

OPEN MEETING ITEM

COMMISSIONERS
KRISTIN K. MAYES - Chair
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

ORIGINAL



0000103441

ARIZONA CORPORATION COMMISSION

DATE: FEBRUARY 11, 2010
DOCKET NO.: RR-03639A-09-0373

Arizona Corporation Commission
DOCKETED
FEB 11 2010

DOCKETED BY

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

UNION PACIFIC RAILROAD COMPANY
(CLOSE PEDESTRIAN CROSSING)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

FEBRUARY 22, 2010

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

MARCH 18, 2010

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

RECEIVED
2010 FEB 11 P
AZ CORP COMMISSION
DOCKET CONTROL

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 KRISTIN K. MAYES - Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

8 IN THE MATTER OF THE APPLICATION OF THE
9 CITY OF PHOENIX TO CLOSE THE EAST SIDE
10 OF THE 1ST AVENUE RAILROAD PEDESTRIAN
11 CROSSING AT THE TRACKS OF THE UNION
12 PACIFIC RAILROAD BETWEEN JACKSON
13 STREET AND BUCHANAN STREET, IN THE
14 CITY OF PHOENIX, MARICOPA COUNTY,
15 ARIZONA AT AAR/DOT NO. 741-472-S.

DOCKET NO. RR-03639A-09-0373

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING: November 10, 2009

12 PLACE OF HEARING: Phoenix, Arizona

13 ADMINISTRATIVE LAW JUDGE: Marc E. Stern

14 APPEARANCES: Mr. Daniel L. Brown, Assistant Chief Counsel, Office of
15 the City Attorney, on behalf of the City of Phoenix;

16 Mr. Terrance L. Sims, Beaugureau, Zukowski &
17 Hancock, P.C., on behalf of the Union Pacific Railroad
18 Company; and

19 Mr. Charles Hains, Staff Attorney, Legal Division, on
20 behalf of the Safety Division of the Arizona Corporation
21 Commission.

22 **BY THE COMMISSION:**

23 On July 27, 2009, the City of Phoenix ("City") filed with the Arizona Corporation
24 Commission ("Commission") an application for approval for the Union Pacific Railroad ("Railroad")
25 to close an existing at-grade pedestrian crossing at the Railroad's tracks on the east side of First
26 Avenue between Jackson Street and Buchanan Street, in Phoenix, Arizona, at AAR/DOT No. 741-
27 472-S ("Application").

28 On August 12, 2009, by Procedural Order, the proceeding was scheduled for hearing on
November 10, 2009, and other procedural dates for filing and public notice were established.

1 On October 5, 2009, the City filed certification that it had provided public notice of the
2 proceeding pursuant to the Commission’s Procedural Order.

3 On November 10, 2009, a full public hearing was convened before a duly authorized
4 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The City, the
5 Railroad and the Commission’s Railroad Section of the Safety Division (“Staff”) appeared with
6 counsel. At the conclusion of the hearing, the matter was taken under advisement pending
7 submission of a Recommended Opinion and Order to the Commission.

8 * * * * *

9 Having considered the entire record herein and being fully advised in the premises, the
10 Commission finds, concludes, and orders that:

11 **FINDINGS OF FACT**

12 1. On July 27, 2009, the City filed an Application for approval for the Railroad to close
13 an existing at-grade pedestrian crossing at the Railroad’s tracks on the east side of First Avenue
14 between Jackson Street which lies to the north and Buchanan Street which lies to the south in
15 Phoenix, Arizona at AAR/DOT NO. 741-472-S.

16 2. Where First Avenue intersects with the path of the Railroad’s tracks, automobile
17 traffic is routed beneath the tracks by a grade-separated underpass where the cars travel beneath the
18 tracks.

19 3. According to the Staff Report, prior to 1987, First Avenue was a one-way roadway
20 running south with an at-grade crossing for both cars and pedestrians at the Railroad’s tracks. The at-
21 grade crossing was equipped with flashing lights, automatic gates, bells and a cantilever.

22 4. In 1987, the City completed a grade-separation project that created a southbound one-
23 way three lane roadway that passed beneath the Railroad’s tracks at First Avenue. During the grade-
24 separation project which created the underpass, two dedicated at-grade pedestrian crossings were
25 constructed, one on the east side of First Avenue and one on the west side of First Avenue instead of
26 having sidewalks constructed parallel to the roadway in the underpass beneath the tracks.

27 5. These pedestrian crossings carry pedestrian traffic in a north-south direction and are
28

1 equipped with automatic warning devices which include flashing lights and bells.

2 6. The area to the north of the tracks adjacent to First Avenue primarily consists of
3 numerous county governmental buildings, the courthouse complex and other office buildings. The
4 area to the south of the tracks consists of vacant lots and industrial businesses.

5 7. The nearest alternative pedestrian crossing to the one which the City proposes to close
6 is the pedestrian crossing located across the street on the west side of First Avenue approximately
7 150 feet away. The nearest pedestrian crossing to the east is located approximately 622 feet away at
8 First Street.

9 8. According to the Staff Report, on September 1, 2009, the City performed a pedestrian
10 traffic count on both crossings from 8:00 a.m. to 10:00 a.m. and from 4:00 p.m. to 6:00 p.m. and
11 during those periods a total of 47 people utilized the crossings at First Avenue.

12 9. On October 5, 2009, the City filed certification that it had provided notice of the
13 Application and hearing thereon pursuant to the Commission's Procedural Order.

14 10. The hearing was held as scheduled on December 10, 2009.

15 11. The City, in support of its Application, called the following witnesses: Mr. Daniel
16 Klocke, the vice president of development for the Downtown Phoenix Partnership ("DPP"); Ms.
17 Belinda Cummings, a civil engineer and the project manager for the City; and Mr. Kerry Wilcoxon, a
18 civil engineer with the City.

19 12. At the outset of the proceeding, counsel for the City related that as of October 19,
20 2009, a quiet zone had been established pursuant to the rules of the Federal Railroad Administration
21 ("FRA") extending from Third Avenue on the west to Fourth Street on the east and from Jackson
22 Street on the north to Lincoln Street on the south.

23 13. Mr. Klocke provided testimony concerning the DPP which is the term utilized to
24 represent the enhanced municipal services district often referred to as a business improvement
25 district, which he termed "a 90 square block area in downtown Phoenix." According to Mr. Klocke,
26 the improvement district was established in the early 1990s. (Tr. at p. 9)

27 14. Mr. Klocke described the area encompassed by the quiet zone and the roadways which
28 have either vehicular and/or pedestrian crossings which intersect the Railroad's tracks except for

1 Central Avenue where both cars and pedestrians utilize an underpass which enables them to pass
2 beneath the tracks. (Tr. at p. 10)

3 15. Mr. Klocke testified concerning the various types of improvements made in the quiet
4 zone at the respective crossings such as "better striping in the roadbed in order to notify vehicle
5 drivers as well as posting signs that there are no train horns for both vehicles as well as pedestrians."
6 (Tr. at p. 11)

7 16. Mr. Klocke described in greater detail that fencing had been installed at the First
8 Avenue crossing to direct pedestrians to utilize the sidewalks to prevent pedestrians from wandering
9 across the tracks in different areas. (Tr. at p. 11)

10 17. Mr. Klocke testified that at Third Avenue, where the roadway intersects with the
11 Railroad's tracks, the Railroad will be moving its automatic gates closer to the tracks due to the
12 previous removal of a set of tracks that were no longer in use. (Tr. at p. 12)

13 18. Mr. Klocke testified further that the establishment of the quiet zone took place over a
14 period of four years during which time the DPP had numerous public meetings with property owners
15 to inform them what was going on. (Tr. at p. 12)

16 19. In furtherance of the project, the City conducted an outreach effort and sent letters in
17 both English and Spanish to households within a half-mile radius of the proposed quiet zone along
18 with a brochure describing "safety tips" about the Railroad crossings. (Tr. at p. 14)

19 20. Additionally, Mr. Klocke stated that a neighborhood community development
20 organization, the Phoenix Revitalization Corporation ("PRC"), delivered notices door to door to
21 residents from roughly about Ninth Avenue to about Seventh Street and from an area north of the
22 tracks south to approximately Buckeye Road. (Tr. at p. 14)

23 21. Mr. Klocke described in detail the steps taken by the City to inform various
24 neighborhood organizations, businesses and the County about the establishment of the quiet zone for
25 a period of months. (Tr. at p. 16 and 17)

26 22. According to Mr. Klocke, the DPP was first approached by property owners within the
27 area of the tracks to seek the establishment of the quiet zone. (Tr. at p. 24)

28 23. Based on Mr. Klocke's testimony, the determination to close the east side pedestrian

1 crossing of the Railroad's tracks at First Avenue resulted from the diagnostic review which was
2 conducted for the FRA during the proposed development of the quiet zone. Participating in the
3 diagnostic review were the FRA, the Arizona Department of Transportation ("ADOT"),
4 representatives of the City, community representatives and Staff. (Tr. at p. 29)

5 24. Ms. Cummings testified that on November 26, 2008, the City filed a Notice of Intent
6 which indicated to the FRA that the City was in the process of developing the quiet zone. (Tr. at p. 35)

7 25. On September 15, 2009, the City subsequently filed a Notice of Establishment of the
8 quiet zone which indicated that the City was ready to proceed with its establishment. (Tr. at p. 35)

9 26. Ms. Cummings provided insight into the diagnostic talks which were conducted to
10 establish the quiet zone. She testified that discussions were had which resulted in a general opinion
11 that one of the seven pedestrian crossings within the quiet zone should be closed and more
12 particularly, the crossing on the east side of First Avenue due to the proximity of the pedestrian
13 crossing only 156 feet away on the west side of First Avenue and due to liability and maintenance
14 issues. (Tr. at p. 36)

15 27. Ms. Cummings testified further that the east side crossing located at First Avenue and
16 the Railroad's tracks was chosen because there are no businesses on that side and there is only a
17 parking lot and a vacant lot adjacent to the crossing. (Tr. at p. 36)

18 28. Ms. Cummings referenced the seven crossings within the newly established quiet zone
19 describing safety improvements including signs to warn pedestrians and the operators of motor
20 vehicles. She further described that at First Avenue, at the west pedestrian crossing, the City installed
21 a handrail in a zigzag fashion that requires pedestrians to look both directions at the tracks before
22 they can actually cross them. She testified that the City had also installed "no train horn signs" and
23 signs that show the word "look" and that have an arrow pointing both directions at the bottom of the
24 signs. (Tr. at p. 36 and 37)

25 29. Ms. Cummings stated that there are warning lights at all crossings within the quiet
26 zone for vehicular traffic. (Tr. at p. 37)

27 30. According to Ms. Cummings, the cost of the sign installation and pedestrian upgrades
28 at the First Avenue pedestrian crossing are approximately \$30,000 to \$40,000 which will be paid for

1 by the City. (Tr. at p. 38)

2 31. At the time of the hearing, Ms. Cummings was unaware of the cost for the removal of
3 the pedestrian crossing on the east side of the Railroad's tracks at First Avenue. (Tr. at p. 39)

4 32. Ms. Cummings described the situation which involves the Railroad's relocation of the
5 automatic gates at Third Avenue as being somewhat delayed because the City has failed to increase
6 the length of its curbs, and the gates will have to be relocated "behind a curb" when the city
7 completes its part of the construction. (Tr. at p. 40)

8 33. Ms. Cummings stated that the City and the DPP are funding the various improvements
9 within the quiet zone. (Tr. at p. 41)

10 34. Ms. Cummings testified that once the Commission approves the closing of the
11 pedestrian crossing at the east side of First Avenue, it is estimated that the crossing will actually be
12 closed in approximately three to four months. (Tr. at p. 43)

13 35. Based on City records, there have been no accidents or fatalities at any of the seven
14 crossings in the quiet zone according to Ms. Cummings. (Tr. at p. 44)

15 36. The City has received a letter from the Railroad acknowledging that the quiet zone has
16 been accepted and the Railroad has directed its engineers to stop sounding their horns in that area of
17 the City. (Tr. at p. 45)

18 37. The City is required to annually recertify the quiet zone with the FRA and inform it
19 that the quiet zone still meets federal standards. (Tr. at p. 45)

20 38. Mr. Klocke testified that wayside horns have not been installed at any of the crossings
21 in the quiet zone and that crossing warnings consist of the standard flashing lights and ringing bells,
22 which were present prior to the effective date of the quiet zone. (Tr. at p. 50)

23 39. Mr. Wilcoxon, a city traffic engineer who is in charge of the Safety Neighborhood
24 Traffic Section, testified that he had personally investigated as to whether any collisions had occurred
25 at the crossings located within the City's quiet zone and stated that material from ADOT and from the
26 City's police crash reports for the past ten years show that there have been no crashes of any kind
27 reported to ADOT. (Tr. at p. 52 and 53)

28 40. Mr. Brian Lehman, the supervisor of the Railroad Section of Safety at the

1 Commission, testified that he had both prepared and reviewed the Staff Report along with Mr. Chris
2 Watson, an assistant supervisor and grade-crossing inspector, and that Staff is recommending
3 approval of the City's Application for the proposed closure of the east side at-grade pedestrian
4 crossing located at First Avenue and the Railroad's tracks. (Tr. at p. 55)

5 41. Mr. Lehman related that in 2005, during the diagnostic review for the seven crossings
6 for the quiet zone it was recommended that one of the dedicated pedestrian crossings, which serve
7 only pedestrians and do not include roadway traffic, be closed due to the redundancy of a nearby
8 dedicated pedestrian crossing. (Tr. at p. 56)

9 42. Mr. Lehman testified that it made sense to close the east side pedestrian crossing at
10 First Avenue because there is no necessity for access to businesses, while on the west side of First
11 Avenue there is a need for access to what will become the new county Courts Tower. (Tr. at p. 57)

12 43. Additionally, Mr. Lehman cited the pedestrian maze that will be constructed to force
13 pedestrians to look in each direction as they approach the west side pedestrian crossing at the tracks
14 along with the flashing lights and bells as being additional safety features at the crossing. (Tr. at p. 57)

15 44. Mr. Lehman confirmed that no wayside horns have been installed, or are proposed to
16 be installed, at the crossings within the City's quiet zone. (Tr. at p. 59)

17 45. Mr. Lehman further described the situation at Third Avenue which requires the
18 Railroad to relocate its gates on the north side of the Railroad's tracks due to the earlier removal of a
19 set of unused tracks. He stated that this is a "part of maintenance" which does not require
20 Commission approval, and that Staff, the Railroad and the City had previously discussed this matter.
21 (Tr. at p. 61)

22 46. Mr. Lehman stated that since the Railroad's public notice of the closing, Staff has not
23 received any comments from the public. (Tr. at p. 63)

24 47. Mr. Aziz Aman, the Railroad's manager of industry and public projects in Arizona,
25 testified that the gates at Third Avenue would be relocated to their proper location as soon as the City
26 notifies the Railroad that it has completed the construction of the roadway, curbs and sidewalks at the
27 crossing. (Tr. at p. 65)

28 48. According to Mr. Aman, the Railroad is unable to relocate its gates to the proper

1 location until the City constructs its curb on the north side of the Third Avenue crossing. (Tr. at p. 70)

2 49. Mr. Aman estimated that upon notification from the City that it has completed
3 construction, the Railroad could complete its relocation of the gates at Third Avenue within three
4 months. (Tr. at p. 67)

5 50. Mr. Aman stated that the Railroad has no objection to filing notice when the project
6 for the relocation of its gates on the north side of the Third Avenue crossing is completed. (Tr. at p. 71
7 and 72)

8 51. At the conclusion of the proceeding, counsel for the City indicated that it would file,
9 within thirty days of the hearing, an estimate of the time frame when the City would complete the
10 necessary improvements at the Third Avenue crossing so that the Railroad can relocate its gates on
11 the north side of the Railroad's tracks.¹ (Tr. at p. 71)

CONCLUSIONS OF LAW

13 1. The Commission has jurisdiction over the parties and over the subject matter of the
14 Application pursuant to Article XV of the Arizona Constitution and A.R.S. §§ 40-336, 40-337 and
15 40-337.01.

16 2. Notice of the Application was provided in accordance with the law.

17 3. The closure of the east side pedestrian crossing at the Railroad's tracks at First Avenue
18 in Phoenix, Arizona, at AAR/DOT NO. 741-472-S is necessary for the public's safety.

19 4. Pursuant to A.R.S. §§ 40-336 and 40-337, the Application should be approved as
20 recommended by Staff.

21 5. After the relocation of the Railroad's gates at Third Avenue, the Railroad should
22 maintain the crossing in accordance with A.A.C. R14-5-104.

ORDER

24 IT IS THEREFORE ORDERED that the City of Phoenix's Application as described herein, is
25 hereby approved for the closure of the east side at-grade pedestrian crossing at the Railroad's tracks
26 at First Avenue in Phoenix, Arizona, at AAR/DOT NO. 741-472-S.

27 ¹ On February 4, 2010, the city made a filing which indicates that it "is unable to provide a definitive date at this time,"
28 but once the accurate legal boundaries are determined, the City estimates approximately 18 to 24 months to complete the improvements.

1 IT IS FURTHER ORDERED that the Union Pacific Railroad shall complete the relocation of
2 its gates on the north side of the Railroad's tracks at Third Avenue as soon as possible after
3 notification from the City of Phoenix that it has completed its street improvements.

4 IT IS FURTHER ORDERED that the Union Pacific Railroad shall notify the Commission, in
5 writing, within ten days of both the commencement and the completion of the relocation of its gates
6 at the Third Avenue crossing, pursuant to A.A.C. R14-5-104.

7 IT IS FURTHER ORDERED that upon the relocation of the Union Pacific Railroad's gates
8 on the north side of its tracks at Third Avenue, the Railroad shall maintain the crossing in compliance
9 with A.A.C. R14-5-104.

10 ...
11 ...
12 ...
13 ...
14 ...
15 ...
16 ...
17 ...
18 ...
19 ...
20 ...
21 ...
22 ...
23 ...
24 ...
25 ...
26 ...
27 ...
28 ...

1 IT IS FURTHER ORDERED that the Union Pacific Railroad shall notify the Commission, in
2 writing, within ten days of both the commencement and the completion of the closure of the east side
3 at-grade pedestrian crossing of its tracks at First Avenue in Phoenix, Arizona, pursuant to A.A.C.
4 R14-5-104.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

7
8

CHAIRMAN _____ COMMISSIONER _____

9
10

COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER _____

11

12
13
14

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON,
Executive Director of the Arizona Corporation Commission,
have hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this _____ day of _____, 2010.

15
16

ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

17
18

DISSENT _____

19

20

DISSENT _____

21

MES:db

22
23
24
25
26
27
28

1 SERVICE LIST FOR: UNION PACIFIC RAILROAD COMPANY

2 DOCKET NO.: RR-03639A-09-0373

3 Syd Anderson, P.E.
4 Engineering Supervisor
5 CITY OF PHOENIX
6 STREET TRANSPORTATION DEPARTMENT
1034 East Madison Street
Phoenix, AZ 85034

7 Daniel L. Brown, Assistant Chief Counsel
8 OFFICE OF THE CITY ATTORNEY
9 GARY VERBURG, CITY ATTORNEY
200 West Washington Street, Suite 1300
Phoenix, AZ 85003-6761

10 Aziz Aman, Manager of Special Projects
11 UNION PACIFIC RAILROAD COMPANY
2073 East Jade Drive
Chandler, AZ 85286-4898

12 Anthony J. Hancock
13 Terrance L. Sims
14 BEAUGUREAU, ZUKOWSKI & HANCOCK, P.C.
302 East Coronado
Phoenix, AZ 85004
15 Attorneys for Union Pacific Railroad Company

16 Robert Travis, P.E.
17 State Railroad Liaison
ARIZONA DEPARTMENT OF TRANSPORTATION
205 South 17th Avenue, Room 357
18 M/D 618E
Phoenix, AZ 85007

19 Janice Alward, Chief Counsel
20 Legal Division
ARIZONA CORPORATION COMMISSION
21 1200 West Washington Street
Phoenix, AZ 85007

22 Brian Lehman, Chief
23 Railroad Safety Section of the Safety Division
ARIZONA CORPORATION COMMISSION
24 1200 West Washington Street
Phoenix, AZ 85007

25

26

27

28