operates two daily intercity passenger trains over the line. A local train operates on the line on Tuesday and Thursday afternoons.

4. Environmental Review

The County is the lead agency for this project under the California Environmental Quality Act (CEQA), Pub. Res. Code § 21000 *et seq.* The County offered evidence to show that on March 17, 2006, it filed a Notice of Exemption for work at the proposed new crossing. The notice concludes that construction of a pedestrian walkway is classified as a minor alteration to land and is categorically exempt from CEQA review under § 21084 and CEQA Guideline 15301(c). The exemption was filed with the County Clerk and was available for public review for 30 days.

The Commission is a CEQA responsible agency, as defined in Pub. Res. Code § 21069, for the project. To comply with CEQA, a responsible agency must consider the lead agency's Environmental Impact Report or Negative Declaration prior to acting upon or approving the project. (CEQA Guidelines §§ 15050, 15096.)

In this case, the lead agency has determined that the project is exempt from CEQA. We are aware of no reason why the determination of exemption for the project is not warranted. We find the Notice of Exemption adequate for our decision-making purposes. Accordingly, we concur in the County's determination that the project is exempt from CEQA.

5. Discussion

Pub. Util. Code § 1201 provides that no public road, highway or street shall be constructed at grade across a railroad track without prior approval of this Commission. The Commission has exclusive jurisdiction to require, where practicable, a separation of grades. (Pub. Util. Code § 1202.) The Commission has stated that the reason for this latter requirement is that

> railroad grade separations constitute ultimate protection, since all grade crossing accidents and delays then are eliminated. It has long been recognized that the Commission should not grant applications for crossings at grade where there is a heavy movement of trains, unless public convenience and necessity absolutely demand such a crossing (*Mayfield v. S.P. Co.* (1913) 3 CRC 474). The advantages which might accrue by way of added convenience and financial benefit are outweighed by the dangers and hazards attendant upon a crossing at grade. Accident incidence is related to increases in the number of crossings; therefore, grade crossings should be avoided whenever it is possible to do so (*Kern County Bd. of Supervisors* (1951) 51 CPUC 317). (*City of San Mateo* (1982) 8 CPUC2d at 580-81.)

The Commission has set the bar high for approval of a new at-grade crossing of a heavy rail mainline:

> Today in this State a proponent who desires to construct a new at-grade crossing over mainline railroad trackage carrying any appreciable volume of passenger traffic has a very heavy burden to carry. Against the aforestated formidable backdrop of fundamental statutory and professional opprobrium, he must convincingly show both that a separation is impracticable and that the public convenience and necessity absolutely require a crossing at grade. (*City of San Mateo, supra*, at 581.)

In *Re Los Angeles to Pasadena Metro Blue Line Construction*, 2002 Cal. PUC LEXIS 301, *15, the Commission provided guidance regarding the standards it will apply to determine whether a separated grade is practicable and whether an at-grade crossing is justified by public need and convenience, indicating that it will give consideration to the cost of a separation in comparison to the cost of an at-grade crossing. (It should be noted that this case involved the proposed crossing of a light rail system; light rail vehicles have superior stopping capabilities in comparison to freight trains.)

The Commission indicated that it would consider an otherwise cost-prohibitive at-grade crossing if the applicant shows (1) elimination of all potential safety hazards; (2) concurrence of local authorities; (3) concurrence of local emergency authorities; (4) support by the general public; (5) cost justification; and (6) Commission staff concurrence.

The County here has shown broad community support for the proposed new crossing, particularly among parents of children who use the dirt path crossing. Since only pedestrians would use the crossing, emergency vehicles are unaffected. The County proposed safety devices at the crossing that would meet the requirements both of the Commission and Union Pacific. The County did not

demonstrate that it will be able to timely fence the track corridor leading to the new crossing, nor did it demonstrate the support of the Commission's RCES, which urged a more comprehensive rail crossing plan for San Miguel and the county. Similarly, the County did not show that a separated crossing was impracticable.

Solely on the merits of the County's application, therefore, a new at-grade crossing at 16th Street should be denied, with a recommendation that the County consider improving the nearby 14th Street crossing and routing children there or encouraging them to take an existing school bus service.

As a practical matter, however, the County has persuaded us – and Union Pacific's witnesses agree – that a growing number of children (and adults) are going to continue to use the dirt path crossing at 16th Street to get to school, as they have been doing for the past decade or more. Furthermore, even if the tracks are fenced the entire distance to 14th Street, fencing alone is not likely to deter children for long if the alternative is to walk a considerable distance out of their way to reach the school.

For these reasons, and primarily because the current situation puts children at risk, ALJ Walker on July 25, 2006, issued a proposed decision approving the application. The approval was subject to a number of conditions, including closure of two existing crossings, construction of tamper-proof fencing to discourage children from crossing tracks at open areas, installation of new safety devices at the approved crossings, and improvements to the existing 14th Street crossing.

The County and Union Pacific then requested an extension of time in which to comment on the proposed decision in order to further consider settlement. The extension was granted. On April 23, 2007, the parties moved for

approval of a proposed settlement agreement pursuant to Rule 12.1 of the Rules of Practice and Procedure. It is this settlement that the Commission approves today.[2]

The settlement agreement settles all issues between the applicant and Union Pacific and the Commission's rail crossing staff. The criteria for settlements are set forth in Rule 12.1(d) of the Rules of Practice and Procedure, which requires that a settlement be reasonable in light of the whole record, consistent with law, and in the public interest. We conclude that the settlement agreement is consistent with these criteria, and we approve it in the order that follows.

A. Terms of Settlement

The settlement agreement is attached to and made part of this decision as Exhibit A. Its terms include the following conditions:

- The County shall permanently close one active crossing in San Luis Obispo County before beginning construction of the 16th Street crossing and shall arrange a second permanent closing before seeking any other new at-grade crossing.
- The County shall design and install a pedestrian pathway separate from the roadway at the existing 14th Street crossing.
- The County shall construct vandal-resistant fencing or other barriers along the railroad right-of-way from the existing 11th Street crossing to a point 200 feet north of the 16th Street crossing. Union Pacific shall cooperate with the County in the installation of fencing along its right-of-way by assisting the County in locating an appropriate fence line.

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[2] Under Rule 1.2, we waive the requirement that a settlement must be finalized within 30 days after the close of public hearings. The waiver is based on the unique circumstances of this case and the fact that children are at risk.

- The County will construct a concrete sidewalk and signal-activated flashing lights for the new pedestrian crossing, subject to approval of the Commission's RCES and Union Pacific. Union Pacific shall be responsible for maintenance of the signaling devices at the crossing.

6. Categorization

This proceeding was preliminarily categorized as ratesetting on July 8, 2004 by Resolution ALJ 176-3136. We also preliminarily determined that hearings were not necessary. With the filing of the protest by Union Pacific, a hearing was deemed necessary and has been conducted. The preliminary categorization of this proceeding is confirmed, but the determination on hearings is changed to find that hearings are necessary.

7. Comments on Proposed Decision

The proposed decision of ALJ Walker in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed by the parties suggesting minor changes, and those changes have been made where appropriate.

8. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Glen Walker is the ALJ in this proceeding.

Findings of Fact

1. Notice of the application was published in the Commission Daily Calendar on July 8, 2004.

2. Union Pacific on July 30, 2004, filed a timely protest to the application.

3. The County sought authority to construct a new at-grade pedestrian crossing of Union Pacific tracks in the vicinity of 16th Street in San Miguel.

4. Every weekday, about 70 or 80 pedestrians, most of them children, now use an unauthorized dirt path crossing at 16th Street to reach the Lillian Larson Elementary School.

5. Hearings were conducted in April 2006 in San Miguel, and a proposed decision approving the application, with conditions, was issued on July 25, 2006.

6. The parties were granted an extension of time to further consider settlement of this matter and, on April 23, 2007, requested approval of a proposed settlement agreement.

7. The County is the CEQA lead agency for the project.

8. The Commission is a responsible agency for the project under CEQA.

9. Pursuant to Rule 12.1(d) of the Rules of Practice and Procedure, the settlement agreement is reasonable in light of the whole record, consistent with law, and in the public interest.

Conclusions of Law

1. Commission approval of new rail crossings in this state is required by Pub. Util. Code §§ 1201 through 1205.

2. A proponent of a new at-grade crossing over mainline railroad tracks has a heavy burden because of the inherent safety hazards created by roadway-railway crossings.

3. The County has shown that children are at risk in crossing the tracks at unauthorized locations to reach the Lillian Larson Elementary School.

4. The application for construction of the new crossing should be granted pursuant to the terms of the parties' settlement agreement dated April 4, 2007.

5. The settlement agreement, attached hereto and made part of this decision, should be approved.

O R D E R

IT IS ORDERED that:

1. The application of the San Luis Obispo County Public Works Department (the County) for an order authorizing construction of an at-grade pedestrian crossing in San Miguel, California, crossing the tracks of the Union Pacific Railroad (Union Pacific) in the vicinity of 16th Street, County of San Luis Obispo, is granted, subject to the conditions set forth in the parties' settlement agreement attached hereto as Exhibit A and made part of this decision. The new 16th Street crossing will be known as CPUC Crossing No. 00E-206.70D.

2. The County shall comply with all applicable General Orders and the Federal Highway Administration's Manual on Uniform Traffic Control Devices, as amended by the California Supplement.

3. Within 30 days of completion of the work under this order, Union Pacific shall notify the Rail Crossing Engineering Section (RCES) in writing, by submitting a completed standard Commission Form G (Report of Changes at Highway Grade Crossings and Separations), that the authorized work is completed.

4. This authorization shall expire if not exercised within two years, pursuant to terms of the settlement agreement. Authorization may be revoked or modified if public convenience, necessity or safety so require. A request for an extension of time must be submitted to RCES at least 30 days before the expiration of this authorization, with a copy of the request sent to all interested parties.

5. The Commission concurs in the County's conclusion that construction of the pedestrian walkway is categorically exempt from the California Environmental Quality Act.

6. Application 04-07-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Walker Agenda Dec Exhibit A