

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**10/15/20
02:18 PM

October 15, 2020

**Agenda ID #18863
and
Alternate Agenda ID #18865
Ratesetting**

TO PARTIES OF RECORD IN APPLICATION 18-08-010:

Enclosed are the proposed decision of Administrative Law Judge (ALJ) Ferguson previously designated as the presiding officer in this proceeding and the alternate decision of Commissioner Randolph. The proposed decision and the alternate decision will not appear on the Commission's agenda sooner than 30 days from the date they are mailed.

Pub. Util. Code § 311(e) requires that the alternate item be accompanied by a digest that clearly explains the substantive revisions to the proposed decision. Accordingly, the digest of the alternate decision is attached to the alternate decision.

When the Commission acts on these agenda items, it may adopt all or part of the decision as written, amend or modify them, or set them aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision and alternate decision as provided in Pub. Util. Code §§ 311(d) and 311(e) and in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed [15] pages. **[If GRC, then 25 pages.]**

Comments must be filed pursuant to Rule 1.13 and served in accordance with Rules 1.9 and 1.10. Electronic copies of comments should be sent to Commissioner Randolph advisor Lester Wong at lj@cpuc.ca.gov. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ ANNE E. SIMONAnne E. Simon
Chief Administrative Law JudgeAES:mph
Attachment

Decision PROPOSED DECISION OF ALJ FERGUSON (Mailed 10/15/2020)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Ione for a Public Road Crossing at the Extension of Foothill Boulevard and Milepost No. 0.84 of the Amador Central Railroad (AMC) Recreational Railroad - Coalition Historical Society (RRCHS), City of Ione, County of Amador, State of California.

Application 18-08-010

PHASE I DECISION CONDITIONALLY AUTHORIZING THE CITY OF IONE, CALIFORNIA TO CONSTRUCT A NEW AT-GRADE PUBLIC RAILROAD CROSSING AT MILEPOST 0.84 OF THE AMADOR CENTRAL RAILROAD

TABLE OF CONTENTS

Title	Page
PHASE I DECISION CONDITIONALLY AUTHORIZING THE CITY OF IONE, CALIFORNIA TO CONSTRUCT A NEW AT-GRADE PUBLIC RAILROAD CROSSING AT MILEPOST 0.84 OF THE AMADOR CENTRAL RAILROAD	1
Summary	2
1. Background	3
1.1. Overview	3
1.1.1 Amador Central Railroad Inaugurates Passenger Service	4
1.1.2 Ione Determines that Two Means of Entry/Exit Are Essential	7
1.1.3 Ione Reverses Position on Dual Entries/Exits	11
1.1.4 Ione Disregards the Need for Dual Entries/Exits Again.....	13
1.1.5 The Great Recession Intervenes; Development Stalls	15
1.1.6 Ione Officially Approves the Railroad Crossing As Wildflower’s Sole Entry/Exit and Declares the Project Exempt from CEQA Review	15
1.1.7 Ione Opens the Closed, Private Crossing to the Public Without Commission Authority and Despite the Danger	17
1.2. Procedural Background.....	21
2. The Commission Has Plenary and Exclusive Authority to Set the Terms and Conditions of Use in California for a Public Railroad Crossing.....	23
3. Issues Before the Commission	27
4. Discussion and Analysis of Safety Issues at Milepost 0.84.....	28
4.1. The Safety of the Crossing as Built is Inadequate.	28
4.2. Ione Has Increased the Inherent Danger of the Crossing for Occupants of Railcars.....	30
4.3. Alternatives for Alleviating the Risk Ione Has Created	32
4.4. The California Environmental Quality Act	33
4.5. Ione’s Explanations of Its Actions Are Neither Relevant Nor Persuasive	35
5. Conclusion	41
6. Comments on Proposed Decision	42
7. Assignment of Proceeding.....	43
Findings of Fact.....	43
Conclusions of Law	53
ORDER	55

Appendix A

Appendix B

PHASE I DECISION CONDITIONALLY AUTHORIZING THE CITY OF IONE, CALIFORNIA TO CONSTRUCT A NEW AT-GRADE PUBLIC RAILROAD CROSSING AT MILEPOST 0.84 OF THE AMADOR CENTRAL RAILROAD

Summary

In this application, the City of Ione (Ione) seeks authorization to construct a new at-grade public railroad crossing at Milepost No. 0.84 (MP 0.84) of the Amador Central Railroad (AMC). In the course of this proceeding, the Commission became aware that an at-grade public railroad crossing had already been constructed at this location long ago without the requisite Commission's authorization and that the applicant had omitted this salient fact in its application. Given that this unauthorized crossing is the only entry/exit to an already partly occupied development, this Phase I Decision approves the crossing conditionally and requires Ione to install crossing gate arms to reduce the more immediate, non-fire related, safety concerns.

This proceeding will remain open for a Phase II which will address the penalty issues arising from the unauthorized construction of the at-grade public rail crossing as well as the failure to disclose its untimely construction in this application. During Phase II, we will also consider the possibility of mitigating any monetary penalty we may impose to the extent Ione promptly mitigates the risk that this crossing poses by ensuring that another means of entry/exit to the development is promptly constructed. The crossing gate arms ordered in this Phase I Decision do not mitigate the dangerous conditions that wildfires or other similar emergencies present.¹ We have serious concerns this single passageway

¹ See Amador County Local Hazard Mitigation Plan, January 2014, Annex B (City of Ione), at B.5 (wildfire "recurrence level of 10 years or less"); B.29 ("evacuation of large portions of the population") and Table B.1. Amador County classifies Ione's vulnerability to wildfires as "high" and rates the likelihood of a wildfire in Ione's environs as "likely." (*Id.* at B.29.) We take judicial

into a housing development could quickly become a bottleneck for both railcars and those entering and exiting the housing development in the event of a wildfire or other emergency.

1. Background

1.1. Overview

Many of the consequential facts in this application concern Ione's actions pursuant to powers that are vested in and used by municipalities to advance housing projects. In this proceeding, Ione makes the argument that, while it is exercising such powers, particularly when acting pursuant to the California Environmental Quality Act (CEQA), it is immunized from this Commission's plenary and exclusive authority to set the terms and conditions of use for a public railroad crossing. Ione also argues that if its municipal powers are subservient to the powers of the Commission, the Commission had a limited time to exercise its authority and failed to do so in a timely manner.

We reject both arguments. Our state legislature did not diminish the exclusive authority of the Commission regarding railroad crossings when it enacted CEQA. And it is Ione, not this Commission, that failed to act timely under CEQA.

We will begin with the relevant facts concerning the history of the railroad crossing at issue. Next, we will describe Ione's simultaneous efforts to advance construction of 276 single family homes in the pasture where the rail crossing is located. These facts, unless otherwise noted, are undisputed. It is the application of the pertinent laws to these facts that is disputed.

notice of this government publication, which can be found at <https://www.amadorgov.org/departments/office-of-emergency-services/local-hazard-mitigation-plan> and was last visited 06/16/2020.

1.1.1 Amador Central Railroad Inaugurates Passenger Service

The rail line formerly was owned by Sierra Pacific Industries, Inc. (Sierra Pacific) which leased use of the line to one of its affiliates, Sierra Pines, LLP (Sierra Pines). Since 1939, the rail line was used exclusively to haul freight. By 2003, freight traffic had declined precipitously, and maintenance of the tracks had also lapsed. In November 2003, a Commission investigation conducted with federal officials found 123 serious defects in the operation and maintenance of the Sierra Pines railroad. A year later, in 2004, two derailments occurred on the tracks.

To fix the 123 deficiencies would have required approximately \$6 million and taken several years.² Consequently, Sierra Pacific and Sierra Pines developed separate plans. Sierra Pines' plan was to "discontinue use," while Sierra Pacific's plan was to "abandon the track." Both plans required approval from the Federal Railroad Administration (FRA). Sierra Pines was successful in its efforts to discontinue its use of the tracks; however, Sierra Pacific's efforts to abandon the rail line met with strong opposition from Amador County and other organizations interested in historical preservation.³

During this same period, Mr. Larry Bowler, a witness in this proceeding and a former California State Assemblyman, created an organization known as "Recreational Railroad - Coalition Historical Society" (RRCHS) for the express purpose of purchasing the rail line from Sierra Pacific. RRCHS initially leased the rail line from Sierra Pacific for five years, while the dispute between Sierra Pacific and Amador County at the FRA involving historical preservation issues

² Surface Transportation Board Decision, STB Docket No. AB-512X (Sierra Pacific Industries - Abandonment Exemption), decided February 23, 2005, at 2 - 3.

³ Evidentiary Hearing (EH) Tr. Vol. 2. (AMC/Bowler), at 288, line 15 - at 291, line 20.

continued. RRCHS eventually brokered a resolution of that dispute by partnering with the Amador County Historical Society (ACHS) and purchasing the railroad right-of-way from Sierra Pacific, obviating the need for Sierra Pacific to abandon the rail line and mooting all of Amador County's historical preservation objections.⁴

RRCHS/ACHS then sought to gain authority to re-introduce passenger traffic on the rails, which still required significant repairs. The two non-profits sought permission from the FRA to operate an historical-type passenger service on the rail line, which extended a total of 16 miles from Ione to a point near Martell, California. In 2015, RRCHS/ACHS finally received FRA approval to operate a "non-insular, historic, tourist railroad" from Ione to a point near Martell, and to use the name Amador Central Railroad.⁵

Although AMC could operate with a diesel or steam locomotive, AMC thus far has not used such locomotive power.⁶ Instead, from the time that RRCHS first leased use of the rails from Sierra Pacific to the present, only what are known as "speeders" (defined in the paragraphs below) have operated on the trackage and used the unauthorized crossing.

Until 2015, when AMC received permission to provide passenger service, only those who owned or leased speeder railcars could use the tracks. After it obtained federal permission to do so, AMC began charging the public to ride in

⁴ See EH Tr. Vol. 2. (AMC/Bowler), at 291, lines 8-14 (two non-profits paid a total of one dollar to Sierra Pacific for the rail line).

⁵ The name that the FRA approved for the railroad was its historic name, *see id.*, at 288, lines 4-15. Every active, tourist-type railroad whose track crosses a public highway at-grade is a "non-insular" railroad subject to federal as well state regulation. (49 CFR 225.3(a)(3).) The AMC track is active and crosses several public highways at grade. See Exh. Ione-1, Attachment 1, Slide 5; EH Tr. Vol. 2 (AMC/Bowler) at 305-310.

⁶ See EH Tr. Vol. 2. (AMC/Bowler), at 288, lines 2-4.

the speeders. Passenger service is provided from March through November, largely during the dry season in California (which coincides with wildfire season), on the second Saturday of each month.

Currently, groups of speeders, varying from two to as many as eleven, generally will travel through the unauthorized crossing at Milepost (MP) 0.84 within the Wildflower development approximately one hundred times per year.⁷ Typically, passengers board AMC-operated speeders at the “Lane” station, which is beyond Ione’s eastern boundary. Most are transported three miles eastward before being returned to the Lane station. Occasionally, AMC will carry historic railroad fans or potential donors from the center of Ione, instead of the Lane station, to a more distant eastward location and return to Ione.⁸ Members of RRCHS also travel from the center of Ione to points along the tracks to make needed repairs and perform maintenance work.

When not in use, the speeders themselves are taken off the track in central Ione and transported by truck or trailer to private storage areas. Thus, the speeders pass through the unauthorized crossing at MP 0.84 on the way outbound to do maintenance work, to make lengthy trips with special passengers and to pick-up paying passengers at Lane station. They cross the unauthorized crossing at MP 0.84 again when they finish their special passenger trips and when returning from maintenance work and when finished transporting paying passengers.

Speeders are gasoline powered railcars that travel at low speeds (25 mph). They are individually owned, rather than owned by AMC. Every speeder must

⁷ Exh. SED-2, Attachment 2.

⁸ Status Conference (SC) Tr., April 10, 2019 (Bowler), at 22, lines 3–20.

be driven by an operator. Speeders vary in size and can transport up to five individuals in addition to the operator. They move down the rails in caravan-fashion when transporting passengers.

It is of significance here that speeders can only travel in a forward direction. They must be physically lifted off the rails and turned 180 degrees to reverse direction. Some speeders are equipped with hydraulic lifts that manage the task of elevating the speeder off the rails to reverse its direction, but most do not. Since they weigh nearly a half ton or more each, each speeder requires a minimum of four individuals manually to reverse direction. Of necessity, passengers must disembark for this operation to take place.⁹

We now turn to the history of the housing development which uses the (unauthorized) crossing at MP 0.84 as its sole entry/exit.

1.1.2 Ione Determines that Two Means of Entry/Exit Are Essential

Sixteen years ago, in October 2004, Ione issued an Initial Study and Mitigated Negative Declaration (IS/MND) for an 85-acre pasture that Ione had annexed into itself and rezoned for residential development.¹⁰ Ione's IS/MND required multiple means of ingress and egress to the development project for wildfire safety reasons.¹¹

⁹ The City Manager's prepared testimony in this proceeding incorporates by reference, in its entirety, a video demonstrating the operations of the AMC speeders, including the procedure for and equipment required to turn a speeder around to reverse its direction of travel. Exh. Ione-1 at 5, lines 6-18. As the City Manager's testimony indicates, the video, which is several minutes long, can be found on the AMC's website at www.amadorcentralrailroad.com.

¹⁰ The IS /MND is attached as a single document, Exhibit D, to the City's Application which itself was marked and admitted as Exhibit Ione-3.

¹¹ Exh. Ione-3, Exh. D, Initial Study and Mitigated Negative Declaration (IS/MND), at 42 (the development has "potentially significant risk" of "[e]xposing people or structures [to] loss, injury or death involving wildland fires").

The housing development, which eventually came to be called Wildflower, is bounded on its east and south sides by extensive wildlands and on the west by a public park containing an equestrian racetrack and sports fields. The north, sloping side of the Wildflower development parallels State Route 104, separated by a separate, 600-foot wide parcel, not a part of the development parcel. However, a non-exclusive, easement over this separate parcel in favor of the development parcel will allow vehicular traffic to enter or exit the development from State Route 104 once the easement is graded and paved.¹² According to a traffic study completed in preparation for the IS/MND, this easement was intended to serve as the main entry/exit for the housing development, carrying at least 80 percent of all vehicular traffic in and out, during and after construction.¹³ It was deemed essential to mitigating the wildfire danger.¹⁴ To date, it has not been built.

The AMC track traverses both legs of the southwestern right-angle of the development parcel. In 2003/2004, when Ione was preparing the IS/MND, Sierra Pacific and its subsidiary Sierra Pines were in the process of winding down usage of and attempting to abandon all the track from Ione to the town of Martell, 16 miles away, which included the portion of the track passing through the development parcel. The parcel itself had been used for grazing livestock for

¹² Application, Exh. D. at Fig. 5; Ione Exh. 7 at Exh. B; and Exh. SED-3. (On July 1, 2019, a newly created division of the Commission, titled Rail Safety Division, assumed responsibilities for rail crossing applications. Accordingly, the party to this proceeding originally identified as the Safety and Enforcement Division shall hereinafter be identified as the Rail Safety Division (RSD). However, RSD's exhibits were marked and received into evidence well before July 1, 2019 with the prefix "SED" and for the sake of clarity, in this Decision we shall continue to use the prefix "SED" for RSD's exhibits.)

¹³ Exh. CPUC-1, Attachment 2 at 1.

¹⁴ See notes 16-24, below, and accompanying text.

decades, and Sierra Pacific had allowed the farmer to cross the track to enter and exit his pasture at the point identified in this proceeding as AMC's MP 0.84.

However, it is important to note that railroads are generally entitled to close private crossings at-will; and, either Sierra Pacific, before it sold its trackage to AMC, or AMC after it purchased Sierra Pacific's trackage, physically closed the private crossing at MP 0.84 by erecting a steel chain link fence to prevent any vehicular traffic from crossing the tracks.¹⁵ Thus, for several years before construction of the housing development began, there was no possibility of a conflict between vehicular traffic of any kind and AMC's speeders at MP 0.84.

When the IS/MND was prepared, the pasture was owned by Gallelli & Sons, LLC (Gallelli), a housing developer headquartered in Rocklin, California. Gallelli proposed to build 276 single-family homes on the site. The IS/MND addresses Gallelli's proposal. The mandatory "Hazards" section of the IS/MND states that the "project site is surrounded by wildlands[;] [a]reas to the east and south of the project site, including the southern portion of the project site are sloped with dense tree growth [and] [h]omes are proposed adjacent to these areas."¹⁶ The IS/MND concludes that "the project's potential for exposure to wildland fires is considered potentially significant" and that there is a "potentially significant risk" of "[e]xposing people or structures [to] loss, injury or death involving wildfires."¹⁷ In short, according to Ione's IS/MND, this

¹⁵ An archival street view photograph taken in 2012 of the closed, private crossing can be found at the following link to Google maps: <https://goo.gl/maps/BvXjBE1wyjP2>, last visited October 23, 2019. The record will be re-opened for the limited purpose of allowing the photograph referenced in this note to be marked and admitted as Exhibit CPUC-3. We take judicial notice of it. *United States v. Burroughs*, 810 F. 3d 833, 835 n. 1 (D.C. Cir. 2016).

¹⁶ Exh. Ione-3, Exh. D., at 44, par. (h).

¹⁷ See *ibid.* and Exh. Ione-3, Exh. D at 42.

crossing at MP 0.84 into the pasture was intended to be only a secondary entry/exit for the development project, servicing about 20 percent of the vehicular traffic during and after construction of 276 homes.¹⁸

This same section of the IS/MND states that “[t]he proposed project would not interfere with an adopted emergency response plan”¹⁹ because “[a] secondary access to the project site is proposed at the southwest corner of the project site.”²⁰ The IS/MND identified the proposed secondary passageway as “... an at-grade crossing of the ... Railroad.”²¹ It concluded that “no impact would occur” so long as the crossing at MP 0.84 was used only as a “secondary” entry/exit, clearly indicating that the railroad crossing should serve only a “secondary” role to the main entry/exit on the opposite side of the development parcel more than a half mile away.²² It further stated that wildfire impacts on the project would be reduced to “less than significant” only if the developer took additional precautions: “All areas of wildland ... shall have an access point” as a “condition of project approval.”²³

A subsequent, “Transportation” section of the IS/MND, also emphasized the threat from wildfires and the importance of multiple means of entry/exit for the site:

¹⁸ Exh. Ione-3, Exh. D., at 44, par. (g) (at-grade crossing is a “secondary access” for the development); at 65, par. (e) (“main access at the northern end of the project ... secondary access ... in the southwest corner of the property ... at-grade with” AMC); CPUC Exh.-1, Attachment No. 2, at 1 (“80/20 percent split of vehicle trips” between the two entries/exits).

¹⁹ Exh. Ione-3, Exh. D., at 44, par. (g).

²⁰ *Ibid.*

²¹ *Ibid.*

²² Exh. Ione-3, Exh. D. at 44, par. (g).

²³ *Id.* at 44, Mitigation Measure MM VII-2.

The proposed project identifies a main access at the northern end of the project site.... A secondary access is also proposed in the southwest corner of the property. This access would have an at-grade crossing with the ... Railroad.

Provision of two access points would reduce emergency access issues to less than significant. (Emphasis added.)²⁴

Recently, in April 2020, Ione once again affirmed its commitment to the very same principle it espoused 16 years ago in its above referenced IS/MND for Wildflower housing development. In a proposed revision to Amador County's 2014 Local Hazard Mitigation Plan for Ione, Ione promises:

[T]o ensure that proper ingress and egress are fully constructed BEFORE houses in a subdivision are constructed. One of the key lessons from the Paradise fire was [that] the lack of multiple escape routes added to the casualty list. Developments need at least 2 ways in and out of the subdivision.²⁵ (Emphasis original.)

As we explain in the next several sections, we find Ione's unauthorized construction and use of the rail crossing at MP 0.84 do not conform to the Public Utilities Code and the safety standards of this Commission. The Code does not allow Ione to expose the public to the dangers associated with Ione's use of the crossing at MP 0.84 as the only entry/exit for residents of a community of new, single-family homes.

1.1.3 Ione Reverses Position on Dual Entries/Exits

Not long after issuing the IS/MND, on January 18, 2005, Ione filed at the State's CEQA Clearinghouse a notice that it had issued the then-developer,

²⁴ *Id.* at 65, par. (e).

²⁵ The location for Ione's 2014 Local Hazard Mitigation Plan can be found in note 1, above. The quotation above is located at <https://amadorgov.org/home/showdocument?id=36195>, last visited June 17, 2020. We take judicial notice of this government document published jointly by Amador County and the City of Ione.

Gallelli, a conditional use permit and tentative subdivision map.²⁶ The conditional use permit and tentative subdivision map illustrate that Ione changed its position on the need for at least two points of entry/exit.

The subdivision map contains a set of 49 conditions for approval.²⁷ The conditions begin by approving of phasing the project by starting to construct the first homes in either Units 1 and 2 of the development closest to the proposed main entrance to the project on its northside,²⁸ or in Units 3, 4 or 5 of the project closest to the southern portion of the development near the MP 0.84 crossing.

Condition 48 introduced the new concept of a single entry/exit if anything less than the total 276 authorized homes were built. For the buildout of houses in only Units 1 and 2 in the northern half of the parcel, condition 48 allowed the developer to build a temporary street “turn-around” in Unit 2 and use only the main entryway into the development as an entry/exit.²⁹ Condition 36 reinforced Ione’s decision to permit a single point of entry/exit for the development. It permitted the developer to avoid building the secondary entry/exit over the railroad track until homebuilding in the three southern units (Units 3, 4 and 5) closest to the track was underway.³⁰

²⁶ Exh. Ione-5. Here, we note that, there is no record evidence in this proceeding that anyone in Ione’s municipal offices sent notice to this Commission, in either 2004 or 2005, of Ione’s plan to develop a new community of single family homes through which the track of a railroad that had recently suffered two derailments ran.

²⁷ Exh. Ione-4.

²⁸ The project was divided into five distinct areas, or “units,” for construction. *See, e.g.*, Exh. Ione-3, at Exh. E; *and* Exh. Ione-7, at 25.

²⁹ Exh. Ione-4, at 9, par. 48 (“A temporary turn-around shall be constructed at the south end of Units 1 and 2 if [a road] is not constructed through to [the rail crossing] in the first phase of development.”).

³⁰ *Id.*, at 7, par. 36.

1.1.4 Ione Disregards the Need for Dual Entries/Exits Again

By June 2006, a new developer, Ryland Homes of Northern California (Ryland Homes), a subsidiary of home building-giant, Lennar Corporation, had acquired control of the housing development.³¹ In June 2006, the City distanced itself further from its conclusion in the IS/MND that two entry/exit points were necessary in the development for safety reasons.

A June 12, 2006, memorandum summarizing a June 8, 2006, teleconference between Ryland Homes, a representative of Amador County and a city planner from Ione confirms that Ryland Homes reached an oral agreement with both Ione and Amador County's Department of Public Works to permit a single entry/exit to be built at the MP 0.84 crossing, so long as only a limited part of the 276-unit project was built in the vicinity of the railroad crossing at MP 0.84. The agreement "limited [Ryland Homes] to 100 homes under construction or completed until the [main entrance on the northside of the development] is accepted for use by Caltrans."³²

The quantity 100 was chosen based on a recently completed traffic study of safety issues related to left-hand turns during rush hour at the T-intersection of a two lane, county road, called Brickyard Road, and State Route 124, outside the housing development itself and approximately a third of a mile west of AMC's MP 0.84. The traffic study assumed occupancy of up to 100 homes in Units 3, 4 and/or 5, and looked only at what, if any, traffic congestion would result during

³¹ Exh. Ione-6.

³² Exh. Ione-6. Other conditions, not relevant to this proceeding, were apparently also agreed to by Ryland, according to the memorandum.

peak travel hours at the intersection of Brickyard Road and State Route 124.³³ It concluded that “between 75 and 100 dwelling units could be occupied before improvement to the SR 124/Brickyard Road intersection [for left-hand turns] would be required and the planned [main entrance on the northside of the project] would have to be [made] available.”³⁴

That study only identified the point at which left-hand-turn traffic, at an intersection a third of a mile distant from the development, would reach a congestion level during a workday (rather than an emergency evacuation event) requiring that the northern entrance to the development be constructed. That study is silent about whether the railroad crossing at MP 0.84 could accommodate the residents of 100 homes fleeing a wildfire or how first responders could gain entry through the crossing to fight a wildfire in the development while residents were fleeing through the same crossing, much less what would happen if railcars were attempting to pass through the crossing at the very same time.³⁵ Nor does that study address how the residents, first responders, or those in railcars could traverse the crossing if vegetation around the crossing itself were on fire.³⁶

³³ Exh. Ione-9, at 1. This 13-page traffic study, dated June 5, 2006, was offered into evidence as an additional exhibit by Ione after the evidentiary hearing. The ALJ has issued an order identifying it for the record as Ione-9 and admitting it.

³⁴ Exh. Ione-9, at 4.

³⁵ Exh. Ione-9. At the time this traffic study was conducted, the Federal Railroad Administration had not yet approved of AMC’s purchase of the tracks nor had it approved use of the tracks for paying passenger traffic. The latter would not occur until 2015. However, Amador County itself was proposing at that time that the track be used for an historical railroad. *See* section 1.1.1, above.

³⁶ *Ibid.*

1.1.5 The Great Recession Intervenes, Development Stalls

The 2008-2012 economic recession intervened before any construction work could take place at the Wildflower development. A Google map, street view photo, taken in 2012 shows that the private railroad crossing at MP 0.84 was still closed with chain link fencing blocking all vehicular and pedestrian access to and from the development parcel.³⁷ The property changed hands during this period more than once.³⁸

1.1.6 Ione Officially Approves the Railroad Crossing as Wildflower's Sole Entry/Exit and Declares the Project Exempt from CEQA Review

In December 2012, interest in developing the housing project revived. The railroad crossing was still closed to vehicular and pedestrian traffic, but the Ione City Council was preparing to advance the project by approving an extensively updated development agreement with the new owner of the property, Wildflower Investments, LLC (Wildflower Investments).

The new development agreement resurrected and ratified the oral agreement reached in 2006 by Ione, Amador County and Ryland Homes. It allowed development, sale, and occupancy of up to one hundred homes in the

³⁷ See note 15, above.

³⁸ During this period, the entire development project and parcel came into the possession of Wildflower Investments, LLC, an entity controlled by Mr. Ken Lupton, who currently remains in control of Units 1 and 2. EH Tr. Vol. 1 (Hanken), at 182, lines 8-11; at 184, lines 3-5.

project with only one entry/exit over the railroad track.³⁹ The Ione City Council preliminarily approved this agreement on October 2, 2012.⁴⁰

Caltrans records subpoenaed by the Commission⁴¹ indicate that, between October 2 and December 4, 2012, Caltrans learned of Ione's October 2012 decision to resurrect the 2006 oral agreement made by Ione, Amador County and Ryland Homes. Specifically, Caltrans learned that the 2006 oral agreement had been incorporated by reference in a new 2012 development agreement and this new development agreement would be presented to the City Council to adopt by resolution on December 4, 2012.⁴²

Before the Council voted, Caltrans wrote to Ione's City Planner pointing out the discrepancy between Ione's position on entry/exit routes in the 2004 IS/MND and in the new development agreement. Caltrans also advised Ione to refuse to allow anyone to occupy the homes in the Wildflower development until two means of entry/exit were constructed:

The environmental document for the project [the IS/MND] did not anticipate a phased development with exclusive access [over the rail track] ...; such a development pattern would be inconsistent with the project description from the environmental review of the project

³⁹ See Exh. Ione-7, at page 2, par. F and page 7, section 4.4. In Paragraph F of the Recitals, Ione agreed to honor "all entitlements, contracts and other agreements relating to the development of the [Wildflower] property... [that] were assigned and transferred to each successor in interest, including the [then] [o]wner." Section 4.4 allowed the owner to develop the project in any sequence and at any rate the "owner deems appropriate within the exercise of its subjective business judgment."

⁴⁰ *Id.*, at 2, par. J.

⁴¹ The Commission's subpoena and the Caltrans documents obtained in response are included in the record as Exh. CPUC-1.

⁴² See Exh. Ione-7 at 2, par. J; Exh. CPUC-1, Attachment No. 2.

The 80/20 percent split of vehicle trips assumed in the [2004] TIS [Traffic Impact Study] clearly anticipates construction of [the northern entry/exit] prior to occupancy of homes, so the project condition requiring construction of [the northern entry/exit] should be applied prior to issuance of building permits for the project.⁴³ (Emphasis added.)

Notwithstanding this admonition from Caltrans, the Ione City Council adopted Ordinance No. 458, approving the new development agreement and incorporating, without change, the prior oral agreement Ione reached with Ryland Homes in 2006.⁴⁴ Ordinance No. 458 became effective January 3, 2013, and the mayor of Ione executed the new agreement the same day. The development agreement granted the developer the right to construct 100 homes, with only a single entry/exit, over the railroad crossing at MP 0.84.⁴⁵ Ione chose to ignore Caltrans' advice to block occupancy of the homes until a second evacuation route (the main entry/exit) could be built.

1.1.7 Ione Opens the Closed, Private Crossing to the Public Without Commission Authority and Despite the Danger

In 2016, Wildflower Investments, sold two of the five units of the development, specifically, Units 4 and 5, to a new, independent, and unaffiliated owner, Wildflower 276, LLC (Wildflower 276). Units 4 and 5 together had been approved by Ione earlier for construction of a total of 101 homes.⁴⁶

⁴³ Exh. CPUC-1, Attachment 2.

⁴⁴ Exh. Ione-7, at 2, par. J.

⁴⁵ *Id.*, at page 2, para. F.

⁴⁶ EH Tr. Vol. 2. (Borge), at 350, line 17; at 351, line 8. In 2018, Wildflower 276 also purchased Unit 3 from Wildflower Investments, which entitled Wildflower 276 to build another 92 homes. *Id.* at 351, lines 11-14. Wildflower Investments retained ownership of Units 1 and 2, the northernmost units in the Wildflower development, with permits for a total 83 homes. *Ibid.* As noted above, the two companies are not related.

Neither the current Ione City Manager, Jon Hanken, nor Thomas Borge, the sole member of Wildflower 276, had any prior experience with railroad crossings.⁴⁷ Hanken deferred to Borge, who deferred to an engineering firm, KASL, to provide advice and management of all crossing-related issues.⁴⁸ Someone, acting on behalf of Ione and/or the developer, contacted the Commission for advice regarding the crossing at MP 0.84 in March 2017.⁴⁹

On March 9, 2017, Mr. Marvin Kennix from the Commission's Rail Safety Division (RSD) met on site with Messrs. Hanken and Borge, as well as others from AMC and KASL, for a diagnostic analysis of the closed, dirt-and-gravel crossing leading into the former pasture.⁵⁰ Mr. Kennix conducted a second site visit to MP 0.84 on June 29, 2017.⁵¹ Mr. Borge and a City representative participated in this second diagnostic site visit.⁵²

Throughout the last half of 2017 and the first half 2018, Mr. Kennix remained in touch with representatives of Ione and Wildflower 276 and provided advice, including a copy of a successful application from a different public agency, and comments on multiple drafts of Ione's application for a public crossing at MP 0.84. During his interactions with them, Mr. Kennix advised Ione and the developer that crossing gates would be required at the MP 0.84

⁴⁷ EH Tr. Vol. 3 (Borge), at 355, lines 4-9.

⁴⁸ EH Tr. Vol. 2. (Borge), at 359, lines 18-24.

⁴⁹ The record does not indicate who made the first contact with the Commission regarding the crossing at MP 0.84.

⁵⁰ Exh. SED-2, at 2, lines 6-16.

⁵¹ *Id.* at 2, lines 25-26.

⁵² *Ibid.*; see also EH Tr. Vol. 2. (Borge), at 361, lines 2-7.

crossing.⁵³ Ione strenuously opposed this recommendation.⁵⁴ Mr. Kennix, at some point in his discussions with Ione and the developer, agreed to withdraw his recommendation regarding the installation of crossing gates, although he did not explain his rationale.⁵⁵

Ione filed its application to open the crossing to the public on August 21, 2018, more than 16 months after the initial visit by Mr. Kennix. Mr. Kennix insisted in his testimony that throughout that entire time, he clearly and repeatedly informed representatives of Ione that they must first obtain an order from the Commission permitting the crossing at MP 0.84 to be opened to the public before actually constructing the crossing or permitting members of the public entry into the development parcel over the dirt-and-gravel crossing.⁵⁶

The City Manager and the developer contend that they either did not hear Mr. Kennix's admonishment or they heard it and misunderstood his advice.⁵⁷ In any event, in 2017, Ione permitted Mr. Borge's contractors to open the crossing at

⁵³ Exh. SED-2, at 2, lines 17-24 ("I initially recommended that a CPUC Standard No. 9 [flashing light signal assembly with automatic gate arm] warning device be installed on both sides of the crossing. ... [My] recommendation ... was met by much resistance from the City of Ione and the developer of the housing subdivision."); *see also* EH Tr. Vol. 2. (Kennix), at 250, line 10 – at 254, line 20.

⁵⁴ *Ibid.*

⁵⁵ EH Tr. Vol. 2. (Kennix), at 250, line 17 – at 251, line 12.

⁵⁶ *Id.*, at 246, line 24 – at 247, line 16 (made it clear in March 2017 meeting that he had no authority to approve the crossing); *see also id.*, at 255, lines 17-27 (made it clear in June 2017 meeting that he had no authority to approve the crossing).

⁵⁷ *See* Ione Phase I Opening Brief, at 8 (crossing was constructed without formal application "due to miscommunication, oversight and a misunderstanding of the Commission's procedures"); EH Tr. Vol. 2. (Borge), at 381, line 20 – at 382, line 9 (Borge thought Kennix meant "proceed" with construction rather than "proceed" with application).

AMC's MP 0.84 for construction crews to enter the parcel.⁵⁸ Then, Ione permitted construction of infrastructure for the development project, the construction of houses in Units 4 and 5 and the occupancy of houses in Units 4 and 5 without securing permission from the Commission to open the crossing to public use.

In 2018, Ione filed the instant application to this Commission and represented that the crossing was still closed and requested a three-year window after our approval to build the crossing.⁵⁹ However, by the time the evidentiary hearing on the application began, 40 or more homes had already been constructed, sold, were occupied and using the unauthorized crossing; and, another 60 were scheduled for construction at the rate of three per month.⁶⁰

Ione and Wildflower 276 implemented the 2006 road plan originally devised by Ione, Ryland Homes and Amador County, so that a single road entered the development over the MP 0.84 crossing and continued into the development parcel only so far as necessary to construct one hundred homes. The City contends that it is safe for the road to end where it does, approximately a half mile short of the distance necessary to afford a second means of entry/exit to the public and first responders.⁶¹

⁵⁸ EH Tr. Vol. 2. (Borge), at 349, line 19 – at 351, line 16; at 355, line 17 – at 356, line 17 (Borge chose his own company Axios Homes as the general contractor for the development and Granite Construction as the subcontractor for the crossing itself and other necessary infrastructure).

⁵⁹ Exh. Ione-3, at 5.

⁶⁰ EH Tr. Vol. 2. (Borge), at 351, line 25 –352, line 11.

⁶¹ Exhibit SED-2A, was marked by RSD witness Marvin Kennix to show where the paved road ends within the development and Exhibit SED-2 shows what the topography looks like from the end of the paved road to State Route 104, approximately a half mile away. (See EH Tr., May 13, 2019 (Kennix), at 282, lines 1-27.)

1.2. Procedural Background

Ione's misleading application was filed on August 21, 2018. On September 28, 2018, RSD, unaware that the public crossing had already been constructed, responded to the application by supporting the application, including Ione's request not to use crossing gates and Ione's request for a period of up to three years to build the crossing.

At the October 22, 2018, prehearing conference (PHC), AMC appeared and requested permission to participate in the proceeding as a party. AMC was granted party status.

In response to questioning by the Administrative Law Judge (ALJ) during an October 22, 2018, prehearing conference, Ione, through its City Manager, disclosed that Ione had already built the proposed MP 0.84 crossing and that the proposed crossing had been used by the developer and public for a considerable period of time.⁶² He also stated that Ione's request for a three-year period after a final decision in this proceeding to build the crossing was inappropriate and that Ione did not intend to demand that the developer provide two means of entry/exit for the occupants of the first 100 homes sold.⁶³

RSD's representative, Mr. Garabetian, the immediate supervisor of Mr. Kennix,⁶⁴ expressed surprise that the proposed crossing had been built without the Commission's approval and indicated his disapproval.⁶⁵

⁶² The City Manager of Ione, in response to questions from the Administrative Law Judge at the prehearing conference (PHC) held on October 22, 2018, admitted the crossing was built well before seeking the Commission's approval. See PHC Transcript, October 22, 2018, at 13, line 26 - at 14, line 2.

⁶³ PHC Transcript, October 22, 2018, at 7, line 19 - at 14, line 2.

⁶⁴ *Id.* at 16, line 23 - at 17, line 6.

⁶⁵ PHC Transcript, October 22, 2018, at 20, lines 1-14.

On February 1, 2019, the assigned Commissioner issued her Scoping Memo and divided the proceeding into two phases: Phase I would address safety and CEQA issues; and Phase II would address penalty issues for violation of Pub. Util. Code § 1201, *et seq.*, (because by its own admission, Ione had constructed the unauthorized crossing before obtaining Commission approval) and for violation of Commission Rule 1.1 (because Ione's representations in its application that the crossing had not yet been built and Ione would need three years to construct it, appeared to be false).⁶⁶

Ione retained outside counsel and requested a stay of the proceeding for two months. The ALJ granted a portion of the requested delay.

After the Scoping Memo issued and on the basis of Ione's admissions at the PHC, the ALJ issued a ruling ordering AMC to employ immediate and additional safety measures for the benefit of the new residents of the housing development and the construction crews working there, as well as the operators and passengers on the speeders, as follows:

- (1) He ordered AMC to select one of four alternative modes for operating the railcars and to notify RSD of its choice; and
- (2) He ordered RSD to make repeated, unannounced visits to MP 0.84 at appropriate times to observe whether AMC was following his order.⁶⁷

AMC and RSD complied with the order.

At the May 13-14, 2018 evidentiary hearing, the ALJ subpoenaed Mr. Borge, who is the sole member of Wildflower 276 (the owner of Units 4 and 5

⁶⁶ Scoping Memo, February 1, 2019, at 4.

⁶⁷ The ALJ's Ruling Ordering AMC to Conduct Its Operations at the Milepost 0.84 Crossing with Foothill Boulevard in a Safe and Prudent Manner, filed March 6, 2019, is attached hereto as Appendix B.

of the development parcel) and the president of Axios Homes (the general contractor building the one hundred homes in Units 4 and 5) to testify. All parties were served with copies of the subpoena for Mr. Borge's appearance, prior to the evidentiary hearing. The ALJ also obtained and distributed to all parties prior to the hearing, copies of a letter from Caltrans to Ione, dated December 4, 2012, and a Traffic Impact Study conducted for Ione and Amador County at the intersection of Brickyard Road and State Route 124 in 2006, about a third of a mile from the MP 0.84 crossing.

Ione and RSD submitted post-hearing opening briefs on Phase I issues in late August 2018, and both waived their right to submit reply briefs. AMC did not file any post-hearing briefs.

2. The Commission Has Plenary and Exclusive Authority to Set the Terms and Conditions of Use in California for a Public Railroad Crossing

The Commission's authority to set the terms and conditions for the safe use of a new, city street crossing over existing rail tracks is exclusive. It derives from the State Constitution, is incorporated in statutory law, and has repeatedly been confirmed by the highest court in this state and many decisions by this Commission.

Our State Constitution confers on the Legislature plenary authority to add to the authority already granted to the Commission by the Constitution. *See* Cal. Const., art. XII, §5. The Legislature has used that plenary power to grant the Commission the exclusive power to decide the conditions for safe use of a new city street, crossing over an existing railroad track: "The [C]ommission has the exclusive power: (a) To determine and prescribe ... the terms of ... use ...of each crossing of ... a railroad by a street." Pub. Utilities Code § 1202 (a); *see also* Pub. Utilities Code § 701("The commission ... may do all things, whether specifically

designated in this part or in addition to thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”).

California’s Supreme Court has established that the Commission’s authority extends over both charter and general law cities’ intended uses of streets with rail crossings. *City of San Mateo, et al. v. Railroad Commission*, 9 Cal. 2d 1 (1937). In that case, the Court affirmed a Commission order that “directed the council of each [of three cities in a nine-mile-long area] to do all things necessary or required under the law to divest the area of such public streets as traversed the railroad right of way of its public character” in order to prevent traffic deaths at several of the rail crossings. 9 Cal. 2d at 4-5.

Notably, the Commission’s order in *City of San Mateo* extended past the physical distance between the outside rails of the tracks to the streets themselves. The Commission’s decision in that matter expressly ordered that “where the closing of a crossing is found to be proper not only should it be closed physically [by placing barriers parallel to the rails], but the area involved should, in accordance with the provisions of law, be divested of its character as a public street.” Decision 28264, *Peninsula Grade Crossing Conference v. Southern Pacific Company*, 39 C.R.C. 395, at 398 (1935) (emphasis added). One result of the Commission’s order, as the Supreme Court subsequently observed in its decision, was to induce complaints from residents about the disruption of existing traffic patterns and confinement of businesses and residents to the east or west of the tracks. See 9 Cal. 2d at 11-12.

Other Supreme Court decisions have reached conclusions like that in *City of San Mateo*. See, e.g., *S. H. Chase Lumber Co. v. Railroad Commission*, 212 Cal. 691 (1931) (Commission “has power in providing for [separated grade] construction to order the municipality to proceed in the manner provided by law to close such

public streets as may be required in order to effectuate the order of the Commission providing for the construction of such [separated] crossing.”); *and, City of San Bernardino v. Railroad Commission*, 190 Cal. 562 (1923) (affirming Commission order that city repair the wooden roadbed in its street overpass of rail tracks “perchance a passenger train shall be derailed by a broken plank fallen from the [overpass]”); *see also, San Diego Gas & Elec. Co. v. City of Carlsbad*, 64 Cal. App. 4th 785 (1998) (holding that the Commission has jurisdiction to authorize SDG&E to disregard a city’s floodplain plan and ordinance and dredge sand from and deposit it on lands not owned by SDG&E in order to enhance the safety and efficiency of an SDG&E powerplant).

Over a century ago, in a seminal decision on the extent of the Commission’s authority over several street/railroad crossings in Los Angeles, a charter city,⁶⁸ the Supreme Court addressed when the Commission may exercise its authority over a municipality to ensure public safety, as follows:

[I]f the change in the street does not interfere with the operation and use of the railroad at the time, the commission cannot prevent the change, and it may be made without the consent of the commission. But if it does interfere, either at the time or afterward, whether by natural causes, or lack of repair of the street as changed, or by reason of changes in the construction or use of the railroad subsequently directed or approved by the commission, the city must conform to the orders of the commission so as to avoid such interference.

Civic Center Assoc., et al. v. Railroad Com. of California (Civic Center), 175 Cal. 441, 454 (1917) (emphasis added).

⁶⁸ Ione is a general law city with no constitutional right to control its “municipal affairs.” *See California Constitution, Art. XI, sec. 5.* However, were Ione a charter city, *City of Huntington Beach v. Becerra*, 44 Cal. App. 5th 243 (2020)(treatment of immigrants is not a protected municipal policing affair), would dictate the same result we reach here.

Since *Civic Center* was decided, the Commission has often disapproved the use by municipalities of street crossings over rail tracks, and either directly or indirectly overridden a municipality's street plans, actually or potentially interfering with rail operations. See *City of San Mateo, supra* (Commission order to two charter cities and one general law city to destroy permanently the public nature of streets in the areas around at-grade railroad crossings); *S. H. Chase Lumber Co., supra* (order to City of San Jose to close several public streets so that elevated rail tracks could be built through the city); see also Decision (D.) 82932, 76 CPUC 714 (1974) (railroad ordered to follow Commission's rule allowing trains to wait in crossings for up to ten minutes rather than municipality's ordinance limiting trains to only five-minute stops).

There are some refinements to the general rule to prevent the Commission from interfering in strictly municipal affairs. For example, the matter before the Commission must be germane to railroads and involve, to some degree, a matter of statewide interest, rather than solely municipal interests. See Decision (D.) 82932, *City of San Leandro v. So. Pac. Transportation Co.*, 76 CPUC 714, 719 (1974) ("[W]here the street alteration interferes with the operation and use of the railroad, the matter ceases to be a municipal affair and becomes one of statewide concern."); *City of San Mateo, supra*, 9 Cal. 2d at 15 ("... the elimination of railroad crossings at grade is also germane to the subject of railroad regulation in this state").

In disputes involving railroad crossings, the Commission's actions have been routinely upheld, notwithstanding the typically local interest of cities and counties in their streets and roads that have no crossings, on the ground that railroad crossings throughout the state require uniform regulation rather than individual, potentially conflicting, regulation by counties and cities. See *Civic*

Center, supra, 175 Cal. 441 450 (“We are of the opinion that [railroad crossings] ... are not properly municipal affairs, but always have been and still are, affairs to be controlled and regulated by state authority within as well as without any particular municipality.”). Thus, the courts have uniformly held that the operations of railroads operating both within and without a city’s limits are matters of statewide, rather than municipal, concern. *See Los Angeles R. Corp. v. Los Angeles, supra*, 16 Cal. 2d at 787 (“[T]he regulation and operation of the streetcars of the plaintiff over the territory involved is not a matter solely of local concern and is not, therefore, a municipal affair.”); *City of Union City v. Southern Pac. Co.*, 261 Cal. App.2d 277, 279 (1968).

Here, Ione admits that most of AMC’s trackage lies outside Ione’s city limits and all paying passengers embark and disembark outside Ione.⁶⁹ We therefore have jurisdiction to ensure the safe use of each of AMC’s railroad crossings, including that at MP 0.84.

3. Issues Before the Commission

The issues to be determined in Phase I of this proceeding are:

1. Is the crossing at AMC MP 0.84, as currently built and used, compliant with Commission safety standards?
2. Has the City of Ione fulfilled the requirements of

⁶⁹ Exh. Ione-1, Attachment 1 (map showing AMC’s track extending far eastward of Ione’s city limits); *see also* SC Tr. (Bowler), at page 19, lines 3-15; page 24, lines 3-5; page 30, lines 4-17. It is noteworthy that even when a railway’s trackage lies entirely within a single city’s or county’s geographic boundary, the railway’s operations can be classified as of statewide, rather than municipal, concern. *See Orange County Air Pollution Control Dist. v. Publ. Util. Com.*, 4 Cal. 3d 945, 951, fn. 5 (1971). Here, even if AMC’s operations were entirely within Ione’s boundary, the statewide efforts to protect citizens from wildfire would override Ione’s municipal plans for use of the crossing at MP 0.84 as the only entry/exit for Wildflower residents in emergency situations.

CEQA with respect to the crossing at AMC MP 0.84?

4. Discussion and Analysis of Safety Issues at Milepost 0.84

4.1. The Safety of the Crossing as Built is Inadequate.

As currently built, the unauthorized crossing at MP 0.84 has no crossing gates. RSD does not now recommend installing crossing gates. We disagree, as discussed below.

The unauthorized crossing is located at the bottom of a hill that is the highest portion of the housing development. Indeed, the record shows that a municipal water tank has been built on this hill, to gain the advantage of the hill's height.⁷⁰ A nearby road leads directly from the top of the hill downward and intersects with the road that crosses the AMC track, a short distance from the unauthorized crossing itself.⁷¹ The ALJ's March 6, 2019, ruling specified several interim operating procedures for AMC to choose from, including installing crossing gates, leaving the additional cost, if any, of each procedure to be divided between AMC and the City, as they might agree.⁷² AMC selected a procedure that did not require crossing gates.⁷³

Other proceedings involving speeders have come before us. All have involved crossings close to or within residential developments. On no less than four previous occasions, we have ordered the installation of No. 9 crossing gates at new railroad crossings where speeders were expected to transport passengers.

⁷⁰ Exh. Ione-3, Exh. D. at Fig. 3.

⁷¹ Exh. Ione-3, Exh. D. at Fig. 3.

⁷² Appendix B at pages 4-7.

⁷³ March 19, 2019 email from counsel for RSD to the ALJ and the service list informing recipients of AMC's choice with respect to safer operations at MP 0.84 crossing until a final order is issued in this proceeding. The ALJ opened the record for the limited purpose of allowing the email referenced in this note to be marked and admitted as Exhibit CPUC-4.

See, e.g., D. 15-10-034 *through* D.15-10-036 *and* D.15-11-032. We will adhere to what we have previously determined to be the safest protections for crossings where speeders are in use.

Apart from our general concerns regarding speeder crossings, we have special concerns about this crossing. It is part of an active construction site and will continue to be so for the foreseeable future. It has restricted views down the track, due to the curvature of the track as well as the foliage and vegetation around the crossing and down the track in both directions. Indeed, Mr. Bowler testified that the occupants of motor vehicles stopped at the crossing could not see speeders 100 feet down the track, no doubt due to both the curvature of the track, the surrounding vegetation and the small size of the speeders themselves.⁷⁴

Based on our experience, the use of crossing gates would aid in bringing all vehicular traffic to a halt and holding it there. Crossing gates would bar any driver from electing to ignore the bells, flashing lights and/or flaggers based upon limited sight lines and a mistaken assumption that a train must have already passed through or was a safe distance away. Crossing gates also will aid in preventing children from attempting to bike, skateboard, scooter or otherwise traverse the crossing. While flaggers offer some deterrence, a gate provides additional safety because it will physically prevent improper crossings.

For now, we will permit AMC to operate the gates with a remote-control device until AMC deploys a diesel or steam-powered locomotive, at which time we require that the tracks be wired to control the gates in recognition of the added dangers associated with steam and diesel powered trains. If those

⁷⁴ EH Tr. Vol. 2. (Bowler), at page 304, lines 18-24 (at one other crossing, “we are around the corner at 100 feet. At that [MP 0.84] crossing, too, by the way.”).

circumstances arise, AMC must notify RSD in writing, six months in advance of the change in operations, and install wiring for its train to trip the gates, warning lights and bells, prior to such change and use of the crossing.

4.2. Ione Has Increased the Inherent Danger of the Crossing for Occupants of Railcars

As the California Supreme Court held in *Civic Center*, if a municipality effects a change in a crossing that currently or potentially interferes with railroad operations “the city must conform to the orders of the commission.” 175 Cal. at 454. The Supreme Court and appellate courts of this State have adhered to this holding for over a century. Ione’s actions interfered with the crossing at MP 0.84 by making it more dangerous than it was or should be, for those in speeders as well as for the public.

The record here shows that AMC speeders are currently traversing the MP 0.84 crossing up to 100 times per year, and most, if not all, of those journeys take place when wildfires are most likely to occur in the surrounding wildlands.⁷⁵ AMC’s operations have been impacted in a dangerous and unacceptable manner by Ione’s decision to disregard what its own initial planning document concluded – the danger from wildfires in this development, particularly for the area of the development in which MP 0.84 is located, can only be mitigated by constructing two means of entry/exit for the Wildflower development and providing additional access roads for firefighters.⁷⁶ Having a single entry/exit, particularly the MP 0.84 crossing, is insufficient.

AMC was granted permission to purchase the rail line and, in 2015, to operate a passenger-carrying, non-insular historic railroad, before the private

⁷⁵ Exh. SED-2, Attachment 2.

⁷⁶ See Section 1.1.2, above.

crossing at MP 0.84 was opened without our authorization and construction of the housing project began.⁷⁷ Thus, for approximately the next two years, AMC was able to enjoy unobstructed passage through what was still a closed, private crossing. Safe, relatively unobstructed passage through the crossing is not possible now and grows more dangerous as the number of homes increases and construction activities continue.

The pressure Ione has placed on this small crossing is enormous. It is not simply a way for Wildflower residents and the people who provide services to them to enter and exit the development during their daily routines. This sole entry/exit must successfully function for them, plus the scores of workers building the development, as the sole means of mass evacuation as well as serving as an entry for first responders at the same time.

The presence of the AMC railroad increases our concern over the danger Ione has created at this crossing. If a wildfire ignites in or near the Wildflower development, the crossing at MP 0.84 will be overrun with vehicles carrying residents and others attempting to escape and first responders attempting to enter. There will be far less opportunity for speeders to move through the crossing, eastward or westward, until everyone else clears the crossing. Since speeders cannot reverse direction without being manually lifted off the track and turned around, the only other means of fleeing will be on foot. The alternative scenario in which speeders partially or wholly block the crossing during an emergency, thus eliminating the sole escape route for residents, is even more troubling.

⁷⁷ See Sections 1.1.1 and 1.1.7, above.

There is no assurance that a second means of accessing the development will occur anytime soon. The Wild flower project has experienced lengthy delays and changed ownership many times.⁷⁸ The development project's current ownership is divided between two unrelated owners.⁷⁹ Should demand for housing drop significantly for any reason, the project could stall at the 100-home level for several years without a second evacuation route being installed. Yet, the projected periodicity for a wildfire to strike in the vicinity indicates one is long overdue.⁸⁰

4.3. Alternatives for Alleviating the Risk Ione Has Created

It is well established that we can close a railroad crossing to vehicular traffic, if it is in the interest of the public to do so.⁸¹ However, ordering such a remedy here would severely disadvantage the current inhabitants of the Wildflower development. We choose not to pursue this alternative today.

Our authority⁸² also allows us to limit use of the crossing to only those who currently reside in Wildflower and those visiting or providing services to

⁷⁸ See Sections 1.1.4–1.1.7.

⁷⁹ See note 46, above.

⁸⁰ See note 1, above.

⁸¹ See Cal. Const., art. XII, §5 (“The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the[C]ommission”); Pub. Utilities Code Section 701 (conferring on the Commission expansive authority to “do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient” in the supervision and regulation of railroads and every other public utility in California); see, e.g., *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979) at 906 – 909, 913 – 915 (holding that the Commission has inherent equitable power to award attorney fees, even to non-attorneys, in quasi-judicial proceedings); and *AT&T Communications v. Verizon*, D.04-09-056, 2004 Cal. PUC LEXIS 478 *16 (“... the Commission has equitable jurisdiction, which permits it to issue injunctions”).

⁸² See note 81.

them. However, this would entail a complicated enforcement mechanism and would still pose risks associated with evacuation of the development in the event of a wildfire. We therefore prefer a method we have used before with success. We believe it is the proven and fastest way to reduce the current wildfire risk at MP 0.84 for everyone.

Ione has exposed itself to a potential imposition of penalties by this Commission for its actions and inactions.⁸³ In Phase II of this proceeding, we will consider whether to fine Ione and whether and to what extent we may mitigate the penalties to which Ione may be exposed based upon our assessment of Ione's mitigation of the risk to which it has exposed the public, including, of course, railroad passengers and personnel. In view of the overall circumstances, we encourage Ione to reconsider and take all actions needed to mitigate the safety issues it has created and we have identified. Ione might do this by directing construction of a second, permanent or temporary entry/exit for the first responders and evacuation route out of the Wildflower development, capable of handling at least 80% of the inhabitants of the development in a disaster scenario. Alternatively, Ione might consider widening the crossing at MP 0.84 to accommodate outflow and inflow during an emergency.

4.4. The California Environmental Quality Act

CEQA applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities." CEQA Guidelines § 15002. Because the Commission must issue a discretionary decision without which the proposed

⁸³ Exh. Ione-1 (Hanken Direct Test.), at pages 11-20.

action will not proceed, the Commission must act as either a Lead or a Responsible Agency under CEQA. In the context of the Wildflower housing development project, Ione is the Lead Agency and the Commission is the Responsible Agency.

CEQA requires that a Responsible Agency consider the environmental consequences of a project that is subject to discretionary approval. In particular, the Responsible Agency must consider the Lead Agency's environmental documents and findings before acting upon or approving the project. CEQA Guidelines § 15050(b).

Ione prepared an IS/MND in 2004 for the underlying housing project. That document did not raise any environmental concerns with the protective devices or other typical, physical characteristics of the rail crossing itself (for example, bell noise, light pollution, pollutants from vehicles stopped at the crossing, etc.).⁸⁴ Ione subsequently issued a notice of exemption in late 2012. That document also did not find any environmental impacts with the railroad crossing.

We have reviewed the IS/MND and the notice of exemption and find they are adequate for our purposes.⁸⁵

⁸⁴ As discussed above, the IS/MND did find that a public crossing at MP 0.84, must be available for use together with the "primary" entrance to the Wildflower development at SR 104, to mitigate the otherwise significant wildfire danger present in and around the development. See section 1.1.2, above.

⁸⁵ While we are a "responsible" rather than "lead" agency under CEQA in this instance, that fact does not diminish our plenary and exclusive authority under the Public Utilities Code over rail crossings. We have for decades before and since the enactment of CEQA assessed the dangers associated with rail crossings based on our agency expertise and the authority granted us by Public Utilities Code. We have done precisely that again here.

4.5. Ione's Explanations for Its Actions Are Neither Relevant nor Persuasive

Through the City Manager's testimony, Ione defended its handling of the MP 0.84 crossing on the ground that Ione's annual budget is small (\$6 million); the City has limited staff personnel; and neither City employees nor the City's outside consultants knew anything about railroad crossings or the Commission's procedures for obtaining permission to convert a private crossing to a public crossing.⁸⁶ None of these arguments excuse Ione's failure to comply with the Commission's directives. None of these arguments justify ignoring its own determination that two distinct means of entry/exit, plus fire access roads into the wildland areas in the development, were needed to reduce the significant danger from wildfires.

Furthermore, in January 2013, after AMC had been formed, its speeders were operating on the rail line and federal authority to carry passengers was being pursued, Ione's mayor signed a new development agreement for Wildflower that allowed the City to pass through all its attorney fees incurred for advice on the Wildflower project to the developer.⁸⁷ Waiting five more years, until 2018, to hire knowledgeable counsel was Ione's choice. Due to its development agreement for Wildflower, Ione would not have incurred any expense for itself by hiring knowledgeable counsel back in 2013 to obtain competent, professional advice about its legal obligations with respect to converting a private to a public railroad crossing and to obtain help preparing a proper application to submit to the Commission. As for City Manager

⁸⁶ Exh. Ione-1 (Hanken Direct Test.), at 3, lines 5 - 16; EH Tr., May 13, 2019 (Hanken), at 133, lines 7-8 ("I wasn't aware of how the PUC worked in terms of the rail processes") and *id.*, lines 15-17 ("I was over reliant on the consultant ... to put an application together.")

⁸⁷ Exh. Ione-7, at 22-23, section 22 ("Reimbursement").

Hanken's argument that no one on his staff and none of Ione's outside consultants (excepting current counsel) knew anything about the law or procedures pertaining to railroad crossings in this state, we are not persuaded by that excuse either. By failing to retain counsel sooner than it did, Ione exposed itself to possible penalties, which we will address in Phase II of this proceeding. Those penalties may be substantial.⁸⁸

Ione also contends that the Commission's scope of authority with respect to the crossing is severely narrowed by certain time limits specified in the Public Resources Code and CEQA regulations. For example, Ione contends that the Commission is time-barred by CEQA legislation from doing anything that would change Ione's plan for roadbuilding within the Wildflower development as it was established in the oral agreement with Ryland Homes and Amador County in 2006 and subsequently memorialized in the 2013 revised development agreement with Wildflower Investments.⁸⁹ Ione submits that, at this time, CEQA limits the Commission's authority to only the environmental impact of the protective devices at the crossing and the construction details of the pavement and rails.⁹⁰ Ione objects to the Commission fashioning any remedy that would

⁸⁸ For violating section 1202 by opening the crossing to the public in October 2017 without our permission, Ione has exposed itself to Pub. Utilities Code §2111 monetary penalties in a low-to-high range of \$365,000 to 36,500,000 (730 days x \$500 or \$50,000 per day), using a span from October 1, 2017 to September 30, 2019. Penalties for its violation of Rule 1.1 are not included in this calculation.

⁸⁹ Ione Phase I Opening Brief, at 17-18.

⁹⁰ *See id.*, at 23-24 ("The Commission's authority to order railroad safety equipment is a regulatory function, not an act triggering environmental review." [Citing Pub. Utilities Code §§1201-1205 and 1219]).

directly or indirectly affect the City's decision to authorize the use of a single entry/exit into the Wildflower development at the MP 0.84 railroad crossing.⁹¹

As explained above, our remedial efforts in this matter are not based on CEQA. They are based on our exclusive authority over railroad crossings bestowed on us in the State Constitution and in Public Utilities Code §1202.⁹² Furthermore, this decision does not order the current crossing closed, but allows it to remain open provided certain conditions are met.

Ione also makes a tardiness argument as follows:

Since the Commission never identified itself as a responsible agency prior to the public review period (or after, for that matter), the City had no obligation to consult with the Commission prior to adoption of the mitigated negative declaration for the Wildflower Subdivision project.⁹³

We disagree. Ione's argument presumes a lead agency, in this case Ione itself, has no duty to notify, in advance, all responsible agencies that the lead agency is about to issue a critical decision required by CEQA. Under CEQA, it is not the duty of responsible agencies (in this proceeding, at least two state agencies, the Commission and Caltrans) to search daily the public records for every city and county in California, looking for projects in which they might have discretionary jurisdiction over one or more aspects, so as not to be precluded from performing their respective duties as CEQA reviewing agencies.

⁹¹ See Ione Phase I Opening Brief, at 17-25.

⁹² See Section 2, above.

⁹³ Ione Phase I Opening Brief, at 21 (ultimate sentence); see also *id.* at 20 ("... if the Commission had identified itself as a responsible agency for the Wildflower Subdivision project" it could have pursued a remedy "within 30 days of the filing of the 2005 NOD"); and 20-21 ("... the Commission did not identify itself as a responsible agency at any point during an environmental review of the Wildflower Subdivision project").

Quite the contrary, CEQA places the duty to notify entirely on lead agencies. It is a lead agency's responsibility to identify all responsible agencies and solicit input from them before making a critical environmental decision. Section 15073(c) of the CEQA Guidelines clearly explains who is to notify whom, as between lead and responsible agencies:

(c) A copy of the proposed negative declaration or mitigated negative declaration and the initial study shall be attached to the notice of intent to adopt the proposed declaration that is sent to every ... public agency with jurisdiction by law over resources affected by the project.

14 CCR §15073(c). (Emphasis added.)⁹⁴

Moreover, for municipalities unsure of which public agencies might qualify as responsible agencies, CEQA provides that California's "Office of Planning and Research ... shall assist the lead agency in determining the various responsible agencies." Public Resources Code §21080.3(b). CEQA also provides specific guidance with respect to housing projects located within ten miles of "rail transit." CEQA provides "the lead agency shall consult with ... public agencies that have transportation facilities within their jurisdictions that could be affected by the project." Pub. Resources Code § 21092.4.⁹⁵

⁹⁴ Ione cites two dozen or more individual CEQA Guidelines in its opening brief, yet not once does it discuss, refer to or mention Guidelines §15073(c). Ione references Guidelines §15072(a)'s requirement that notice must be given by a lead agency to every responsible agency in advance of adopting a negative declaration, but Ione avoids Guidelines §15073(c) which describes the mechanics of how to give notice of an impending negative declaration to responsible agencies "with jurisdiction by law over resources affected by the project." According to §15073(c), the IS/MND must be attached to the notice of intent and sent to each agency with jurisdiction over resources affected by the project.

⁹⁵ By the time Ione filed its Notice of Exemption on December 10, 2012 in connection with the revised redevelopment agreement with Wildfire Investments, LLC, the Recreational Railroad - Coalition Historical Society, a 50% owner of Amador Central Railroad, was already

In summary, CEQA makes it the obligation of lead agencies to identify and contact all responsible agencies before completing a negative declaration and the Office of Planning and Research is there to provide help if a city or county needs help identifying responsible agencies for a proposed project. It bears repeating that Ione failed to contact anyone at the Commission until approximately March 2017, more than 13 years after filing its Notice of Determination on the Wildflower project. Ione has produced no evidence that it ever sent its proposed IS/MND to the Commission.

Ione also contends that the Commission is time-barred from affecting any aspect of the roadbuilding sequence incorporated into the revised development agreement (Ione Exhibit 7) which Ione signed in January 2013.⁹⁶ This sequence called for the MP 0.84 entry/exit to be the sole entry/exit for the first 100 homes in the development. In this portion of its Opening Brief, Ione points out that it declared this agreement and its entry/exit sequencing exempt from CEQA in its 2012 Notice of Exemption (Ione Exhibit 2), in effect, a statement that there was no significant wildfire hazard associated with using the MP 0.84 crossing as the sole entry/exit for the development.⁹⁷ However, as explained above, CEQA imposes

running speeders on the track from the loading station in central Ione to almost Martell, and the plan to operate an historic railroad with passenger service was publicly known. *See* EH Tr., May 13, 2019 (Bowler), at 287, lines 16 – 288, line 4 (speeders on the track as early as 2004, and possibly before then); at 290, line 16 – 291, line 20 (debate over preserving the railroad “got public” so Bowler’s organization joined with Amador County Historical Society to buy the railroad).

⁹⁶ Ione Phase I Opening Brief, at 17-25.

⁹⁷ The City’s Notice of Exemption was filed December 10, 2012, two days before the Ione City Council approved the second development agreement for Wildflower. A Notice of Exemption is a statement that there are no known significant environmental impacts of the project or, if there are significant impacts, they are specifically exempted from CEQA’s general requirement to mitigate that which poses a significant harm.

an obligation on lead agencies to notify responsible agencies of IS/MNDs at the very outset of a project, not the other way around.⁹⁸ Having failed to notify this Commission when it should have, Ione is not permitted to bar the Commission from fulfilling its duties under CEQA. *Cf. Fall River Trout Foundation v. County of Shasta (Fall River Trout)*, 70 Cal. App. 4th 482 (1999) (Shasta County's failure to send to the California Department of Fish and Wildlife a copy of its MND approving significant changes to a housing project along the banks of a river constituted a prejudicial abuse of discretion thereby invalidating its prior MND and requiring that the original MND be set aside). As in *Fall River Trout*, a full CEQA review by the Commission of the Wildflower project would not be time-barred. If the facts required it, we could treat Ione's IS/MND as invalid under *Fall River Trout*. But we find the IS/MND sufficient for our role as a responsible agency, not because we believe we are time-barred by CEQA.

In fulfillment of our CEQA obligations, we will make a finding that there is no negative environmental impact threatened or resulting from the design of the crossing, once No. 9 crossing gates are added to the protective devices already installed in the crossing at AMC MP 0.84. This finding is consistent with our similar findings in four prior railroad crossings involving speeders.⁹⁹ RSD

⁹⁸ We note that Ione also misstates our role in this proceeding. Ione argues that "there is no evidence in the record of this proceeding that the Commission identified itself [to Ione] as a responsible agency at any point in the environmental review process." Ione Phase I Opening Brief, at pages 20-21. The Commission has no obligation to introduce evidence into this record, certainly not evidence to prove a negative, for example, that Ione did not notify the Commission. The Commission can, if it deems it helpful, introduce evidence into the record. However, it is under no obligation to do so. It has no burden of proof. It is not a party to this proceeding. Rather, it is the decisionmaker. And, with respect to the issue whether Ione properly notified and consulted with the Commission about the Wildflower development, we find that it did not, see Finding of Fact No. 23, below.

⁹⁹ See section 4.1, above.

will be ordered to file a Notice of Determination with our findings within 60 days of the date of this order.

We also find that the 2006 traffic study identified as Ione Exhibit 9 is limited to the risk associated with automobiles making left-hand turns at an intersection outside the Wildflower development during normal weekday traffic conditions. It has no apparent relevancy, bearing or mitigating effect on the dangers associated with using the crossing at MP 0.84 as the only evacuation route for the first one hundred homes in Wildflower and the sole entryway for first responders in the event of a wildfire in or around the development, much less use of the crossing by AMC during an emergency.

5. Conclusion

Our conclusion is that this small crossing at MP 0.84 is inadequate to mitigate the dangers for those using the crossing, whether by rail or roadway. The use of the crossing as the sole passageway into and out of the development presents a heightened risk of injury or death, not only to any occupant of a speeder on the AMC track at the same time as an evacuation and/or first response activity may be taking place, but also to the inhabitants of the Wildflower development, the construction workers onsite, those who service the current inhabitants and first responders.

This Phase I decision directs Ione, within 90 days of this decision, to make the crossing safer by installing No. 9 crossing gates at AMC MP 0.84. The gates may be wired to operate by handheld remote-control devices but only for such time as no steam or diesel locomotives are operated on the AMC tracks. Ione must comply with further specifications on safety devices and procedures at the MP 0.84 crossing, as set forth in the ordering paragraphs below. Ione must provide a written notice of completion of the crossing gate installation to RSD

within three days. RSD must conduct an onsite inspection of the operation of the crossing gates as soon as practicable upon receipt of written notice from Ione that the crossing gate ordered in this decision has been installed. Within seven business days of its inspection, RSD must file a compliance filing in this proceeding and report on its inspection findings.

We encourage Ione to use the time to direct construction of an additional evacuation route at the Wildflower development, capable of carrying the traffic associated with residents of at least 80% of the 276 homes at the Wildflower development as well as construction traffic for the development. If such an additional evacuation route is built, Ione shall notify RSD immediately in writing, and RSD shall complete an onsite inspection of the additional evacuation route and file a report in the docket of this proceeding as soon as practicable after notification by Ione. If an additional evacuation route is not ready for inspection within 180 days of the date of issuance of this order, RSD will notify the ALJ as soon as practicable. Similarly, we encourage Ione to construct the access roads referenced in the IS/MND; their completion will reduce the pressure on the MP 0.84 crossing to serve as the only access point for first responders.

The ALJ will be providing further guidance and set a detailed briefing schedule for Phase II, not to exceed 210 days from the date of this decision.

6. Comments on Proposed Decision

The proposed decision of the ALJ 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. Comments were filed on _____, and reply comments were filed on _____ by _____.

7. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and Charles Ferguson is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On October 13, 2004, Ione, the applicant in this proceeding, issued an IS/MND for a 276-housing development project to be located on an 85-acre pasture previously annexed into the southeastern portion of Ione and rezoned for residential use. The project is currently referred to as the Wildflower development.
2. A single railroad track and associated 100-foot wide right-of-way passes through the Wildflower development in the development's southwestern corner. The track and right-of-way are currently owned by the AMC, a party to this proceeding.
3. For many years, the parcel referenced in Finding No. 1 was used for grazing purposes. The previous owner of the track, Sierra Pacific Industries, Inc., as it had authority to do, permitted a farmer to use a short, dirt-and-gravel road to cross the track and enter the parcel at MP 0.84. Only the farmer was permitted to use this private crossing. No crossing gates were erected at the crossing while it was a private crossing.
4. On August 21, 2018, Ione filed the instant application seeking authorization to construct a new at-grade public railroad crossing at MP 0.84 (the Proposed Crossing), which is within the Wildflower development.
5. Ione must secure our authorization because this Commission has exclusive authority to approve the design as well as the terms and conditions of use by both the railroad and the municipal proponent for a public railroad crossing.

6. Ione's August 21, 2018 application failed to disclose that a public crossing had already been built at MP 0.84. Instead, Ione included in its application a request that the Commission grant it a period of three years to build a crossing that had already been built.

7. AMC speeders pass through the crossing at MP 0.84 approximately one hundred times each year, sometimes with non-paying passengers, other times with maintenance crews and still other times to board paying customers at the Lane Station.

8. From at least 2012 until its unauthorized opening to the public in 2017, the crossing at MP 0.84 was closed to all vehicular and pedestrian traffic, by a high chain link fence. While the crossing at MP 0.84 remained blocked by a fence, operators of AMC speeders could traverse the crossing at MP 0.84 without concern for encountering any vehicular, bicycle, scooter, skateboard, or foot traffic.

9. The chain link fence at MP 0.84 was removed no later than October 2017.

10. Upon removal of the fence, Ione, without the Commission's authorization, allowed a permanent, paved road to be built over the AMC track at MP 0.84 and allowed the public to begin using the crossing.

11. As constructed without authorization, the crossing at MP 0.84 now has warning lights and bells, protective devices that are operated by a handheld remote control. However, there are still no crossing gates of any kind at the MP 0.84 crossing.

12. In a ruling on March 6, 2019, which is appended to this decision as Appendix B, the Administrative Law Judge made findings on certain unsafe features of the unauthorized crossing at MP 0.84. We adopt them in their entirety.

13. In his ruling on March 6, 2019, the Administrative Judge also ordered AMC to choose one among several alternative operating procedures to improve safety at the crossing.

14. In response to the March 6, 2019 ruling, AMC chose a procedure that included stationing four flaggers, two on each side of the tracks, to control local vehicular traffic, especially construction vehicles, bicycles, scooters, and skateboards, while AMC speeders traverse the crossing.

15. Due to the curvature of the track and trackside vegetation in the immediate vicinity of MP 0.84, it is not possible for operators of vehicles or other traffic entering the crossing to see more than 100 feet down the track in either direction.

16. As soon as speeders pass through the crossing at MP 0.84 and head eastward, they travel through a wildland urban interface which presents a potentially significant risk of wildfire to those in speeders as well as to all inhabitants of the Wildflower development.

17. Ione determined that there is a "potentially significant" risk of wildfires in the southern portion of the development project. The crossing at MP 0.84 is in the southern portion of the development.

18. The IS/MND that Ione prepared for the Wildflower development in October 2004 analyzed a housing development plan that called for two entries/exits at the Wildflower development. One entry/exit on the northern side of the parcel was designated as the "main" entry/exit. Another entry/exit, designated as "secondary," was located on the southern boundary of the parcel at MP 0.84. A single paved road running the full length of the parcel was planned to connect the two entries/exits to each other. The "main" entry/exit to the development on the northside was expected to carry 80% of the traffic in and

out of the development, while the “secondary” entry/exit over the railroad track on the southside was expected to carry the remaining 20%.

19. Ione’s 2004 IS/MND concluded that there was a potentially “significant risk ... of loss, injury or death involving wildland fires” associated with the subdivision project unless “provision” was made for “two access points” into the project. We adopt this finding for purposes of exercising our authority under the Public Utilities Code.

20. Ione’s 2004 IS/MND concluded that the construction of both the “main” entry/exit on the northern boundary and the “secondary” entry/exit with an at-grade crossing of the railroad track near the southern boundary of the project at MP 0.84 would avoid “[i]mpairing implementation of, or physically interfere[ing] with, an adopted emergency response plan or emergency evacuation plan.” We adopt this finding for purposes of exercising our authority under the Public Utilities Code.

21. Ione’s 2004 IS/MND also determined that:

The proposed project identifies a main access at the northern end of the project site A secondary access is also proposed in the southwest corner of the property. This access would be at-grade with the ... Railroad.
Provision of two access points would reduce emergency access issues to less than significant.
(Emphasis added.)

22. Ione is in Amador County. The County’s 2014 Local Hazard Mitigation Plan (LHMP), January 2014, Annex B, classifies Ione’s vulnerability to wildfires as “high” and rates the likelihood of a wildfire in Ione and its environs as “likely” with a “recurrence level of 10 years or less.” A proposed update to Amador County’s LMHP, issued in April 2020, adds a mandate for Ione

... to ensure that proper ingress and egress are fully constructed BEFORE houses in a subdivision are constructed. One of the key lessons from the Paradise fire was the lack of multiple escape routes added to the casualty list. Developments need at least 2 ways in and out of the subdivision.¹⁰⁰ (Emphasis original.)

We adopt these findings for purposes of exercising the authority granted us in the Public Utilities Code.

23. There is no record evidence that in 2004 or at any time thereafter (until about March 2017), that Ione notified this Commission of its intent to build a city street over the AMC's track at MP 0.84.

24. In 2006 the entire development project was purchased by Ryland Homes of Northern California and renamed the "Wildflower" subdivision project. On June 8, 2006, Ryland Homes, Amador County Public Works Department and Ione made an oral agreement allowing Ryland Homes to build only the southern entry/exit to the Wildflower project, so long as Ryland Homes limited its construction activity to 100 homes in Units 3, 4 or 5.

25. The June 8, 2006 oral agreement described in Finding of Fact No. 24 was based on a June 5, 2006 Traffic Study which examined the difficulty of making left-hand turns at the intersection of Brickyard Road and State Route 124, a "Tee" intersection approximately a half mile west of MP 0.84 and outside the Wildflower development. This Traffic Study contains no mention nor reference, direct or indirect, to wildfires.

26. Ryland Homes sold all of its interests in the Wildflower development to an entity or entities controlled by Mr. Ken Lupton by 2010, including whatever

¹⁰⁰ See note 25, above.

Ryland Homes' right may have been under the memorialized agreement with the Amador County Department of Public Works and Ione, supposedly allowing the private crossing at MP 0.84 to be used as a temporary or permanent, primary entry/exit into the Wildflower project.

27. In 2012, Caltrans wrote a letter to Ione, to express its concern that Ione intended to approve a new development agreement between itself and Wildflower Investments, LLC, an entity controlled by Mr. Ken Lupton, that would allow construction at the Wildflower project to proceed based on temporary or permanent, primary access over the railroad track at MP 0.84. In that letter, Caltrans recommended that the Ione City Council not issue any certificates of occupancy for homes built in the Wildflower development unless both the main and secondary entry/exits to the development were constructed or a new environmental study was prepared.

28. On December 4, 2012, the Ione City Council approved the new development agreement between Ione and Wildflower Investments, LLC, that allowed use of the crossing at MP 0.84 as the sole entry/exit for the first 100 homes built in the project.

29. By March 2017, Wildflower Investments, LLC, had sold all its interests associated with Units 4 and 5 of the Wildflower development to an unaffiliated developer, Wildflower 276, LLC, whose sole member is Mr. Thomas Borge.

30. In March 2017, an as yet unidentified individual contacted Mr. Marvin Kennix, an employee of this Commission, and asked him to make an initial diagnostic assessment of the closed private crossing at MP 0.84 of the AMC for purposes of converting the crossing to a public crossing.

31. Mr. Kennix made a diagnostic inspection visit to MP 0.84 in March 2017 and again in June 2017. On both visits the crossing consisted of the dirt-and-gravel road previously used by the farmer.

32. In addition to the usual signage, construction requirements for the concrete around the rails and other typical design features, Mr. Kennix recommended installation of No. 9 protective crossing gates at MP 0.84. However, he subsequently acceded to Ione's express preference for no protective crossing gates at all.

33. Before October 2017, without informing Mr. Kennix or anyone else at the Commission, and without applying to this Commission for permission to do so, Ione allowed Wildflower 276 to construct a public crossing at MP 0.84 and initiate construction of the first homes in the Wildflower subdivision.

34. By the time the instant application was filed by Ione, the unauthorized public crossing at MP 0.84 had been built, was in use, and several dozen homes had also been built, sold, and occupied in the Wildflower development.

35. By the close of post-hearing briefing, neither the main entry/exit on the northside of the development, nor the road intended to connect the main entry/exit on the northside to the secondary entry/exit on the southside of the development at MP 0.84, had been built. Instead, a road was built to extend from the secondary entry/exit at MP 0.84 only far enough into the development project to reach 100 homes.

36. No evidence was introduced to show that any access points other than the crossing at MP 0.84 were built for first responders to reach the wildlands and unused portions of the project.

37. The protective devices Ione installed at the crossing at MP 0.84 are not adequate to protect the safety of the public.

38. The existing crossing at MP 0.84 will not meet our standard for safety until No. 9 crossing gates are installed. For now, we allow the AMC to open and close the gates with a handheld remote control until such time as AMC begins using steam or diesel locomotion. At that time, the rail line must be wired so that a train approaching and leaving the crossing will cause the No. 9 gates to operate automatically.

39. Opening the crossing at MP 0.84 to the public without constructing the main entry/exit on the northside of the Wildflower project and a paved roadway connecting both, has impeded the operations of the AMC by exposing the operators and passengers of speeders traversing the crossing to increased dangers, including enhanced danger from wildfires and other natural disasters triggering mass evacuation and/or the need for a large number of first responders to enter the Wildflower development.

40. The safe use of rail crossings by the public and railroads is a matter of statewide concern. Protection of the public from wildfire dangers is also a matter of statewide concern. As built, the crossing at MP 0.84 cannot accommodate the volume of traffic that would result from evacuees and/or first responders plus those in speeders in a wildfire or other disaster scenario, given the lack of a main entrance at the Wildflower development.

41. The ability of AMC to use the crossing at MP 0.84 for passenger rail service and rail line maintenance has been impeded by Ione's use of the crossing as the sole means of entry/exit for the Wildflower development project. This is especially true should AMC rail cars be attempting to traverse the crossing at MP 0.84 during an emergency scenario, which most likely would be the result of a wildfire. When planning its operations, both maintenance and transportation of the public, AMC now must consider the dangers associated with Ione's use of

this crossing as the sole entry/exit into the Wildflower development and curtail its transportation services appropriately. This constitutes an impediment to AMC.

42. Were a main entrance to the Wildflower development project and a connecting road to the crossing at MP 0.84 both built as anticipated in Ione's 2004 IS/MND, the dangers associated with using the crossing at MP 0.84 as the sole entry/exit for the project would be substantially mitigated and rail operations would not be impeded as they are now.

43. Ione took the following actions over the course of 13 years, each of which has increased the level of risk for occupants of the AMC's speeders in a wildfire or other disaster scenario:

- A. Ione entered into an oral agreement in June 2006 with Ryland Homes of Northern California (Ryland Homes) and the Amador County Public Works Department, allowing Ryland Homes to construct only a single entry/exit on the southside of the Wildflower development project at the MP 0.84 crossing, should Ryland Homes or its successor-in-interest choose to build only 100 homes in Units 3, 4 or 5;
- B. Ione entered into a development agreement with Wildflower Investments, LLC, effective January 3, 2013, that incorporated the oral agreement made in June 2006 with Ryland Homes and Amador County, permitting the use of a single entry/exit at MP 0.84 for the first 100 homes constructed in Units 3, 4 or 5; and
- C. In or about October 2017, Ione permitted Wildflower 276, LLC to construct and open a public crossing at MP 0.84 without first obtaining authority to do so from the Commission.

44. The Commission is a responsible agency for the Wildflower development project; and Ione is the lead agency.

45. As a responsible agency for the Wildflower development project, the Commission must review Ione's 2004 IS/MND as well as Ione's 2012 Notice of Exemption declaring the Wildflower development project exempt from CEQA.

46. The Commission has reviewed both Ione's 2004 IS/MND and its 2012 Notice of Exemption.

47. Ione's 2004 IS/MND and its 2012 Notice of Exemption of the Wildflower development project from CEQA are adequate for our purposes insofar as they address the crossing at MP 0.84.

48. Ione's 2012 Notice of Exemption of the Wildflower development project from CEQA is inconsistent with our view of what is required of Ione under Public Utilities Code §§ 1202 and 1219. The crossing at MP 0.84 cannot be used as the primary means of entry/exit at the Wildflower development, on either a temporary or permanent basis, without improperly impeding the operations of the AMC.

49. Ione has, for years, left the unauthorized crossing as the only access to a new, partially-built and occupied housing development in a former 85-acre pasture bordered by wildlands highly liable to be struck by wildfire; in effect, Ione has left the residents, the scores of workers continuing to build homes in the development and emergency responders to the development with but one avenue of ingress and egress – or, for first-responders, entry – over the very crossing we have not yet approved.

50. Ione's decision to ignore the necessity of two or more entries/exits at the development project and to force hundreds of inhabitants of the project through only this small unauthorized crossing (which was never authorized nor designed to handle the flow of all potential evacuees out of the development project and simultaneously the flow of all first responders into the development project)

raises serious questions as to whether AMC can reliably provide safe passage to its passengers and railcar operators through the crossing in question.

51. These safety concerns of having a single access to the housing development are present all year but are especially heightened during wildfire season. All risks could and would have been significantly mitigated if Ione had filed its application before improperly opening this formerly closed private crossing to the public without our authorization. When it was a closed private crossing, there was no vehicular, pedestrian, or other traffic that might intersect with railcars.

52. Crossing gates do not mitigate all the dangerous conditions that a wildfire or other similar emergency would present at this Proposed Crossing. This single Proposed Crossing could quickly become a bottleneck for both railcars and those entering and exiting the housing development in the event of a wildfire or other emergency.

Conclusions of Law

1. Ione should be granted authorization for the Proposed Crossing at MP 0.84 on condition that Ione must install No. 9 crossing gates at the crossing, as a condition of Commission approval. Manually operating the crossing gates by handheld remote control will be permissible, provided that only speeders are operating on AMC's trackage.

2. The Commission has jurisdiction to render decision on this instant application pursuant to, *inter alia*, Public Utilities Code §§1202 and 1219.

3. Ione's construction and use of the public railroad crossing at MP 0.84 is a matter of statewide concern governed by both 14 CCR §15206 and the decision of our Supreme Court in *Civic Center Assoc., et al. v. Railroad Com. of California*, 175 Cal. 441, 454 (1917).

4. The Commission's authority pursuant to Public Utilities Code §§1202 and 1219 includes the right to issue orders to Ione regarding Ione's use of the crossing at MP 0.84, if such use potentially or actually interferes with or impedes AMC's operations.

5. Because Ione has interfered with and impeded the operations of the AMC (*see* Findings of Fact Nos. 39-41), the crossing is non-compliant with the Public Utilities Code, and the Commission has authority to account for such use in any penalty we assess in Phase II of this proceeding.

6. The Commission is a responsible agency under CEQA in this proceeding.

7. CEQA does not nullify or preempt the Commission's exclusive authority over rail crossings granted to the Commission in Public Utilities Code §§ 1202 and 1219.

8. Failure to satisfy the standards in the Public Utilities Code alone will prevent this Commission from issuing unconditional approval of a crossing as a safe, public crossing.

9. Ione's use of the crossing at MP 0.84 as either a temporary or permanent, solitary entry/exit to the Wildflower development does not satisfy the safety standards of the Public Utility Code.

10. The design of the crossing at MP 0.84 is non-compliant with the Public Utilities Code because Ione failed to install crossing gates.

11. The Commission has authority to order the installation of crossing gates at MP 0.84 in this proceeding.

12. Under CEQA, Ione was the lead agency and had a duty but failed to notify the Commission of Ione's preparation of an IS/MND prior to issuing the Ione's October 13, 2004 IS/MND, as required by California Public Resources Code §§

21080.3(a), 21080.4(a) and 21092.4(a) and by 14 CCR §§15072(a), 15063(g), 15203(a).

13. Ione's October 13, 2004 IS/MND for the Wildflower development properly concluded that wildfires posed a significant threat to the housing development and that two entries/exits were necessary to mitigate the danger – the main entry/exit on the northside of the development to carry 80% of the traffic and an entry/exit over the railroad tracks at MP 0.84 to be used only as a “secondary” exit.

14. This proceeding should remain open to resolve Phase II issues.

O R D E R

IT IS ORDERED that:

1. The City of Ione (Ione) is authorized to open a public crossing at Milepost (MP) 0.84 of the Amador Central Railroad (AMC) upon the following conditions:

- A. Within 180 days from the date of this decision, Ione shall have installed No. 9 crossing gates at the MP 0.84 crossing;
- B. The crossing gates may be operated by remote control from a hand-held device, so long as AMC allows only speeders to operate on its track;
- C. Ione must notify the Director of the Commission's Rail Safety Division in writing within three days of the installation, that No. 9 protective devices have been installed; and
- D. Ione shall comply with all other operating requirements in the Commission's general orders for protective devices at rail crossings equipped with No. 9 crossing gates.

2. Amador Central Railroad shall continue to comply with the Administrative Law Judge's ruling issued on March 6, 2019 concerning an

interim method for operating through the MP 0.84 crossing, until the No. 9 crossing gates have been installed. A copy of the Administrative Law Judge's ruling is attached hereto as Appendix B and is incorporated in its entirety, by reference herein.

3. Amador Central Railroad shall comply with all other operating requirements in the Commission's general orders for protective devices at rail crossings equipped with No. 9 crossing gates.

4. If Amador Central Railroad initiates the use of steam or diesel locomotion on its track, it shall give written notice to the Director of the Commission's Rail Safety Division (RSD) at least 90 days in advance, specifying the date upon which steam or diesel locomotion will commence and change the means for triggering the protective devices at the MP 0.84 crossing, including the gates, to electric current in the rails before such operation commences; and Amador Central Railroad must provide written notice to the Director of RSD of the change in the triggering mechanism within three days of the installation of the new triggering mechanism for the protective devices.

5. The Commission's Rail Safety Division (RSD) staff shall inspect the crossing gates as soon as possible upon receipt of written notification from the City of Ione that it has installed No. 9 protective devices, crossing gates, and within seven business days of inspection, RSD must file a compliance filing in this proceeding and report on its inspection findings.

6. The Commission's Rail Safety Division (RSD) shall conduct an inspection of the crossing gates as soon as practicable after receiving written notice that the triggering mechanism has been changed and a new triggering mechanism for the protective devices are installed and within seven business days of inspection,

RSD must file a compliance filing in this proceeding and report on its inspection findings.

7. Findings of Fact 20, 21 and 40 and Conclusion of Law 13 are adopted here for purposes of exercising our authority under the Public Utilities Code.

8. This proceeding shall remain open to resolve Phase II issues.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

APPENDIX A

Summary of Filing Requirements

Application: A.18-08-010

Filed: August 21, 2018

Applicant: City of Ione (City)

Railroads / Transit Agencies: Amador Central Railroad (AMC)

Crossing Location (Roadway, City, and County): The extension of Foothill Boulevard at AMC's milepost (MP) 0.84 in the City of Ione, Amador County.

Crossing Type (Grade Type, Roadway, Bike Path, or Pedestrian): A public at-grade highway-rail crossing at the extension of Foothill Boulevard across an AMC track.

Proposed Crossing Numbers (CPUC/DOT): CPUC No. 012-0.84 and DOT No. 974415X.

Number and Type of Tracks: One AMC track.

Diagnostic Reviews / Site Visit Dates: March 9, 2017 and June 29, 2017.

Compliance with the Commission's Rules of Practice and Procedure:

Rule 3.7 (a): Milepost and Legal Location: The legal description is provided in Exh. Ione-3 (Application), Exhibit E, page 1.

The proposed crossing milepost for the Foothill Boulevard crossing is 0.84.

The proposed crossing is located at geographic coordinates with latitude, longitude: Foothill Boulevard: 38.339638, -120.928678.

Rule 3.7 (b): The crossing identification numbers of the nearest existing public crossings are:

- a. Westerly: SR 124, CPUC Crossing No. 012-0.50 and DOT No. 847034L.
- b. Easterly: SR 104, CPUC Crossing No. 012-2.20 and DOT No. 847040P.

Rule 3.7 (c)(1): A statement showing the public need to be served by the proposed crossing is stated in Exhibit Ione-3 (Application), at page 2, par. 7.

Rule 3.7(c)(2): A statement showing why a separation of grades is not practicable is stated in Exhibit Ione-3 (Application), at page 2, par. 8.

Rule 3.7 (c)(3): A statement showing the signs, signals, or other crossing warning devices which the City recommends be provided at the proposed crossing is stated in Exh. Ione-3 (Application), at pages 2-3, pars. 9 and 10; and in Exhibit B (Sheet 1). The Commission

finds the City's recommendations are deficient in that crossing gates are a necessary, protective element at this crossing.

Rule 3.7 (d): A map in compliance with Rule 3.7(d) is included Exhibit Ione-3 (Application), at Exhibit B (Sheet 1 of 2).

Rule 3.7 (e): A map in compliance with Rule 3.7(e) is included in Exhibit Ione-3 (Application), at Exhibit E.

Rule 3.7 (f): A profile in compliance with Rule 3.7(f) is included in Exhibit Ione-3 (Application), at Exhibit B (Sheet 2 of 2).

Applicable Safety and Regulatory Requirements:

General Order (GO) 26-D: The proposed crossing shall meet all clearance requirements for a public at-grade crossing in accordance with the Commission's GO 26-D.

General Order 75-D: The proposed warning devices, a Commission Standard 9 warning device, on both sides of the crossing, shall meet the requirements of the Commission's GO 75-D. A hand-held, remote-control device may be used to lower and raise the gates. Should the operation of trains with locomotive engines be introduced in the future, the railroad must wire the trackage so that the train will trigger the lowering and raising of the crossing gates.

Crossing Issues:

The Commission finds that the crossing is not safe to operate as a public crossing, pursuant to Public Utilities Code sections 1202, *et seq.*, as a public crossing until the installation of No. 9 crossing gates is completed, as explained above. The Commission further finds that the current use of the crossing by the Applicant is not Public Utilities Code safety compliant until Foothill Boulevard is extended from its present northern terminus within the development to its intended intersection with State Route 104.

(End of Appendix A)

APPENDIX B

APPENDIX B

CFG/rp4 3/4/19

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Ione for a public road crossing at the extension of Foothill Boulevard and Mile Post No.0.84 of the Amador Central Railroad (AMC) Recreational Railroad – Coalition Historical Society (RRCHS), City of Ione, County of Amador, State of California.

Application 18-08-010

ADMINISTRATIVE LAW JUDGE’S RULING ORDERING AMC TO CONDUCT ITS OPERATIONS AT THE MILE POST 0.84 CROSSING WITH FOOTHILL BOULEVARD IN A SAFE AND PRUDENT MANNER

In this proceeding, the applicant, City of Ione (hereafter, Ione or Applicant), has requested authority from the Commission to convert a formerly closed, private at-grade railroad crossing¹⁰¹ at Mile Post 0.84 of the Amador Central Railroad (AMC) to a heavily-trafficked, public at-grade railroad crossing. Ione filed an Application for permission to do so with this Commission on August 21, 2018.

¹⁰¹ An archival photograph from 2012 of the closed, private crossing can be found at the following link to Google maps: <https://goo.gl/maps/BvXjBE1wyjP2>. Until approximately 2004, the private crossing was used exclusively by a farmer to access an 85-acre pasture for grazing his livestock. In or before 2004, a housing developer acquired the parcel and applied for entitlements to develop approximately 300 homes, ranging in size from townhomes to luxury estate homes. Application, Exh. D at 1, 15.

In its Application, Ione expressly asked for a period of three years, from the issuance of a final decision by this Commission, to accomplish the conversion.¹⁰² By any reasonable reading of the Application, construction of the public crossing had not yet begun when Ione filed its Application with the Commission.¹⁰³ Unfortunately, this was not true; Ione constructed the public crossing at Mile Post 0.84, with or without help from others, before applying for permission to build it, as Ione's City Manager admitted at a Prehearing Conference (PHC) on October 21, 2018.¹⁰⁴

1. Background

The newly constructed public crossing is the only means of ingress to and egress from the large housing development currently under construction. Because some three dozen or more homes have already been built and a significant number of those homes have been sold and are occupied, there is a constant and growing flow of residential traffic over the unauthorized public

¹⁰² Application at 5.

¹⁰³ Ione's August 2018 Application repeatedly implied that a public rail crossing had not yet been built. For example, Ione's Application "request[s] permission to modify an existing private at grade crossing to a public at grade crossing," strongly implying that the private crossing still existed on August 21, 2018. Application at 1 (emphasis added). Furthermore, Ione's Application repeatedly describes attributes of the desired public crossing in future terms: "the proposed crossing will be identified as ..."; "the warning devices to be installed ..."; "the assemblies shall be installed ..."; "[warning] signs shall be installed ..."; *etc.* Application at 3 (emphasis added).

¹⁰⁴ ALJ FERGUSON: Can a vehicle actually ... get across the railroad tracks ... right now today?

MR. HANKEN [City Manager]: Yes

ALJ FERGUSON: ...Is there macadam that goes up over the railroad tracks right now? ... And it connects to Brickyard Road?

MR. HANKEN: Yes.

(October 21, 2018 PHC Tr., at 10, lines 8-28.)

ALJ FERGUSON: ... So, what you submitted here, all the diagrams, Exhibits B and D, this has all been built already?

MR. HANKEN: It's all been constructed already, yes.

(October 21, 2018 PHC Tr., at 13, line 26-at 14, line 2.)

crossing. In addition, there is a stream of construction vehicles going and coming, in and out, of the development over the unauthorized crossing six days per week.¹⁰⁵

The AMC Railroad is somewhat unusual. It does not operate traditional locomotives or railcars. Instead, it carries members of the public along its tracks in what are known in the industry as “speeders,” gasoline-powered vehicles with steel wheels that fit the rails.¹⁰⁶ They were used by large railroad companies for inspecting or repairing track and they accommodate two to four persons.¹⁰⁷ AMC transports passengers in speeders over its track.

2. Dangerous Conditions Exist at the Crossing

The crossing at AMC Mile Post 0.84 is unauthorized and therefore its safety is immediately questionable. The physical aspects of the crossing and its surroundings serve to illustrate and enhance that inherent risk factor.

The crossing at Mile Post 0.84 does not have crossing gates.¹⁰⁸ Furthermore, the warning lights and bells only function when someone associated with AMC uses a single, small, handheld, remote control to activate the lights and bells. Were the remote control lost, dropped or forgotten, or were the remote control too distant from the crossing to trigger the warning system while one or more speeders are entering the crossing, the current, gateless, warning system is essentially useless or, at least, far less useful than it should

¹⁰⁵ PHC Tr. at 24, lines 6-12.

¹⁰⁶ See <https://www.american-rails/speeders.html>.

¹⁰⁷ *Ibid.*

¹⁰⁸ PHC Tr. at p.23, lines 9-22.

be?¹⁰⁹ Thus, there is danger for AMC rail passengers moving through the crossing at Mile Post 0.84 from east to west and west to east, especially from larger construction trucks. A further, serious complication is no clear, down-the-track view is possible, east or west, from a vehicle approaching the track from either direction due to the height of trackside vegetation.¹¹⁰

The crossing poses a risk to more than passengers aboard the speeders. According to the City, families will purchase housing in the development.¹¹¹ That means the sidewalks and streets in the development will be used for riding bicycles, scooters, and skateboards. Unfortunately, the highest hill in the entire 85-acre development is adjacent to the crossing and it already has a paved road leading down toward the crossing making it highly attractive for such play activities.¹¹² Notwithstanding the location of a rail crossing in a new housing development with hundreds of children, the City has chosen to forego crossing gates; and, the warning system that was installed must be operated from a handheld, remote control device. If, for any reason, that device fails to activate the warning system, or activates it too late, when a youngster on a bicycle, scooter or skateboard and a speeder simultaneously enter the crossing, the youngster is the one at grave risk. No other AMC crossing poses such risk to youngsters because there is no other AMC crossing located in a residential neighborhood. All of AMC's trackage runs through agricultural or industrial areas, except the crossing at Mile Post 0.84. Regardless of the type or size of rail

¹⁰⁹ Multiple speeders can be on the tracks at one and the same time and usually are. See <http://www.ncry.org/ride/speeder-rides>.

¹¹⁰ See photograph referenced in *fn.1*, above.

¹¹¹ Application, Ex. D at 58-59 (students expected from the development for the long-term: 106 elementary school students, 27 junior high students and 54 high school students).

¹¹² *Id.* at 7-8, Fig. 3.

traffic running through the crossing, it should have at least the same safety equipment and protection as the other five AMC crossings.

3. The Commission Will Direct AMC to Increase Safety at the Mile Post 0.84 Crossing

There is no question that the Commission has authority to order Ione to close the Mile Post 0.84 crossing, as it was built without first obtaining Commission approval. Public Utilities Code Sections 1201-1202. Closing the crossing would completely remove all risks of bodily injury or worse. However, closing the crossing at Mile Post 0.84, even temporarily, would negatively impact the lives of those Ione residents who have already purchased homes in the new development, as well as completely halt further construction activity at the housing development. Accordingly, the Commission will exercise its inherent authority over AMC to ensure the safe operation of the crossing until evidentiary hearings have been completed in this proceeding and a final decision is issued.

The Commission's authority to order AMC to take on the responsibility of ensuring the safe operation of the crossing is firmly rooted in the California Constitution, the Public Utilities Code, case law and Commission decisions.¹¹³

IT IS RULED that:

¹¹³ See Cal. Const., art. XII, §5 ("The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the [C]ommission ... "); Pub. Utilities Code Section 701 (conferring on the Commission expansive authority to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient" in the supervision and regulation of railroads and every other public utility in California); see, e.g., *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979) at 906 - 909, 913 - 915 (holding that the Commission has inherent equitable power to award attorneys' fees, even to non-attorneys, in quasi-judicial proceedings); and *AT&T Communications v. Verizon Decision (D.)*, D.04-09-056, 2004 Cal. PUC LEXIS 478 *16 ("... the Commission has equitable jurisdiction, which permits it to issue injunctions ... ")

1. Within 10 days of the date of this Ruling and Order and until a final, non--appealable decision and order are issued in this proceeding, the AMC Railroad shall choose one or more of the following options for operating rail equipment at its crossing of Foothill Boulevard, in the City of Ione.

- a. Cease all rail operations completely on the entire length of its trackage; or
- b. Cease operating all railcars, including speeders, through the Mile Post 0.84 crossing at Foothill Boulevard in either direction; or
- c. Install both automatic crossing gates and an activation system for all protection devices at the Foothill Boulevard crossing, other than a handheld remote control; or
- d. Prior to any railcar or speeder approaching within 100 feet of the crossing at Foothill Boulevard, position two flagmen, one on each side of the track, with two large red flags each, who shall trigger the warning devices and wave the flags to stop all vehicular, pedestrian, bicycle, scooter and skateboard traffic approaching the crossing until all railcar or speeder traffic has cleared the crossing entirely.

2. AMC Railroad will inform the Commission's Safety and Enforcement Division (SED) in writing of its choice of an option from the list in paragraph 1, above, no later than ten calendar days from the date of this Ruling and Order. At the same time, and in the same writing, unless AMC selects option 1. (a), AMC will inform SED of the next five anticipated dates for operating speeders anywhere on its trackage, with or without paying passengers.

3. SED will notify the Administrative Law Judge (ALJ) whether it concurs in AMC's selection of an option from the list in paragraph 1. If

SED concurs with AMC's choice, SED will also select a single date from the five anticipated dates, if any, supplied by AMC for operating speeders on its trackage and SED will conduct an unannounced observation of how AMC conducts its operations. If SED observes any violation of any part of this order, SED shall report such violation to the in writing as soon as possible.

4. IF SED disagrees with AMC's choice of an option from paragraph 1, SED will notify the within five business days of receiving notice of AMC's selection and request that a hearing be set for the to determine which option AMC should be compelled to follow.

5. SED will serve a copy of this Ruling on AMC and on both AMC's president and its vice-president, individually, by first class mail.

Dated March 4, 2019, at San Francisco, California.

Charles Ferguson
Administrative Law Judge

(End of Appendix B)