

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

BNSF RAILWAY COMPANY,)	
)	DOCKET TR-070696
)	
Petitioner,)	ORDER 01
)	
v.)	PREHEARING CONFERENCE
)	ORDER; NOTICE OF SECOND
CITY OF MOUNT VERNON)	PREHEARING CONFERENCE
)	(Set for August 1, 2007, 9:30 a.m.)
Respondent.)	
.....)	

1 **NATURE OF PROCEEDING.** Docket TR-070696 involves a petition by Burlington Northern Santa Fe Railway Company (BNSF) to abandon and close to public use a railroad-highway grade crossing located at Hickox Road, Mount Vernon, Skagit County, WA (US DOT #084737D) in accordance with Revised Code of Washington (RCW) 81.53.060.

2 **CONFERENCE.** The Washington Utilities and Transportation Commission (Commission) issued a Notice of Prehearing Conference on Wednesday, June 13, 2007, and subsequently convened a prehearing conference in this docket at Olympia, Washington, on Friday, July 13, 2007, before Administrative Law Judge (ALJ) Adam E. Torem.

3 **APPEARANCES.** Bradley Scarp, Montgomery Scarp MacDougall, PLLC, Seattle, Washington, represents BNSF. Kevin Rogerson, City Attorney, Mount Vernon, Washington, represents the City of Mount Vernon. Stephen Fallquist, Civil Deputy Prosecuting Attorney, Mount Vernon, Washington, represents Skagit County. Scott Lockwood, Assistant Attorney General, Olympia, Washington, represents the Freight Systems Division of the Washington State Department of Transportation (WSDOT), Tumwater, Washington. Brian Snure, Snure Law Office, PSC, Des Moines, Washington, represents Skagit County Fire Protection District No. 3, Conway, Washington. Gary T. Jones, Jones & Smith, Mount Vernon, Washington, represents David Boon, Yvonne Boon, and Western Valley Farms, LLC, local residents and their corporation; Mr. Jones also represents Richard Smith, Patricia Smith, Robert Burkland, Pamela Burkland, and S&B Land, LLC, local residents and their corporation. Jonathan Thompson, Assistant Attorney General, Olympia, Washington,

represents the Commission's regulatory staff ("Commission Staff" or "Staff").¹ Contact information provided at the conference for the parties' representatives is attached as Appendix A to this Order.

4 **CLARIFICATION OF CAPTION.** At the prehearing conference, BNSF confirmed that the Hickox Road grade crossing is within the city limits of Mount Vernon. Therefore, in accordance with RCW 81.53.060, the correct Respondent in this matter is the City of Mount Vernon, not Skagit County. All further pleadings in this matter shall be captioned accordingly.

5 **ISSUES RAISED BY PETITION; BURDEN OF PROOF.** RCW 81.53.060 allows any railroad company whose road is crossed by any highway to file a petition alleging that "the public safety requires . . . the closing or discontinuance of an existing highway crossing" and praying that such relief be ordered. BNSF filed such a petition on April 11, 2007. As petitioner, BNSF will carry the burden of proving, by a preponderance of the evidence, that public safety requires closure of the Hickox Road grade crossing.

6 **POTENTIAL ISSUES PRESENTED FOR HEARING.** As indicated by the governing statute, public safety requirements will be the main focus of the hearing on the merits. However, the following additional specific issues were raised by participants at the prehearing conference as potentially relevant to the Commission's determination of this matter:

- Compliance with State Environmental Policy Act (SEPA)
- Adequacy of WSDOT Study Supporting Closure
- Impact of Closure on Local Emergency Preparedness
 - Effect on Response Times for Emergency Services
 - Effect on Flood Hazard Evacuations (including farm animals)
- Impact of Closure on Planning under the Growth Management Act
- Impact of Closure on Regional Transportation Planning
- Impact of Closure on Viability of Local Agricultural Lands
- Impact of Closure on Designated Critical Areas (i.e. floodplain)

¹ In formal proceedings, such as this case, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an "ex parte wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including Staff. RCW 34.05.455.

Petitioner BNSF opposes expansion of the issues beyond public safety. However, Commission Staff indicated that the statute need not be so narrowly construed as to exclude evidence on reasonably related issues.

- 7 Commission Staff has agreed to publish a letter explaining its position as to compliance with the State Environmental Policy Act, including the identification of the lead agency for this proposed action and indicating what environmental assessment documents, if any, may have already been produced regarding the proposed closure. Staff will serve the letter to all parties by Wednesday, July 25, 2007.
- 8 Prior Commission proceedings demonstrate that in addition to public safety, the local need for the crossing and alternatives to closure can be considered.² The Commission has entertained evidence on these topics through analyzing criteria established by the Federal Railroad Administration (FRA) and by BNSF to evaluate the need for a crossing.³ Further, the Commission has reviewed the Railroad-Highway Grade Crossing Handbook and the factors it sets out as relevant for consideration of a grade crossing.⁴
- 9 Upon consideration of the criteria contained in RCW 81.53.060 and the scope of similar proceedings previously conducted by the Commission and related agencies, the undersigned ALJ concludes that in addition to the requirements of public safety, the convenience and necessity of those using the crossing must also be considered, as well as alternatives to closure. However, despite the tangential relevance of the

² See Puget Sound and Pacific Railroad v. Thurston County, TR-041729, Order 01 (Prehearing Conference Order), 25 January 2005, at ¶6. See also Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254, 212 P.2d 829 (1949) (“Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and necessity of those using the crossing and whether the need of the crossing is so great that it must be kept open notwithstanding its dangerous condition.”).

³ The FRA-recommended criteria are 1) redundancy of crossings (more than four crossings per mile in urban areas, more than one per mile in rural areas); 2) ability of vehicular traffic to be re-routed safely and efficiently to an adjacent crossing; 3) a high number of collisions at a crossing; and 4) poor visibility. See BNSF v. City of Sprague, TR-010684, Third Supplemental Order, 21 October 2002, at ¶ 12, and Fourth Supplemental Order, 10 January 2003, at ¶ 43. The BNSF criteria are 1) redundancy; 2) whether the crossing is a designated emergency route; 3) whether it has low traffic volumes. *Id.*, Third Supplemental Order at ¶ 13 & Fourth Supplemental Order at ¶ 45.

⁴ The Handbook factors include: existence of alternative routes within a reasonable travel time and distance from the closed crossing; sufficient capacity in the alternative routes to accommodate diverted traffic safely and efficiently; sufficient access over the railroad by emergency vehicles, ambulances, fire trucks and police; frequent use of the crossing by emergency vehicles; economic assessment of the positive and negative impacts of crossing closures. See BNSF v. City of Sprague, TR-010684, Third Supplemental Order at ¶ 17, and Fourth Supplemental Order at ¶ 47.

potential impacts of closure of this grade crossing on regional land use planning efforts under the Growth Management Act (GMA), expanding the issues to be litigated before the Commission in this matter to include those best taken up by a Growth Management Hearings Board cannot be justified under the governing statute or under prior Commission actions.

10 Therefore, for the reasons set out above, the issues to be presented at the hearing on the merits in this case shall generally be limited to:

- Requirements of Public Safety
 - Impact of Closure on Local Emergency Preparedness
 - Effect on Response Times for Emergency Services
 - Effect on Flood Hazard Evacuations (incl. farm animals)
- Convenience and Necessity of Use of Hickox Road Crossing
 - Impact of Closure on Regional Transportation Planning
- Alternatives to Closure
 - Adequacy of WSDOT Study Supporting Closure

The parties may, within the scope of these issues, introduce evidence addressing the criteria established by FRA, BNSF, or the above-referenced Handbook.

11 **PETITIONS FOR INTERVENTION.** RCW 34.05.443 permits a presiding officer to grant a petition to intervene at any time, upon a determination that the petitioner qualifies to intervene under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings. WAC 480-07-355(3) allows the presiding officer to grant petitions to intervene when they disclose a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest.

12 Petitions to intervene were filed with the Commission prior to the prehearing conference by the City of Mount Vernon; Skagit County; WSDOT – Freight Systems Division; Skagit County Fire Protection District No. 3; Western Valley Farms, LLC, and David Boon and Yvonne Boon; and S&B Land, LLC, and Patricia and Richard Smith and Robert and Pamela Burkland. No additional petitions for intervention were orally presented at the prehearing conference.

13 BNSF opposed all of these petitions except for that of WSDOT. However, BNSF did not formally object to any petitions to intervene except for that of S&B Land, LLC.

Therefore, the petitions to intervene submitted by Mount Vernon; Skagit County; WSDOT; Skagit County Fire Protection District No. 3; as well as that of David & Yvonne Boon and Western Valley Farms, LLC, are GRANTED, subject to the limitations set out below in accordance with RCW 34.05.443(2) and (3) as well as WAC 480-07-355(3).

- 14 The petition to intervene filed by S&B Land, LLC, and its members Richard and Patricia Smith and Robert and Pamela Burkland, paragraph 4, states these petitioners' interest as:

Continuing to realize investment backed expectations for land use which is compatible with Growth Management Act planning for Skagit County and the City of Mount Vernon, including transportation plans, zoning, utilities, extensions and other factors related to realizing the highest and best use of land resources.

The petition further explains their opposition to the proposed crossing closure with a focus on the potential economic impacts of the action on investments made in local dairy farming enterprises.

- 15 As noted above, economic analysis of the proposed closing is wholly appropriate for this matter, but the petition filed by Smith, Burkland, and S&B LLC does *not* express a sufficiently specific substantial interest in the subject matter of the hearing nor does it further the public interest. The interest of these petitioners is undistinguishable from that of any other investor or business owner in the region. In addition, it would appear that the general business interests of these petitioners will already be adequately represented in this case by David and Yvonne Boon and Western Valley Farms, LLC, who operate a dairy farm on the west side of the Hickox Road crossing. Further, the governmental entities already granted intervenor status are in a much superior position to address any impacts on regional or local transportation plans. Granting this petition would be cumulative and therefore impair the orderly and prompt conduct of the proceedings.⁵ Therefore, this petition to intervene must be DENIED.

⁵ The interests of these petitioners may yet be expressed at hearing, perhaps through another party designating a representative of S&B, LLC, as a witness with regard to the convenience and necessity of the use of the Hickox Road crossing. However, status as a separate party in this case is not merited.

- 16 Under RCW 34.05.443(2), the presiding officer may impose conditions on the intervenors participating in the proceeding. In order to reduce repetitive evidence and in accordance with RCW 34.05.443(2)(c), Skagit County and Skagit County Fire Protection District No. 3 shall combine their presentations with that of Respondent City of Mount Vernon. Further, WSDOT shall combine its presentation with that of BNSF. These parties shall, to the extent feasible, present joint witnesses and designate one lead counsel to conduct cross-examination of their opponents' witnesses on all topics to be presented at hearing. Each party will remain entitled to present individual opening statements and closing arguments at hearing as well as independent briefing as needed. Such combination of presentations will ensure the orderly and prompt conduct of the proceedings in the most efficient manner possible.
- 17 **PROTECTIVE ORDER.** A protective order will not be entered in this docket at this time. However, the parties reserved their right to ask that the Commission enter a protective order in this docket under RCW 34.05.446, RCW 80.04.095, WAC 480-07-420 and WAC 480-07-423 to protect the confidentiality of any information identified as proprietary information.
- 18 **DISCOVERY.** The parties jointly requested to invoke the Commission's rule on discovery, WAC 480-07-400(2)(b) and the request was granted. Discovery will proceed in accordance with Commission's rules, WAC 480-07-400 – 425.
- 19 **PROCEDURAL SCHEDULE.** The parties agreed upon a basic framework for a procedural schedule during the conference. The Commission adopts this procedural schedule, which is attached to this Order as Appendix B, and incorporated into the body of this Order by this reference, subject to further refinements and revisions at the Second Prehearing (Status) Conference.
- 20 **NOTICE OF SECOND PREHEARING (STATUS) CONFERENCE.** The Commission schedules a second prehearing conference in this matter, to commence on **Wednesday, August 1, 2007, at 9:30 a.m., in Room 108, First Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.**
- 21 **Parties may attend the status conference on August 1, 2007, via the Commission's teleconference bridge line (360) 664-3846.** If you appear via the teleconference, you must place your call five minutes before the time that the conference is scheduled to being. *Note:* There is limited space for participation on the bridge line and space cannot be reserved.

- 22 **DOCUMENT PREPARATION AND FILING REQUIREMENTS.** Parties must file an original plus twelve (12) copies of all pleadings, motions, briefs, and other prefiled materials. These materials must conform to the format and publication guidelines in WAC 480-07-395 and WAC 480-07-460. The Commission prefers that materials be three-hole punched with *oversized* holes to allow easy handling. The Commission may require a party to refile any document that fails to conform to these standards.
- 23 All filings must be mailed or delivered to the Executive Secretary, Washington Utilities and Transportation Commission, P.O. Box 47250, 1300 S. Evergreen Park Drive, S.W. Olympia, Washington 98504-7250. Both the post office box and street address are required to expedite deliveries by the U.S. Postal Service.
- 24 An electronic copy of all filings must be provided through the Commission's Web Portal (www.wutc.wa.gov/e-filing) or by e-mail delivery to records@wutc.wa.gov. Alternatively, parties may furnish an electronic copy by delivering with each filing a 3.5-inch IBM-formatted high-density diskette or CD including the filed document(s). Parties must furnish electronic copies in MS Word 6.0 (or later) supplemented by a separate file in .pdf (Adobe Acrobat) format. Parties must follow WAC 480-07-140(5) in organizing and identifying electronic files.
- 25 **ELECTRONIC SUBMISSION OF DOCUMENTS.** Pursuant to WAC 480-07-145(6), the presiding officer grants a one-day extension of the paper-filing requirement, allowing electronic submission of documents with the Commission on the filing deadline. Parties must submit documents through the Commission's Web Portal (www.wutc.wa.gov/e-filing) or by e-mail to records@wutc.wa.gov, and file an original, plus twelve (12) paper copies, of the documents with the Commission by noon on the following business day. Parties must provide courtesy copies of their electronic submissions to the presiding administrative law judge and the parties to the proceeding.
- 26 **ALTERNATE DISPUTE RESOLUTION.** The Commission supports the informal settlement of matters before it. Parties are encouraged to consider means of resolving disputes informally. The Commission does have limited ability to provide dispute resolution services; if you wish to explore those services, please call Ann E. Rendahl, Director, Administrative Law Division, at (360) 664-1144.

27 **NOTICE TO PARTIES:** Any objection to the provisions of this Order must be filed within ten (10) days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review. *Any objections timely filed will be taken up at the Second Prehearing (Status) Conference scheduled for August 1, 2007.*

Dated at Olympia, Washington, and effective July 20, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

ADAM E. TOREM
Administrative Law Judge

APPENDIX A				
PARTIES' REPRESENTATIVES				
DOCKET TR-070696				
PARTY	REPRESENTATIVE	PHONE	FACSIMILE	E-MAIL
BNSF	BRADLEY SCARP Montgomery Scarp MacDougall, PLLC 1218 Third Avenue, Suite 2700 Seattle, WA 98101	206-625-1801	206-625-1807	brad@montgomeryscarp.com
CITY OF MT VERNON	KEVIN ROGERSON City Attorney 910 Cleveland Avenue P.O. Box 809 Mount Vernon, WA 98273	360-336-6203	360-336-6267	kevinr@ci.mount-vernion.wa.us
SKAGIT COUNTY	STEPHEN R. FALLQUIST Civil Deputy Pros. Atty 605 S. 3 rd Street Courthouse Annex Mount Vernon, WA 98273	360-336-9460	360-336-9497	Stephen@co.skagit.wa.us
WSDOT – FREIGHT SYSTEMS DIVISION (Jeff Schultz)	SCOTT LOCKWOOD Asst. Attorney General 7141 Cleanwater Dr SW P.O. Box 40113 Olympia, WA 98504-0113	360-753-1620	360-586-6847	ScottL@atg.wa.gov
SKAGIT COUNTY FIRE PROTECTION DIST. No. 3	BRIAN K. SNURE Snure Law Office, PSC 612 S. 227 th Street Des Moines, WA 98198	206-824-5630	206-824-9096	Brian@snurelaw.com

PARTY	REPRESENTATIVE	PHONE	FACSIMILE	E-MAIL
WESTERN VALLEY FARMS, LLC as well as DAVID & YVONNE BOON	GARY T. JONES Jones & Smith Attorneys at Law 415 Pine Street P.O. Box 1245 Mount Vernon, WA 98273	360-336-6608	360-336-2094	gjones@jonesandsmith.com
[<i>Not a Party</i>] S & B LAND, LLC as well as PATRICIA & RICHARD SMITH and ROBERT & PAMELA BURKLAND	[<i>Intervention Denied</i>] GARY T. JONES Jones & Smith Attorneys at Law 415 Pine Street P.O. Box 1245 Mount Vernon, WA 98273	360-336-6608	360-336-2094	gjones@jonesandsmith.com
COMMISS'N STAFF	JONATHAN THOMPSON Asst. Attorney General 1400 S Evergreen Park Dr SW P.O. Box 40128 Olympia, WA 98504-0128	360-664-1225	360-586-5522	JThomps@utc.wa.gov
Admin. Law Judge	ADAM E. TOREM 1300 S Evergreen Park Dr SW P.O. Box 47250 Olympia, WA 98504-7250	360-664-1138	360-664-2654 [<i>ALD fax only</i> – <i>do not use to file</i>]	atorem@utc.wa.gov

**APPENDIX B
PROCEDURAL SCHEDULE
DOCKET TR-070696**

EVENT	DATE	INTERVAL
Prehearing Conference	Friday, July 13, 2007	—
Commission Staff to Issue Letter on SEPA Applicability/Compliance	Wednesday, July 25, 2007	12 Days
Second Prehearing Conference	Wednesday, August 1, 2007	7 Days
Filing of Motions, Responses, and Reply Briefs	August / Sept 2007	—
Hearing on Motions (<i>Seattle</i>)	Wednesday, September 19, 2007	—
Petitioner BNSF's and Proponents' Prefiled Direct Testimony	To be Determined	—
Respondent City of Mt Vernon's and Other Opponents' Prefiled Direct Testimony	To be Determined	—
All Parties' Prefiled Rebuttal Testimony	To be Determined	—
Settlement Discussions	Week of _____	—
Evidentiary / Cross-Exam Hearing	To be Determined	—
Public Comment Hearing	To be Determined	—
Closing Arguments / Briefs	To be Determined	—