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6 BEFORE THE WASHINGTON  
7 UTILITIES AND TRANSPORTATION COMMISSION

8 BNSF RAILWAY COMPANY, )

9 Petitioner, )

10 vs. )

11 )  
12 CITY OF MOUNT VERNON, )

13 Respondent. )  
14 )  
15 )  
16 )

DOCKET NO. TR-070696

PETITIONER BNSF'S MOTION TO  
LIMIT THE SCOPE OF THE SUBJECT  
MATTER BEFORE COMMISSION

17 **I. INTRODUCTION AND RELIEF REQUESTED**

18 Petitioner BNSF Railway Company ("BNSF"), formerly the Burlington Northern and  
19 Santa Fe Railway Company, submits the following Motion to Limit the Scope of the Subject  
20 Matter Before the Commission during the hearing on BNSF's Petition to Close the Grade  
21 Crossing at Hickox Road, Mount Vernon, Washington.

22 By formally setting forth the legal standards in support of its position, BNSF respectfully  
23 requests that the Commission limit the scope of the subject matter to those matters dealing  
24 directly with the public safety. The statutory standard for evaluating whether a crossing should  
25 be closed is whether "public safety requires ... the closing or discontinuance of an existing  
26 highway crossing." RCW 81.53.060. Case law and prior Utilities and Transportation  
27 Commission ("UTC") rulings have provided a series of factors that help to define the parameters

1 of “public safety,” and this case presents no extraordinary circumstances that require the UTC to  
2 go beyond the settled scope of railroad grade crossing closure hearings.<sup>1</sup>

## 3 4 **II. STATEMENT OF FACTS**

5 In April 2007 BNSF petitioned the UTC to close the grade crossing at Hickox Road in  
6 Mount Vernon, Skagit County Washington. The petition was assigned docket number  
7 TR-070696 by the UTC and during the public comment period the UTC received comments from  
8 over 30 local businesses, government entities and private individuals in opposition to the closure.  
9 RCW 81.53.060 requires that the UTC hold a hearing when a petition to close a crossing is  
10 opposed and the parties participated in a prehearing conference on July 13 to begin the process  
11 of defining the proper scope of the hearing and settling procedural and scheduling matters.

12 Hickox Road runs perpendicular to Interstate 5 and Old Highway 99 South just south of  
13 the city of Mount Vernon. The railroad tracks parallel I-5 in that area, and run fairly close to the  
14 Interstate. Hickox Road is one of three crossings in the area. West Stackpole Road is one mile  
15 to the south, and Blackburn Road is 1.5 miles to the North. Hickox Road itself has an I-5  
16 on-ramp for southbound traffic and an exit for northbound traffic, but it is not a full interchange.  
17 Local government groups have, apparently in conjunction with WSDOT, explored expanding this  
18 interchange to contain full on- and off-ramps in both directions. Farmland and residential  
19 property are to the west of the railroad tracks. To the east of the grade crossing, the area has been  
20 designated as the southern boundary to the Mount Vernon Urban Growth Area, while the area to  
21 the north of the crossing is zoned for light industrial and commercial use.

22 In addition, the area lies within the Skagit River floodplain, which FEMA reportedly  
23 considers potentially one of the most damaging rivers in the state. The City of Mount Vernon  
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25 <sup>1</sup>BNSF acknowledges that the Second Prehearing Conference Order issued on August 14, 2007 addressed  
26 its initial concerns regarding the relevance of Regional Transportation Planning. This motion, however, is meant to  
27 more broadly address the proper standards for ensuring the relevance of evidence and testimony submitted by the  
parties in this proceeding and to formally outline the standards for reviewing admissibility. It is intended to allow  
these standards “to get more firmly grounded” in the law, as suggested by Judge Torem during the Second Prehearing  
Conference on August 1 (*See Transcript*, Vol. II, 77).

1 estimates that there is a 10% chance of flooding in any given year. This potential means that  
2 residents must occasionally evacuate their homes and business, and residents in the Hickox Road  
3 area suggest that it has been used as a route away from the Skagit River.

4 The crossing falls within WSDOT's larger Mount Vernon Siding Upgrade project, which  
5 involves upgrading and lengthening a side track (a track used by railroads to temporarily store rail  
6 cars while another train uses the mainline) between Stackpole Road and Blackburn Road to  
7 improve both passenger and freight rail traffic. This stretch of track is a major part of the planned  
8 upgrades for high-speed rail service between Portland and Vancouver, B.C., and it is a federally  
9 designated High Speed Rail Corridor. The project has already upgraded the existing side track  
10 and will soon extend the side track across Hickox Road. This site was selected for the siding  
11 project because of the efficiencies of upgrading the existing side track and its location allows both  
12 passenger and freight trains to overtake or pass each other while maintaining viable arrival and  
13 departure times at points north and south. Once the side track is complete, Hickox Road will  
14 cross the new side track in addition to crossing the mainline.

15 At the prehearing conference on July 13, parties had an initial discussion regarding the  
16 proper scope of the hearing, and agreed that the statutory language in RCW 81.53.060 basing the  
17 criteria on "public safety" should serve as the starting point. Parties have continued to disagree  
18 regarding how to define that term, however, and both BNSF and Mount Vernon filed objections  
19 to the Initial Preconference Order issued in this proceeding. BNSF files this motion in response  
20 to the Second Prehearing Conference Order to outline in greater detail what it believes is the  
21 proper scope of the issues before the UTC.

### 22 23 **III. ISSUE PRESENTED**

24 This matter presents a question regarding the proper scope of a WUTC hearing into the  
25 merits of closing a grade crossing. The statutory language is unambiguous; the proper focus of  
26 the hearing is whether the public safety requires the closing of the crossing. Ultimately, this  
27 hearing presents a question of how broadly or how narrowly the UTC should define the phrase

1 “public safety” to properly reach a decision on the merits of the closure without expanding its  
2 jurisdiction beyond the established boundaries.

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5 **IV. EVIDENCE RELIED UPON**

6 This motion is based upon the pleadings and materials on file in this action.  
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9 **V. AUTHORITY AND ARGUMENT**

10  
11 **A. The statutory language clearly restricts the inquiry to matters of public safety.**

12 Washington law unambiguously states that the proper focus of a UTC hearing into  
13 whether a grade crossing should be closed is *public safety*. The relevant statutory language reads,  
14 “Any railroad company ... may file with the commission ... its petition in writing, alleging that  
15 the public safety requires ... the closing or discontinuance of an existing highway crossing.”  
16 RCW 81.53.060. While this language is clear, the meaning of the terms “public safety” and  
17 “require” are subject to some degree of interpretation. Courts have tended to rule that the  
18 statutory language implies a balance between public safety and the use of the crossing, and that  
19 additional factors should be included in a proper UTC hearing.  
20

21 **1. Existing case law and previous grade crossing hearings have narrowly**  
22 **defined the scope of public safety to those matters directly related to the use**  
23 **of the crossing.**

24 Fortunately, this question is not one that needs to be redefined at each grade crossing  
25 closure hearing, and both the Washington Supreme Court and the UTC have ruled that additional  
26 factors directly related to the current use of the crossing are appropriate. Because the inherent  
27 dangers of grade crossings, “the Commission generally will grant a petition to close a grade  
crossing unless the public need for the crossing outweighs the hazards that result from the

1 crossing.” *Burlington Northern Railroad Company v. City of Ferndale*, Docket No. TR\_940330  
2 (March 1995). This balancing test was stated more thoroughly by the Washington Supreme  
3 Court, “Having found that the grade crossing herein is dangerous and unsafe, we must also  
4 consider the convenience and necessity of those using the crossing and whether the need of the  
5 crossing is so great that it must be kept open notwithstanding its dangerous condition.”  
6 *Department of Transportation v. Snohomish County*, 35 Wn.2d 247, 254 (1949). These cases  
7 suggest that absent a compelling showing of great need for a crossing, a crossing is presumptively  
8 dangerous and the UTC should grant a closure request.

9 To help evaluate the convenience and necessity of the public’s use of the crossing, the  
10 UTC uses factors such as the following characteristics of the crossing:

- 11 • the amount and character of travel on the railroad and on the highway;
- 12 • the availability of alternate crossings;
- 13 • whether the alternate crossings are less hazardous;
- 14 • the ability of alternate crossing to handle any additional traffic that would result from  
closure; and
- 15 • the effect of closing the crossing on public safety factors such as fire and police control

16 *Burlington Northern Railroad Co. v. Skagit County*, Docket No. TR\_940282 (Dec. 1996). Each  
17 of these factors is in the present tense and incorporates current considerations of the public  
18 convenience and necessity of the crossing. These are not factors that contemplate abstract policy  
19 considerations, future development possibilities or hypothetical and speculative changes to the  
20 use of the crossing. Because the rail line and side track at issue in this case are along the heavily  
21 traveled BNSF main line running between Seattle and Vancouver, it is illogical to allow the  
greater risks to public safety in the face of hypothetical factors.

22 Nor does this case present specific circumstances that would require the Commission to  
23 broaden the scope of the inquiry beyond these factors. As in many grade crossing hearings,  
24 preliminary comments and proceedings in this matter indicate that two main sources of public  
25 concern in this case are emergency response times and the potential impact on flood escape  
26 routes. See, e.g., Comments filed by Skagit County Commissioners (May 14, 2007) and the  
27 Mayor of Mount Vernon (December 6, 2006). Evaluating these two issues on the merits can be

1 done more than adequately by using the public safety factors. More travel on the roads might  
2 indicate greater numbers of people potentially requiring emergency services. Less travel might  
3 indicate the crossing is not a great necessity. Easily accessible and better protected crossings  
4 might point towards closure, while a heavily used but isolated crossing might support safety  
5 solutions other than outright closure. While the respondents in this case are likely to portray  
6 Hickox Road as a highly unique crossing – which it may or may not be – the reality is that the  
7 factors previously outlined by Washington courts and the UTC are more than capable of  
8 providing a substantial and in-depth analysis into the merits of whether public safety requires the  
9 closing of the crossing.

10  
11 **2. An examination of public safety requires those factors currently in existence,  
12 not factors that are conjectural, hypothetical or mere possibilities.**

13 The proper public safety analysis is focused on the current and directly foreseeable use  
14 of the crossing, not the use as it may become under different circumstances or different scenarios.

15 The UTC has itself previously summarized the rationale behind this distinction:

16 The Commission agrees with the initial order's conclusion that only the present  
17 public need should be considered in determining whether to close a crossing.  
18 Where the legislature has considered future need to be a relevant consideration,  
19 that has been stated. See, for example, RCW 81.80.070 in which the Commission  
20 was directed to consider the present or future public convenience a necessity in  
a grant of motor carrier authority. In addition, as pointed out by Commission  
Staff, the City is always entitled to petition the Commission to open a grade  
crossing, should the public need for it arise.

21 Finally, even if future need for the crossing were a relevant consideration, the  
22 Commission would not be persuaded that the likely future use of the at grade  
crossing is anything more than speculative and highly uncertain.

23 *Burlington Northern Railroad Company v. City of Ferndale*, Docket No. TR\_940330. In  
24 *Ferndale*, BNSF petitioned the UTC to close the crossing because expanding Amtrak service  
25 required the construction of a side track for temporary storage of rail cars so the faster passenger  
26 trains could maintain a proper schedule. The UTC evaluated the opposing claims by the City  
27 using the factors listed above and concluded that public safety required the closure. While the

1 similarities to this case on the merits will be presented at the appropriate time, what is important  
2 about *Ferndale* at this juncture is that the UTC declined to speculate on future uses to evaluate  
3 the merits.

4 There are no underlying circumstances in this case that would necessitate such review  
5 either. The side track is currently under construction and when completed, there will be two sets  
6 of tracks. The crossing would be blocked for indeterminate amounts of time. Though the growth  
7 of the agricultural sector on one side of the tracks and the developing cityscape on the other are  
8 factors in determining what the *future* use of the crossing might be, they are not new or novel  
9 factors that require broadening the UTC's analysis. And each time the UTC evaluates a grade  
10 crossing closure petition, it has wisely decided that than an evaluation of current public safety  
11 needs against the current use of the crossing is the proper evaluation. To disregard current safety  
12 issues in order to consider leaving a crossing open based on speculative and highly uncertain uses  
13 would go against precedent and undermine the sound policy and analysis set forth therein.

14  
15 **B. The UTC is an agency of limited subject matter jurisdiction which does not include**  
16 **hearings into the adequacy of environmental review or coordination with regional**  
17 **growth and development planning bodies.**

18 RCW provisions and WAC regulations outline a comprehensive approach to carrying out  
19 the execution and review of the State's administrative functions and the UTC has neither the  
20 authority nor the expertise to review matters in this hearing beyond an inquiry into whether the  
21 public safety requires the closing of the grade crossing at Hickox Road. The UTC is given  
22 statutory authority to "regulate in the public interest, as provided by the public service laws, the  
23 ... practices of all persons engaging in the transportation ... [of] property within this state for  
24 compensation ... including freight and freight line companies." RCW 80.01.040. This authority  
extends to conducting hearings on:

- 25 (a) Formal complaint proceedings commenced pursuant to RCW 80.04.110  
26 [Water standards] or 81.04.110 [public service companies];
- (b) General rate proceedings;
- 27 (c) Applications for authority (e.g., certificates, licenses, and permits);

- (d) Petitions for enforcement of interconnection agreements;
- (e) Objections to closures of highway-railroad grade crossings;
- (f) Declaratory order proceedings.

WAC 480-07-300. That authority, however, is not unlimited. For example, it does not extend to hearings regarding the proper workings of the Department of Transportation. See RCW 47.01.011 (“Through this chapter, a unified department of transportation is created”). Neither does it extend to hearings regarding the state’s agricultural policies. See RCW 15.04.400 (“The department of agriculture has a duty to promote and protect agriculture and its dependent rural community in Washington state...”).

This limited jurisdiction of the UTC reinforces the concept that a rail crossing closure hearing is not an open-ended process. The focus should not be on BNSF business plans or strategies, how well WSDOT and the local governments have coordinated, or how well the local governments have attempted to address flood management plans or emergency services. The focus is regulating the grade crossing closure process as provided by the public service laws, which have limited the scope to whether *public safety* requires the closure of the crossing.

**1. The Surface Transportation Board has Exclusive Jurisdiction over the Environmental Review of Rail Projects.**

In addition to avoiding intra-state agency conflicts, maintaining a narrow focus on public safety issues also avoids a larger conflict with federal railroad regulations. Railroads are subject to extensive federal regulations, many of which preempt local and state regulations. See *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9<sup>th</sup> Cir. 1998) (“We begin by first noting that Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well established and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area”) (internal citations omitted). The U.S. Supreme Court has clarified that:

Where a state statute conflicts with, or frustrates, federal law, the former must give way.... To prevail on the claim that the regulations have pre-emptive effect,



1 petitioner must establish more than that they "touch upon" or "relate to" that  
2 subject matter.

3 *CSX Transp. v. Easterwood*, 507 U.S. 658, 663-664 (U.S. 1993) (internal citations omitted). In  
4 this case, there is little doubt that federal environmental regulations do more than simply "touch  
5 upon" this field, and therefore preempt local review.

6 The proper agency for reviewing any environmental compliance is not the UTC but is  
7 instead the federal Surface Transportation Board ("STB"). Courts have consistently held that  
8 local environmental review for rail projects related to transportation activities are preempted by  
9 national review. While that preemption does not preclude respondents from objecting to the  
10 environmental review at the federal level, either with the STB or the Ninth Circuit, depending on  
11 the level of previous STB involvement, the UTC does not have the authority to compel additional  
12 environmental review.

13 The STB has exclusive jurisdiction over the "construction, acquisition, operation,  
14 abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities,  
15 even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. §  
16 10501(b)(2). In addition, the Ninth Circuit has held that this preemption extends to  
17 environmental review:

18 Given the broad language of § 10501(b)(2), (granting the STB exclusive  
19 jurisdiction over construction, acquisition, operation, abandonment, or  
20 discontinuance of rail lines) the distinction between "economic" and  
21 "environmental" regulation begins to blur. For if local authorities have the ability  
22 to impose "environmental" permitting regulations on the railroad, such power will  
23 in fact amount to "economic regulation" if the carrier is prevented from  
24 constructing, acquiring, operating, abandoning, or discontinuing a line.

25 *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998). See also *Green Mountain*  
26 *R.R. Corp. v. State of Vermont*, 2003 U.S. Dist. LEXIS 23774, \*22-23 (2003) ("Under similar  
27 circumstances, both courts and the STB have determined that state environmental regulations,  
however laudable, are preempted under the ICCTA"). In this case, preemption means that the  
UTC does not have authority to evaluate whether state SEPA requirements were met. Therefore,

1 whether petitioners have undertaken proper environmental review steps – while certainly an  
2 important matter – is not before the UTC. Any objections respondents may wish to make should  
3 properly be done in a separate forum.  
4

5 **2. The Growth Management Board is the Proper Forum for Land Use Planning**  
6 **Disputes**

7 Neither is the UTC the proper forum for land use planning disputes, including whether  
8 WSDOT and the Regional Transportation Planning Organizations did or did not, or even should  
9 have, acted in greater coordination regarding the future use of Hickox Road. The Growth  
10 Management Board is instead the proper state review agency for such issues. While RCW  
11 81.53.060 simply asks whether public safety requires the closing of the grade crossing, the  
12 Growth Management and land use planning statutes outline the legislature’s goal to create a  
13 comprehensive planning process based on “the public’s interest in the conservation and the wise  
14 use of our lands.” RCW 36.70A.010. Moreover, the Growth Management Hearing Boards are  
15 explicitly charged with hearing petitions alleging “that a state agency, county, or city planning  
16 under this chapter is not in compliance with the requirements of this chapter.” RCW 70A.280.  
17 How the siding project and the accompanying closure of Hickox Road fits into longer-term  
18 county plans, and how to weigh any potential conflicts with the State’s broader transportation  
19 plans, involve issues that go beyond the narrow public safety criteria used to evaluate grade  
20 crossing petitions. The UTC does not have jurisdiction to review such matters, and to do so in  
21 this case is to usurp the authority the legislature has expressly given to another agency. To the  
22 extent that the grade crossing closure and the siding project impact the public interest and quality  
23 of life enjoyed by residents of the state, the Growth Management Board has the unique authority  
24 and expertise to consider such matters, not the UTC.

25 **C. Lack of UTC Jurisdiction Does Not Preclude Respondents from Seeking a Broader**  
26 **Review**  
27

1 While respondents would arguably have a more compelling argument for expanding the  
2 scope of the UTC hearing if there were no other adjudicative bodies to properly review their  
3 concerns, that is not simply the case in this matter. Environmental review questions may be  
4 brought before the federal Surface Transportation Board. Planning and development concerns  
5 can be brought before the Growth Management Hearing Board. Furthermore, the factors for  
6 grade crossing closure evaluation and hearing procedures have been well-settled for a long time.  
7 The Washington legislature is the proper body to change or modify those requirements and local  
8 government officials can work with their representatives to modify the controlling statutes and  
9 regulations. In addition, respondents may or may not have neglected to pursue their concerns  
10 with the appropriate boards in a timely manner or simply allowed the process to proceed until it  
11 finally does not suit their purposes, but that should not effect the scope of this particular hearing.  
12 BNSF and WSDOT have relied upon the law as it exists in planning, developing, and carrying out  
13 this particular project. Respondents should be required to do the same.

## 14 15 VI. CONCLUSION

16 RCW 81.53.606 outlines that the proper inquiry into whether a crossing should be closed  
17 is whether the public safety requires it. As a practical matter, courts have limited the factors that  
18 inform that inquiry to those matters that are directly related to the current use of the crossing in  
19 its current or directly pending configuration. The UTC is not the proper forum for an extended,  
20 tangential or abstract discussion of environmental review or growth and developing planning  
21 procedures. The grade crossing closure hearings instead have a highly functional purpose. This  
22 focused approach is not an attempt to exclude relevant factual matter, but is instead to allow the  
23 relevant factual matter to be fully brought before the commission and debated so that the UTC  
24 can make a proper decision on the merits regarding whether public safety requires the closing of  
25 the crossing.



1 **CERTIFICATE OF SERVICE**

2  
3 I am over the age of 18; and not a party to this action. I am the assistant to an attorney  
4 with Montgomery Scarp MacDougall, PLLC, whose address is 1218 Third Avenue, Suite  
5 2700, Seattle, Washington, 98101.

6 I hereby certify that true and complete copies of PETITIONER BNSF'S MOTION TO  
7 LIMIT THE SCOPE OF THE SUBJECT MATTER BEFORE THE COMMISSION have  
8 been sent via U.S. Mail and Electronic Mail to the following interested parties:

9  
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I declare under penalty under the laws of the State of Washington that the foregoing  
information is true and correct.

DATED this 28<sup>th</sup> day of August, 2007 at Seattle, Washington.

  
\_\_\_\_\_  
Lisa Miller, Legal Assistant