

Decision 09-02-032 February 20, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the Exposition Metro Line Construction Authority for an order authorizing the construction of a two-track at-grade crossing for the Exposition Boulevard Corridor Light Rail Transit Line across Jefferson Boulevard, Adams Boulevard, and 23rd Street, all three crossings located along Flower Street in the City of Los Angeles, County of Los Angeles, California.

Application 06-12-005
(Filed December 6, 2006)

And Related Matters.

Application 06-12-020
Application 07-01-004
Application 07-01-017
Application 07-01-044
Application 07-02-007
Application 07-02-017
Application 07-03-004
Application 07-05-012
Application 07-05-013

ORDER DENYING REHEARING OF DECISION 08-07-028

I. SUMMARY

Decision (D.) 08-07-028 (“Decision”) denied the LAUSD’s petition for modification of D.07-12-029.¹ In D.07-12-029, the Commission authorized construction of 36 of 38 proposed rail crossings along the Exposition Boulevard Corridor Light Rail Transit Line in Los Angeles County, including an at-grade crossing at Western Avenue (“Western”), requested in Application (A.) 07-02-007 filed by the Expo Authority (or “Expo”) on February 7, 2007. (*Id.* at p. 5 (slip op.)) D.07-12-029 further noted,

¹ *Interim Opinion Authorizing the Exposition Metro Line Construction Authority to Construct 36 New Crossing Along the Exposition Boulevard Corridor Light Rail Transit Line in Los Angeles County (“Exposition Metro Line Construction Authority Decision”)* [D.07-12-029] (2007) ____ Cal.P.U.C.3d ____.

pursuant to the Scoping Memo, evidentiary hearings would be held regarding proposed crossings at Farmdale Avenue (“Farmdale”) and Harvard Boulevard (“Harvard”), the two crossings not authorized in the decision. (*Id.* at p. 6 (slip op.)) Both of those crossings are within 60 feet of respective schools. The Western crossing is approximately 600 feet west of the proposed Harvard crossing and the Foshay Learning Center (“Foshay”).

In the Scoping Memo² for A.06-12-005,³ it was determined that an evidentiary hearing was not necessary with respect to 36 of 38 of the proposed crossings, including Western avenue, because “no issues of relevant material fact were identified or shown.” (Original Scoping Memo, at pp.4-5.) On November 18, 2007, Neighbors for Smart Rail (“NFSR”) filed a motion for reconsideration of the Scoping Memo concerning the Western crossing.⁴ NFSR asked that the Western crossing, due to its proximity to Foshay, be considered in tandem with the Harvard and Farmdale crossings and as such should be subject to evidentiary hearings. The motion was predicated on a resolution newly adopted by LAUSD, an “information only” party at the time, opposing any at-grade crossings in close proximity⁵ to schools unless all safety hazards will be eliminated by alternative mitigation measures.

² Scoping Memo and Ruling of Assigned Commissioner Determining the Scope, Schedule, And Need for Hearing, issued on October 16, 2007 (“Original Scoping Memo”); Amended Scoping Memo and Ruling of Assigned Commissioner Determining the Further Scope and Procedural Schedule, issued on June 20, 2008 (“Amended Scoping Memo”). The Original Scoping Memo only provided for evidentiary hearings for the Farmdale crossing (Original Scoping Memo, p. 6); evidentiary hearings for the Harvard crossing were authorized later. (D.07-12-029, p. 13 (slip op.))

³ Ten separate Applications have been filed requesting authorization for the 38 proposed crossings; however the Original Scoping Memo, at p. 2, consolidated A.07-02-007 with the lead proceeding A.06-12-005.

⁴ NFSR’s Motion for Reconsideration of the Scoping Memo and Ruling of Assigned Commissioner Concerning Western Avenue/Exposition Boulevard Crossing (A.) 07-02-007, filed November 19, 2007.

⁵ “Close proximity” has never been defined by LAUSD. However, their own policy is not to build school sites within 128 feet of an active rail line (LAUSD Resolution, filed November 13, 2007), and LAUSD letters dated September 28, 2006, and November 6, 2006, state their concern over five schools “located less than 100 feet from the proposed” rail line. Further, in their Position Statement, LAUSD maintains that a grade separate crossing is necessary if the line is within 50 feet of students. (Position Statement of the LAUSD, filed December 18, 2006, p. 6.)

On December 18, 2007, three days before D.07-12-029 was issued, LAUSD filed a motion for leave to become a party to the proceeding and file a position statement, in which LAUSD only discussed Farmdale and Harvard.⁶

In D.07-12-029, issued on December 21, 2007, we specifically rejected the motion to reconsider the scoping memo with respect to Western, stating that we “continue to find that a hearing is not necessary with respect to the Western Ave. crossing.” (*Exposition Metro Line Construction Authority Decision* [D.07-12-029], *supra*, at p. 14 (slip op).) The decision continued, “We find that it is not practicable to construct a grade-separated crossing at Western Ave., and further that the crossing warning devices at Western Ave. will provide an adequate level of safety.” (*Id.*) The Commission also took official notice of the LAUSD resolution. (*Id.*)

On January 8, 2008, an Administrative Law Judge Ruling was issued granting LAUSD limited party status. The ruling stated that LAUSD had been listed in the “information only” category on the service list since the first pre-hearing conference, and that LAUSD representatives attended all public procedural events. The ruling granted LAUSD party status prospectively, and limited their participation to issues involving the proposed crossings at Farmdale and Harvard.⁷

On April 22, 2008, LAUSD filed a petition for modification of D.07-12-029, requesting the Commission to reconsider authorization of the Western crossing. Expo filed a response opposing the petition on May 16, 2008, and LAUSD filed a reply on June 2, 2008. In their petition, LAUSD asked us to rescind that authorization and instead include the Western crossing in the evidentiary hearings ordered for the Farmdale and Harvard crossings.

⁶ Motion of the LAUSD for Leave to Become a Party and to file a Position Statement (“LAUSD’s Motion”), filed December 18, 2007.

⁷ Administrative Law Judge’s Ruling Granting the LAUSD Party Status and Leave to File a Position Statement, pp. 2-3, dated January 8, 2008.

In D.08-07-028, we denied LAUSD’s petition for modification. We found that “LAUSD seeks the same result for the same reasons in its petition as that sought by NFSR in its motion [to reconsider the scoping memo] and comments to the [Proposed Decision],” and that the facts and circumstances presented by LAUSD in their petition for modification had been considered in D.07-12-029. (D.08-07-028, p. 5.) We further found that D.07-12-029 “reached the right result” and that no new or changed facts or circumstances with regard to the Western crossing were presented. (D.08-07-028, p. 5.) Therefore, after reviewing the LAUSD’s petition, we found no basis to change any of their findings or conclusions, and concluded that there was no good cause to modify D.07-12-029 or to reopen the proceeding with respect to the Western crossing. (D.08-07-028, pp. 5 & 6.)

LAUSD filed a timely application for rehearing of the Decision. In their application for rehearing, LAUSD alleged: (1) The Commission erred in requiring LAUSD to demonstrate “new or changed facts or circumstances” in support of its petition for modification; and (2) the Commission erred in allowing an at-grade crossing at Western Avenue without an evidentiary hearing because the Exposition Authority has not met its burden to show that an at-grade crossing is impracticable.

We have reviewed each and every allegation raised by LAUSD in its rehearing application. We are of the opinion that good cause does not exist for granting rehearing. The application for rehearing constitutes an impermissible collateral attack on D.07-12-029. Further, these arguments have no merit. Accordingly, we deny LAUSD’s application for rehearing.

II. DISCUSSION

A. LAUSD’s arguments constitute an impermissible collateral attack of D.07-12-029, and thus, these arguments should be rejected.

In its rehearing application, LAUSD set forth challenges to the original decision (D.07-12-029), rather than the Decision (D.08-07-028) denying LAUSD’s petition for

modification. Specifically, LAUSD raises issues in its petition for modification and its rehearing application that essentially constitute challenges to the Commission's determinations in D.07-12-029. These issues include student safety concerns, the design of the crossing, and the need for evidentiary hearings, and practicability issues. (See generally, LAUSD's Application for Rehearing, pp. 1-14; see also, generally, LAUSD's Petition for Modification, *supra*, at pp. 1-8.)

These challenges to D.07-12-029 constitute an impermissible collateral attack of a final decision. As discussed above, this is an application for rehearing of D.08-07-028, not D.07-12-029. The action taken in D.08-07-028 was limited to our determination as to whether we should grant modification of determinations made in D.07-12-029. D.08-07-028 did not authorize the Western crossing; rather, that determination was made in D.07-12-029. D.08-07-028 did not determine that evidentiary hearings were not necessary, D.07-12-029 did. D.08-07-028 did not conclude, after analysis of a seven step practicability assessment, that the Expo Authority had met its burden of showing that a grade-separate crossing is not practicable, D.07-12-029 did. LAUSD is limited to claims that there was legal or factual error in the Decision for which the application for rehearing was filed, D.08-07-028. Thus, aside from the claim of legal error, LAUSD's arguments constitute an impermissible collateral attack of D.07-12-029. Accordingly, this claim should be rejected.

Since no application for rehearing was filed, D.07-12-029 became final on January 22, 2008, 30 days after its issuance on December 21, 2007.⁸ LAUSD states that an application for rehearing of D.07-12-029 was not filed because their party status was "prospective" and limited to the Farmdale and Harvard crossings.⁹ The fact that LAUSD did not seek a rehearing on D.07-12-029 for alleged procedural reasons does not permit

⁸ Taking into account Monday, January 21, 2008, which was Martin Luther King Jr. Day, a state holiday.

⁹ LAUSD was an information only party throughout the proceedings until they filed a motion for leave to become a party and file a position statement. In these filings LAUSD only discussed the Farmdale and Harvard crossings, therefore they were granted "prospective" party status, limited to those two crossings.

LAUSD to now collaterally attack the determinations in that decision. Accordingly, LAUSD is precluded from raising any argument of error in D.07-12-029.

The necessary result of the foregoing discussion is that the failure of the petitioners to ask the commission for a rehearing within the time allowed by the statute bars them of any right to ask this court to review the order complained of. There is, therefore, no occasion, and it would be improper, to inquire into the merits of the attack made upon the order of the commission. That order has become final, so far as the power of this court to review it in *certiorari* is concerned.

(*Clemmons v. Railroad Com.* (1916) 173 Cal. 254, 258-259.)

LAUSD can not collaterally attack a final decision through the filing of a petition for modification or via an application for rehearing of a decision that denies the petition. Public Utilities Code section 1709 provides: “In all collateral actions or proceedings, the orders and decisions of the [C]ommission which have become final shall be conclusive.” (See *People v. Western Air Lines* (1954) 42 Cal. 2d 621.)

There can be no question but that the commission exercised its judicial power in determining the ... matters above referred to. They were involved and extensively presented to the commission in the prior proceedings.... [T]he fact that other matters are also involved in the present case ... does not detract from the effect of those determinations as conclusive. That conclusiveness arises by operation of law. It is the order and not the reasons for it that establishes its effectiveness.

(*Id.* at.pp. 632-633.)

Accordingly, any challenge to D.07-12-029 constitutes an impermissible collateral attack of that decision.

B. The Commission applied the correct legal standard in denying LAUSD’s petition for modification of D.07-12-029.

LAUSD alleges that the petition for modification was denied on unlawful grounds. Their basis for this claim is an allegation that the petition for modification was denied solely because the Commission erroneously required LAUSD to demonstrate new or

changed facts or circumstances, contrary to our rules and precedent. (Rhrgr. App., pp. 3-4.)

Commission Rule 16.4 sets forth the requirement for a petition for modification, which states in relevant part:

- (a) A petition for modification asks the Commission to make changes to an issued decision. . . .
- (b) A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

(Commission Rules of Practice & Procedure, Cal. Code of Regs., tit. 20, §16.4, subds. (a) & (b).) Rule 16.4(a) and (b) specifies the circumstances that would justify a modification. Those circumstances include a necessary modification because of new or changed facts.

In disposing of the petition for modification, we were not convinced by the petition for modification to revisit our policy determinations in D.07-12-029. (D.08-07-028, p. 5 & 6.) We also looked at whether there were new facts or changed circumstances warranting a modification. (D.08-07-028, p. 6.) As we reasoned in the Decision:

LAUSD seeks the same relief for the same reasons in its petition as that sought by NFSR in its motion and comments to the [Proposed Decision]. LAUSD's primary argument, and that of NFSR, is that the authorized Western Avenue crossing is in proximity to Foshay and the proposed Harvard Boulevard crossing, and will be used by students and others at Foshay. These facts and circumstances were considered in D.07-12-029. LAUSD otherwise did not provide or discuss any new or changed facts or circumstances with respect to the Western Avenue crossing.

....

We have reviewed LAUSD's petition carefully and find no basis to change any of our findings or conclusions in D.07-12-029. The decision reached the right result, and we affirm it. In view of these matters, we find that LAUSD has not demonstrated good cause to modify D.07-12-029.

(D.08-07-028, p. 5). Accordingly, in denying the petition for modification, we acted consistently with our own rules regarding petitions for modifications.

Thus, our denial was not solely based on the fact that the petition did not demonstrate any changed facts or circumstances warranting a modification. Our denial was also based on LAUSD's attempt to relitigate the same arguments that the Commission had previously rejected in D.07-12-029.

Pursuant to Public Utilities Code section 1708, the Commission has broad authority to grant or deny a petition for modification. (See Pub. Util. Code, §1708.) This statute gives us the discretion to reject any attempts to relitigate issues that have already been considered and rejected. LAUSD would not dispute that we have such authority. (See Rhr. App., p. 3, discussing the Commission's authority under this statute.)

However, in speaking about Public Utilities Code section 1708, the Commission "has long recognized that this broad authority should be exercised with great care and justified only by extraordinary circumstances:

By its very nature, Section 1708 provides the possibility of an extraordinary remedy. *Res judicata* principles are among the most fundamental in our legal system, protecting parties from endless relitigation of the same issues. Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed. Our past decisions recognize that the authority to reopen proceedings under Section 1708 must be exercised with great care and justified by extraordinary circumstances

....

Only a persuasive indication of new facts or a major change in material circumstances, which would create a strong

expectation that we would make a different decision based on these facts or circumstances, would cause us to reopen the proceedings.

(Interim Opinion on Whether to Reopen the Shared-Savings Incentive Mechanism Adopted in Decision 94-10-059 for Energy Efficiency Programs [D.03-10-057] ___ Cal.P.U.C.3d ___, citing In The Applications Of PG&E Co. For Certificate To Own, Operate And Maintain Units 1 And 2 Of The Diablo Canyon Nuclear Power Plant, Petition To Set Aside Submission Filed By Center For Law In The Public Interest Denied.[D.92058] (1980) 4 Cal.P.U.C.2d 139, 149 & 150.)

LAUSD claims that the Commission unlawfully denied its petition for modification solely on the grounds that LAUSD did not provide new facts or circumstances. As discussed above, this contention is wrong. We denied the petition on several grounds. One of those grounds was the fact that LAUSD failed to provide convincing justification for us to revisit and modify our determinations in D.07-12-029. (D.08-07-028, p. 5.) Another ground was that after reviewing the petition, we found that D.07-12-029 reached the right result. (D.08-07-028, p. 5.) The petition was further denied on the ground that we had previously considered and rejected similar arguments in D.07-12-029. (D.08-07-028, p. 5 & 6.) We applied the correct legal standard in denying LAUSD's petition for modification of D.07-12-029.

C. The Commission acted lawfully in determining that evidentiary hearings on the Western crossing was not necessary because Expo had not demonstrated that a grade-separation is practical.

LAUSD alleges that the Commission erred in not ordering evidentiary hearings with respect to the Western crossing because LAUSD questions Expo's ability to show that a grade-separate crossing is not practicable.¹⁰ This allegation has no merit. First,

¹⁰ It appears that in their application for rehearing LAUSD occasionally interchanges "at-grade" and "grade-separate," such as in heading number III where they assert "the Expo Authority has not met its burden to show that an *at-grade* crossing is impracticable." (Rhr. App., p.8) For the purposes of this memo, we will assume that assume they intended to say *grade-separate* is not impracticable.

the decision to authorize Western without holding evidentiary hearings was made in D.07-12-029, which is final. Second, there is no legal requirement for holding evidentiary hearings that LAUSD requested, and LAUSD cites to no law stating otherwise.

III. CONCLUSION

For the reasons discussed herein, the LAUSD application for rehearing of D.08-07-028 should be denied.

THEREFORE, IT IS ORDERED that:

1. Application for rehearing of D.08-07-028, filed by LAUSD, is hereby denied.

This order is effective today.

Dated February 20, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners