

**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 crossing located along Flower Street in the City of Los Angeles, County of Los Angeles, California.

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

And Consolidated Proceedings.

Application 06-12-020
(Filed December 19, 2006)

Application 07-01-004
(Filed January 2, 2007)

Application 07-01-017
(Filed January 8, 2007)

Application 07-01-044
(Filed January 24, 2007)

Application 07-02-007
(Filed February 7, 2007)

Application 07-02-017
(Filed February 16, 2007)

Application 07-03-004
(Filed March 5, 2007)

Application 07-05-012
(Filed May 8, 2007)

Application 07-05-013
(Filed May 8, 2007)

**UNITED COMMUNITY ASSOCIATIONS, INC.'S AND NEIGHBORS FOR SMART
RAIL'S APPLICATION FOR REHEARING [ORAL ARGUMENT REQUESTED]**

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1. INTRODUCTION

Pursuant to Public Utilities Code section 1731(b)(1), and California Public Utilities Commission (“Commission”) Rules of Practice and Procedure, Rule 16.1, United Community Associations, Inc. (“UCA”) and Neighbors for Smart Rail (“NSR”) apply for rehearing of Final Decision 10-07-026 (the “Final Decision”). The Final Decision approved a Joint Settlement Agreement between Exposition Metro Line Construction Authority (“Expo”), on the one hand, and Los Angeles Unified School District (“LAUSD”) and Los Angeles County Metropolitan Transportation Authority (“MTA”), on the other hand. The Joint Settlement provides for an at-grade crossing at Farmdale Avenue on the Exposition Boulevard Corridor Light Rail Transit Line in Los Angeles County.

Rehearing is necessary to foreclose Expo, LAUSD and MTA from accomplishing by agreement what Expo was denied from accomplishing directly through a formal application. Under Commission Rules of Practice and Procedure, Rule 12.1(d), a settlement that is inconsistent with the law or unreasonable in light of the whole record may not be approved. The Joint Settlement Agreement is improper for both reasons. It violates legal principles of *res judicata* and collateral estoppel because the Joint Settlement’s proposed at-grade crossing at Farmdale Avenue directly contravenes the Commission’s previous decision, which effectively *mandated* a grade-separated crossing. Further, the Joint Settlement Agreement is unreasonable because uncontroverted evidence in the record has established that the proposed rail crossing is less safe for children than even the original at-grade crossing proposed, which the Commission rejected. Importantly, the Final Decision’s statement that “[n]o party has identified a disputed issue” is flatly erroneous. (Decision 10-07-026, p. 6.) Not only were some of the findings disputed, some of the findings were *contradicted* by undisputed evidence in the record. At a

minimum, an evidentiary hearing should have been conducted before the Commission rendered a Final Decision. For these reasons, this motion should be granted.

2. RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE THE COMMISSION FROM APPROVING A SETTLEMENT THAT IS AT ODDS WITH ITS PRIOR DECISION

As a matter of law, the Joint Settlement Agreement *cannot* be approved because it contemplates the construction of the type of rail crossing that the Commission barred in a previous decision. By Decision 09-02-031, rendered on February 20, 2009, the Commission concluded, “[Expo’s Application] 07-05-013, for an at-grade crossing at Farmdale Avenue, is denied.” (Decision 09-02-031, p. 2) When comparing the costs of an at-grade crossing with a grade-separated crossing, the Commission found “that grade-separated options at Farmdale [are] necessary . . . [and t]he pedestrian bridge with Farmdale closed to traffic option, at \$9 million, is the most cost-effective design for a complete separation of grade at Farmdale.” (*Id.*, p. 22.) By definition, a finding that grade-separation is practicable precludes approval of an at-grade crossing. Public Utilities Code § 1202.

Nevertheless, the Joint Settlement Agreement provides for the construction of an at-grade crossing -- precisely the option *rejected* by the Commission in Decision 09-02-031. Legal principles of *res judicata* and collateral estoppel should have led the Commission to reject the Agreement. *Res judicata* describes the preclusive effect of a final judgment on the merits and collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896-97 (2002). An administrative decision has *res judicata* effect on subsequent proceedings where, as in this instance, the agency “act[s] in a judicial capacity and resolve[s] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate....” *U. S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

The Final Decision readily satisfies the prerequisites necessary to apply *res judicata* or collateral estoppel. First, the proceedings from which the Decision resulted were “judicial” in character because: (1) the administrative hearing was conducted in a judicial-like adversary proceeding; (2) the proceedings required witnesses to testify under oath; (3) the agency determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial hearing officer; (5) the parties had the right to subpoena witnesses and present documentary evidence; and (6) the administrative agency maintained a verbatim record of the proceedings. *See Imen v. Glassford*, 201 Cal. App. 3d 898, 906-907 (1988) (identifying factors relevant to determining whether a proceeding was “judicial”). Second, the issue at hand is identical to that addressed in the prior proceeding -- *i.e.*, whether Expo should be allowed to construct an at-grade crossing at Farmdale Avenue. Third, the parties previously had an adequate opportunity to litigate the issue. Expo, LAUSD and MTA were parties in the prior proceeding. Thus, whether the proposed at-grade crossing is considered a “claim” under *res judicata* or an “issue” under collateral estoppel, the request is barred as a matter of law.

In the Final Decision, the Commission intimates that *res judicata* and collateral estoppel do not apply because Decision 09-02-031 permitted Expo to file any amendments or a new application without limiting the alternatives proposed to be grade-separated -- in essence, a do-over for Expo. (Final Decision, p. 3.) But the matter is not resolved so simply. Whether or not Decision 09-02-031 permitted Expo to file any amendments or even a new application altogether, a specific, fact-based finding that a grade-separated crossing at Farmdale Avenue is practicable has been made, remains binding and does not suddenly lose significance. Under Public Utilities Code section 1202, a finding that grade-separation is practicable *necessarily* means that an at-grade crossing at the same location is not a viable alternative. Certainly, there

has been no finding that grade separation is *impracticable*. Moreover, the fact that these proceedings were left open following the issuance of Decision 09-02-031 does not undermine the finality of the Decision. Finality is determined by applying the factors set forth above. A decision denying authority to construct an at-grade crossing is no less final or effective than a decision granting such authority. Under the circumstances, the Commission could not have properly consented to a Joint Settlement that provides for an at-grade crossing. Approval of the Joint Settlement Agreement, thus, constitutes legal error.

The Commission is bound by its prior ruling that grade-separation is practicable and thus, it cannot revisit the issue in the context of the Joint Settlement (or any other context for that matter). Assuming, however, the Commission were entitled to re-consider its prior final order, the evidence presented at trial demonstrated that grade separation *is* practicable: Expo did not show that it had the concurrence of local residents. Expo did not show that it had the concurrence of emergency authorities. The proposed at-grade crossing costs as much (or possibly *more*) than at least one grade-separated alternative. And, most significantly, Expo did not show that it had eliminated all safety hazards. (In Decision 09-02-031 the Commission found that "[a]ll of these gates, however, can be avoided easily by pedestrians. Considering the large number of crossings during peak periods, and the student populations using the crossing, we find that any system of gates or other warning devices at-grade would not eliminate all potential safety hazards.") Under those circumstances, to approve the Settlement is to eviscerate the concept of practicability entirely.

3. UNCONTROVERTED EVIDENCE ESTABLISHES THAT CHANGES IN TRAIN SPEEDS, STOPPING PATTERNS AND OTHER "SAFETY" MEASURES ENDANGER CHILDREN

It bears emphasis that LAUSD's own evidence establish the significant problems associated with an at-grade crossing near a school. Again, as George Bartleson, the Principal of

Dorsey High School and the witness most familiar with the students, testified, his “students are very distracted, both by the events occurring in their lives and by technologies that prevent them from hearing or focusing fully on their environment.” (LAUSD Exh. 20, p. 7.) Students commonly use iPods and cell phones that prevent them from fully focusing on the environment around them. (*Id.*) Students are also distracted by the social environment around them, including seeking out or avoiding fights with others. (*Id.*)

Not only are the students distracted -- they also take risks that adults would not. Mr. Bartleson testifies that his students sometimes jump the 8-foot fences around campus in order to ditch school, and he fears that they will jump the gates to try to beat the train across the crossing or try to race the train. (*Id.*, p. 8.) LAUSD Police Officer Jaming Arkangel testified that students regularly step into Rodeo Road, a busy four-lane street, with only a brief glance for on-coming traffic, and walk across the road without further regard for other on-coming vehicles. (LAUSD Exh. 15, p. 4.) Officer Arkangel also testified that he identifies students under the influence of alcohol or marijuana as often as two or three times a day. (*Id.*)

The Joint Settlement included a variety of so-called “safety” measures such as slowed train speeds and stop and proceed rules. (Joint Settlement Agreement, May 12, 2010, pp. 2-3 and 7-8.) However, testimony of UCA and NSR’s witnesses established that the reaction of children to certain safety measures differs from the reaction of adults. Safety measures aimed at adults may backfire when directed towards children. Thus, slowed train speeds, stop and proceed rules, and inconsistent supervision may actually reduce safety. A compromise that reduces the safety levels presented in the *rejected* original proposal should not have been approved.

4. THE COMMISSION SHOULD HAVE CONDUCTED AN EVIDENTIARY HEARING

The Commission included many findings of fact in its ruling. Some of these findings are not only disputed, but contradict undisputed evidence already in the record. Given that the Commission's prior order was based on a contested evidentiary hearing, a reversal of that order should not have made new findings of fact without some form of evidentiary hearing.

For instance, the Commission found that Decision 10-04-036 was an addendum to the Environmental Impact Statement (a federal environmental review document). This is incorrect. Decision 10-04-036 only served as an addendum to the Environmental Impact Report (a state environmental review document). As a State entity, the Commission has no authority to amend an Environmental Impact Statement. The Federal Transit Administration is the only entity that can alter the Expo Phase 1 Environmental Impact Statement and, thus far, it has not. Thus, the Joint Settlement improperly seeks approval of an environmental change prior to a completed environmental assessment. (*See* http://ceres.ca.gov/ceqa/cases/2006/Trancas_Property_Owners_Assn._v._City_of_Malibu.pdf.)

5. UCA AND NSR REQUEST ORAL ARGUMENT ON THEIR APPLICATION FOR REHEARING

Pursuant to Rule 16.3, UCA and NSR request oral argument on this Application for Rehearing. Given the complexity of the case, oral argument will be necessary to assist the Commission to resolve the application. Additionally, oral argument is proper as the Final Decision raises issues of major significance and departs from existing Commission and other legal precedent without adequate explanation. As set forth above, the Final Decision approved a settlement that provides for an at-grade crossing that was implicitly rejected by the Commission in a previous decision. Oral argument, thus, is warranted to assist the Commission in resolving this matter.

CERTIFICATE OF SERVICE

I, JoAn Mack, hereby certify that on September 1, 2010, the foregoing document entitled **UNITED COMMUNITY ASSOCIATIONS, INC.'S AND NEIGHBORS FOR SMART RAIL'S APPLICATION FOR REHEARING [ORAL ARGUMENT REQUESTED]** was served by Electronic Mail, U.S. Mail, and Federal Express as indicated on the service list for Application No. 06-12-005 *et al.*:

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Executed on September 1, 2010 at Los Angeles, California.

/s/

JoAn Mack