

35 Wn.2d 247, THE DEPARTMENT OF TRANSPORTATION et al., Appellants, v. SNOHOMISH COUNTY et al., Respondents

[No. 30835. En Banc. Supreme Court December 14, 1949.]

THE DEPARTMENT OF TRANSPORTATION et al., Appellants, v. SNOHOMISH COUNTY et al., Respondents.«1»

[1] PUBLIC SERVICE COMMISSIONS - RAILROADS - CLOSING GRADE CROSSINGS - ORDERS OF DEPARTMENT - APPEAL - COST BOND. A review of an order of the department of transportation closing a railroad grade crossing is governed by Rem. Rev. Stat. (Sup.), § 10523, relating to railroad and highway crossings and providing that orders of the public service commission may be reviewed in the superior court of the county wherein the crossing involved is situated, which statute does not require that a bond for costs be filed when petition is made for such review; therefore, the superior court of the proper county had jurisdiction to review such an order where no cost bond was filed with the petition for review.

[2] APPEAL AND ERROR - REVIEW - EXTENT DEPENDENT ON NATURE OF CASE - RULINGS OF ADMINISTRATIVE BOARDS - FINDINGS. On appeal from a judgment reversing an order of the department of transportation closing a grade crossing, the supreme court is not required to give the findings of the trial court the same weight as it ordinarily gives when a case is tried before the court without a jury and the trial court sees and hears the witnesses; since the trial court reached its conclusions from a transcript of the oral evidence and the exhibits submitted at the departmental hearing, and the supreme court, in that respect, is in the same position as was the trial court.

[3] PUBLIC SERVICE COMMISSIONS - RAILROADS - CLOSING GRADE CROSSINGS - ORDERS OF DEPARTMENT - APPEAL - SCOPE OF REVIEW. Upon an application to close a grade crossing to vehicular traffic, the findings of the department of transportation upon the facts will not be disturbed on appeal unless they show evidence of arbitrariness or disregard of the testimony or the material rights of the parties; and held in this case that the department fully considered the testimony and exercised its honest judgment in ordering the grade crossing closed, and that its order should not be disturbed.

SIMPSON, C. J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Olson, J., entered October 1, 1948, reversing an order of the department of transportation closing a grade crossing. Reversed.

The Attorney General, John Lindberg, and Phil H. Gallagher, Assistants, for appellant department of transportation.

«1» Reported in 212 P. (2d) 829.

[3] 42 Am. Jur. 490.

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Thomas Balmer, A. J. Clynch, and R. Paul Tjossem, for appellant Great Northern Railway Company.

Little, Leader, LeSourd & Palmer, for respondents.

ROBINSON, J. -

On March 17, 1947, the director of the department of transportation of the state of Washington made an order closing the grade crossing of Park avenue in the town of Mukilteo, in Snohomish county, to vehicular traffic over the tracks of the Great Northern Railway Company. The superior court of Washington, for Snohomish county, issued a writ of review. In response to the writ, the department certified to the court a transcript of oral testimony, taken at a hearing conducted by it prior to the making of an order; also, the exhibits introduced in evidence, its findings of fact, and the closure order of March 17. After considering the oral testimony given at the departmental hearing and the exhibits then introduced, the superior court made findings of fact and conclusions of law, and entered a judgment reversing the order made by the department of transportation and directing it to dismiss the petition of the Great Northern Railway Company and enter an order directing the company forthwith to reopen the grade crossing to vehicular traffic. The department and railway company have appealed from that

judgment.

[1] Before considering this appeal on the merits, we must pass upon the contention made by the appellants in their opening brief that the superior court did not have jurisdiction to review the order of the department. That contention seems to be made upon the theory that the review of the closure order of the department of transportation was, in effect, an action against the state of Washington and governed by Rem. Rev. Stat., § 886 [P.P.C. § 933-1]. In the actions therein provided for, the plaintiff is required to file a surety bond to indemnify the state as to costs, and no such bond was filed in this cause. However, we think that the review of the departmental order sought in this proceeding was applied for pursuant to Rem. Rev. Stat. (Sup.), § 10523 [P.P.C. § 824-21], Laws of 1937, chapter 22, Railroad and

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Highway Crossings, pp. 59-60, § 6, wherein it is provided that orders of the public service commission may be reviewed in the superior court of the county wherein the crossing involved is situated. However, there is no provision that a bond for costs shall be required in petitioning for such a review.

The order involved in this case was not, strictly speaking, made by the public service commission but by a division of the department of public works which succeeded to the powers and duties of the public service commission and is itself composed of three divisions, (1) "the division of transportation," (2) "the division of public utilities," and (3) "the division of highways." Rem. Rev. Stat., § 10779 [P.P.C. § 239-1], Laws of 1921, chapter 7, § 21, p. 18. The order which was reviewed by the superior court of Snohomish county was issued by the department of transportation, which will hereinafter be referred to as the department. Since the order involved a crossing situated in Snohomish county, we hold the superior court of that county had jurisdiction to review it, although no cost bond was filed with the petition for review.

By virtue of Rem. Rev. Stat. (Sup.), § 10523, Laws of 1937, chapter 22, § 6, p. 59, the superior court, in making such a review, is authorized to consider the reasonableness and lawfulness of the order under review, and the statute also authorizes the appeal to this court from the judgment entered on review.

[2] We will, therefore, consider this matter on the merits. In so doing, we will keep in mind that the trial court was also a reviewing court and, as such, did not see the witnesses or hear them testify, and had to reach its conclusions from a transcript of the oral evidence given at the departmental hearing and the exhibits submitted therein. We also must review the judgment appealed from upon the same evidence and exhibits, and are, therefore, not required to give the findings of the trial court the same weight which we ordinarily give when a case is tried before the court without a jury and the trial court sees and hears the witnesses.

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Laws of 1937, chapter 22, p. 50, is an act of which the short title is: "Railroad and Highway Crossings." By § 2 of that act, currently codified as Rem. Rev. Stat. (Sup.), § 10514 [P.P.C. § 824-7], the legislature delegated very wide powers to the public service commission with regard to railroad and highway crossings, and those powers are now vested in the department of transportation. The department is authorized to establish under crossings or grade crossings, or to change the location of an existing highway or crossing, or to cause the closing or discontinuance of an existing highway crossing and divert the travel thereon to another highway or crossing, or, if not practicable, to change such crossing from grade, or to close and discontinue the crossing and open an additional crossing for the partial diversion of travel; and these powers are now vested in the department of transportation. In short, the department is given wide powers to rearrange the traffic over or under railways by closing certain crossings and opening others, and may even change the locations of the highways themselves.

When an application is made to the department to close a grade crossing, as was done in this matter,

the department is required to fix a time and place of hearing and give notice to all parties who may be presumed to be affected thereby. After the hearing, the department must make and file its written findings of fact concerning the matters inquired into and enter its order based thereon, specifying any changes to be made by way of closing the grade crossing or establishing an under crossing or over crossing at the grade crossing, or the highway may be closed at the crossing point and the travel diverted through another channel. The whole purpose of § 2 of the railroad and highway crossing act (Laws of 1937, chapter 22, p. 50; Rem. Rev. Stat. (Sup.), § 10514) is to promote the public safety. In enacting it, the legislature was merely reaffirming a long-established legislative policy.

In *Reines v. Chicago, M., St. P. & Pac. R. Co.*, 195 Wash. 146, 150, 80 P. (2d) 406, a case decided in 1938, this court said, in part:

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"The statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous, and administrative commissions have existed for many years with extensive powers of regulation. As early as 1909 an act was passed providing that all railroads, or extensions thereof thereafter constructed should cross all existing railroads and highways by passing under or over, unless authorized to do otherwise by consent of the railroad commission. Laws of 1909, chapter 162, p. 618. Subsequent legislation provided that towns and counties or the state highway commissioner might, upon allegations that the public safety required it, petition for the elimination of existing grade crossings and a substitution of under or over crossings, and provided for the machinery for carrying that purpose into effect, including the right of eminent domain. Laws of 1913, chapter 30, p. 74; Laws of 1921, chapter 138, p. 494.

"Ever since 1909, the railroad commission, or the successor to its powers and duties, has had the power and duty to require any railroad to install and maintain proper signals, warnings, or other devices to warn and protect the public at any highway crossing. Rem. Rev. Stat., § 10513 [P.C. § 5640]. Additional and later legislation (1931) provides that railroads must install the sawbuck crossing signs, with the lettering 'Railroad Crossing,' at all grade crossings and 'additional safety devices and signs may be installed at any subsequent time when required by the department of public works.' Rem. Rev. Stat., § 6308-2 [P.C. § 2691-2], subd. (b)." (Italics ours.)

In the instant matter, the department strictly followed the procedure required by the statute. It fixed August 22, 1946, as the date of hearing. It served notice of the date and place of hearing on the petitioner, and also gave notice of the time and place of hearing to the commissioners of Snohomish county, and posted such notices at several places in the county. It further published notices in the *Everett Daily Herald*, and otherwise notified a number of persons known to be interested in the matter. Many of the residents of Mukilteo and its environs appeared at the hearing, as well as a number of persons from other parts of the county, including Everett. All persons in attendance, who desired to testify, were permitted to do so. Nineteen testified, and a

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stenographic record was made of their testimony. That record and eleven exhibits introduced at the hearing were before the trial court on review, and are, of course, a part of the record before us.

On March 17, 1947, the department filed comprehensive findings of fact, to which was appended the following order:

"WHEREFORE, IT IS ORDERED That the Park Avenue crossing be, and the same hereby is, closed to vehicular traffic.

"IT IS FURTHER ORDERED That the Great Northern Railway Company take such steps as are necessary to accomplish this closure.

"Dated at Olympia, Washington, March 17, 1947 and effective five days after date.

"DEPARTMENT OF TRANSPORTATION OF WASHINGTON
PAUL REVELLE
Director"

The department entered comprehensive findings of fact, and, in so doing, gave a thorough description of the physical features involved and a careful digest of the evidence given at the trial. Because of the length of these findings, we cannot fully state them in this opinion. However, we think a partial quotation from them should be included, as follows:

"Mukilteo is an unincorporated community located on Possession Sound between Seattle and Everett. The tracks of the Great Northern Company pass through Mukilteo in a general easterly-westerly direction. Park Avenue in Mukilteo crosses these tracks in a general northerly-southerly direction. At this crossing there are two main line tracks, a passing track and another track leading to a switch going to the government holdings on a dock located in Mukilteo. It is this crossing which the railway company is seeking to close.

"Approximately 500 feet west of this crossing is located a highway overpass. This overpass was built by the State Department of Highways as a Federal Aid project. Prior to the time this overpass was completed in 1941, Park Avenue was the only means of getting from the north part of Mukilteo to the south part of Mukilteo. During part of the war years the Park Avenue crossing was closed to vehicular traffic at the request of the U. S. Army. Secondary State Highway 1-I runs from a point between Everett and Seattle on U. S. Highway 99 to and across the above mentioned

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overpass. At Second Street in Mukilteo an extension of Highway 1-I goes in an easterly-westerly direction to Park Avenue, turns north for one block on Park, and at a point approximately 1/2 block south of the crossing turns in an easterly direction to Everett. Those persons desiring to travel between Everett and Seattle may do so without crossing the railroad crossing herein involved. Persons traveling between Everett and Mukilteo via Highway 1-I may do so in one of two ways: They may either use Second Street and the over-crossing, or they may use the Park Avenue crossing.

"Park Avenue, north of the crossing, is approximately two blocks in length. Located upon the west side thereof are some of the community's principal businesses. Other businesses are located on Front Street which intersects Park Avenue two blocks north of the crossing; also on Front Street is located the ferry dock which is used by ferries operating between Mukilteo and Whidby Island. To the south of the crossing on Park Avenue is the fire station, the post office and other important portions of the community.

"No traffic count was made as to the amount of vehicular traffic crossing the railroad tracks; however, evidence was adduced as to the amount of train travel at the intersection. During the month of July, 1946, the schedule of the Great Northern Railway Company shows that 12 eastbound trains and 12 westbound trains are scheduled to cross the intersection each day. During the month of July, 246 eastbound passenger trains, and 129 eastbound freight trains crossed this intersection. During the same period of time, 236 westbound passenger trains, and 136 westbound freight trains crossed the intersection. The total number of trains, therefore, crossing Park Avenue during the month of July, 1946, was 747.

"The maximum permissible speed, as set by the railroad company, for passenger trains is 60 miles per hour, and for freight trains it is 50 miles per hour. Some of these trains go at the maximum speed at the crossings.

"No evidence was adduced by petitioner as to the fact of there ever having been any serious accidents

involving automobiles and trains at this crossing. On the other hand, evidence was given by persons who had lived in the vicinity for a number of years that there had been no serious accidents. In spite of this record of no serious accidents, however, the department specifically finds that the grade

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crossing of Park Avenue and the Great Northern Railway tracks in Mukilteo is an exceedingly dangerous crossing because of the following factors: the grade of Park Avenue south of the railway tracks which, particularly in icy or wet weather, could cause northbound motor vehicles to slide onto the tracks, or southbound vehicles to slide backwards onto the tracks, the poor visibility available to motorists approaching the tracks, the number of trains using the tracks, and the speed with which these trains travel over this crossing. It is to be noted here that Mukilteo is not an incorporated city or town; therefore, the railroad company is under no obligation to reduce the speed of its trains.

"Having found that the grade crossing herein is dangerous and unsafe, we must also consider the convenience and the 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. A great deal of the evidence of various persons opposed to the closing of the crossing was directed to this proposition. As has been before stated in these findings, prior to the completion of the overpass west of the crossing, the crossing at Park Avenue was the only way in which persons could travel from one part of Mukilteo to the other. The overpass was constructed as a Federal Aid Project with the view of eliminating the crossing at Park Avenue. From all of the evidence it must be found that the overpass is not wide enough to allow free and unrestricted passage during seasons of the year when persons are traveling in great numbers upon the Mukilteo-Whidby Island Ferry. During the summer months, particularly on week-ends, it is very often the case that a line of cars is parked upon the overpass and on up the road beyond Fifth street, while other cars are moving from the ferry on to the overpass. As before stated the fire station for Mukilteo is located south of the railroad tracks, whereas a good portion of the business district is located north of the tracks. At the fire station is a pulmotor for use in resuscitating victims of drowning accidents. The beaches are also located north of the railroad tracks. It is possible with proper policing for fire equipment to use the overpass even during periods of great ferry travel. The cars coming off the ferry could be stopped and if the cars waiting to go onto the ferry were spaced so as to leave the access streets open and the center of the overpass open, the fire truck could proceed from the station on Second Street to the intersection of Second Street and the highway

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leading to the overpass, thence across the overpass, and thence to Front Street. A fire truck has the right of way in case of an emergency. If other users of the road traversed by the fire truck obey the law, there is access from the south side of the railway tracks to the north side. If other motorists disobey the law, and if they are not properly policed to provide sufficient space for the fire truck, the fire truck would have no way of going from the south portion of Mukilteo to the north portion. This department cannot make findings based upon the assumption that motorists will not obey the law. We must find, therefore, that the overpass provides access from the southern portion of Mukilteo to the northern portion for emergency vehicles. As to ordinary vehicular traffic, there is no great inconvenience in using the overcrossing rather than the grade crossing. The distance is not so great as to justify a finding that it would be not in the interest of the public to close the Park Avenue crossing to vehicular traffic.

"As to pedestrian traffic a different situation exists. To a pedestrian the greater distance which would have to be traversed in going from the south portion of Mukilteo to the north portion would be quite inconvenient. Furthermore, the matter of visibility at the crossing, and the grade of Park Avenue at the crossing would not be factors causing danger-to pedestrians nor to the trains. The department specifically finds, therefore, that the public interest will not be served by closing the Park Avenue-Great Northern Railway crossing to pedestrian traffic.

"It is contended by residents of Mukilteo that the closing of this crossing would damage business

property due to the fact that the closing of the crossing would result in making the north portion of Park Avenue a dead end street. The department has no jurisdiction to consider damage to property as such. Other remedies may be provided by law to compensate owners for damage to property, if any. The department may only consider whether or not convenience and necessity justifies the closing of the crossing. It would be convenient for the residents of Mukilteo for this crossing to remain open. However, because of the overpass there is no necessity for it to remain open.

"No evidence was adduced as to whether or not an overpass or an underpass would be feasible at Park Avenue. Because of the grade of Park Avenue, it is obvious that a highway underpass would not be feasible. A highway overpass would probably do more damage to business and

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business property on Park Avenue than a complete closure because of the fact that the overpass would extend so far into the north portion of Park Avenue. No evidence was adduced as to whether improvements could be made to the existing crossing other than that some structures adjacent to the crossing could be removed. This would not, however, do away with the steep grade on the southerly portion of Park Avenue. As to installing signals or gates or having a watchman on duty at the crossing, signals are already in operation and neither a watchman nor gates would make this crossing safe, principally because of the steep grade of Park Avenue south of the crossing.

"Having considered all of the evidence adduced at this hearing, and having in mind that the general policy of the law of the State of Washington is against the establishment or maintenance of grade crossings, the department finds that public safety requires the closing to vehicular traffic of Park Avenue where it crosses at grade the Great Northern Railway tracks in the community of Mukilteo in Snohomish County."

Extensive as the above quotation of findings is, we have omitted a great part of the findings of fact, consisting largely of the data as to the distances from which drivers of vehicles approaching the crossing can see an approaching train or whether there is a train actually on the crossing.

In reviewing the findings entered by the department, the trial judge held that the department rightly found that the crossing was dangerous, but refused to concur with the departmental finding that it was exceedingly dangerous

Despite the fact that both the department and the reviewing court found from the evidence that the crossing was dangerous, the respondents insistently contend that the evidence did not so prove, basing that contention primarily upon the fact that there was un rebutted testimony to the effect that there had never been an accident at that crossing, although it had been a grade crossing for at least forty years. We are not impressed by that argument. A father, with knowledge that his ten-year-old son constantly attended the so-called western movies, would hardly be considered prudent if he persisted in permitting a loaded pistol to lie around the home, on the theory that there was

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no danger in so doing since the boy had not yet shot anyone while playing with it. In our opinion, the evidence primarily established that the crossing was potentially dangerous. That was the major point with which the department was concerned.

[3] As hitherto shown, many of our statutes are based upon the theory that all grade crossings are dangerous, and from time to time the power to close them has been delegated to various commissions, not to the courts. Furthermore, we have consistently held that the courts should not, without grave cause, interfere with the orders of such commissions, such as the public service commission, the department of public works, or the department of transportation. In *In re Stolting*, 131 Wash. 392, 230 Pac. 405, the court said:

"Time and again we have held that we will not interfere with the action of the department of public works on matters of this nature unless its members have acted unfairly, arbitrarily or in disregard of the testimony. [Citing a long list of cases.] There is nothing in this case to indicate that the department did not fully consider the testimony and honestly exercise its judgment. Such being the case, there is nothing for us to do but affirm the judgment, which is done."

The rule above quoted from the opinion in the Stolting case has since been consistently followed by this court. For example, in its opinion in Northern Pac. R. Co. v. Department of Public Works, 144 Wash. 47, 256 Pac. 333, the court said, in 1927, citing eight of its previous decisions:

"Lastly, it is contended that the findings of convenience and necessity are not supported by the evidence. The record shows that a large number of witnesses, well situated to speak upon the subject, testified to the contrary and with considerable detail showing convenience and necessity for the extension of service granted by the order. By a long line of decisions [citing cases], we have held that we will not interfere with the findings and action of the department of public works in matters of this kind, in the absence of a showing that the members of the department acted unfairly or arbitrarily and in disregard of the material rights of the parties interested. There is nothing here inconsistent

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with the view that the department fully considered the testimony in the case and under the law exercised its honest judgment in disposing of it."

In State ex rel. Model Water & Light Co. v. Department of Public Service, 199 Wash. 24, 90 P. (2d) 243, decided in 1939, the court said, citing eight former decisions as authority for the statement:

"The findings of the department are to be given the same weight accorded to any impartial tribunal, and may not be overturned unless the clear weight of the evidence is against its conclusions, or unless it has mistaken the law applicable to the matter adjudicated, or, as sometimes expressed, unless the findings show evidence of arbitrariness and disregard of the material rights of the parties to the controversy. [Citing cases.]"

In 1945, in its opinion in Taylor-Edwards Warehouse & Transfer Co. v. Department of Public Service, 22 Wn. (2d) 565, 157 P. (2d) 309, this court reaffirmed and stated the general rule by quotation from a former decision as follows:

"In any event, it cannot be said that the department, in denying appellant's application, acted arbitrarily, capriciously, or upon a fundamentally wrong basis.

"Unless we can say that the order of the commission is wrong in the sense that its discretion has been arbitrarily exercised, we must, under well settled rules, say that it is not to be overcome by judicial decree. To do so would be but to substitute our own will for that of the commission, and in so doing we would in all probability trench upon some equities while declaring others.' State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co., 104 Wash. 405, 413, 176 Pac. 539."

There can be no doubt but that the closing of the crossing caused the residents of Mukilteo considerable inconvenience, and that, if we reverse the judgment entered by the trial court, it will continue to do so. However, we agree with the appellants that proper policing will, in a great measure, tend to relieve the situation, and we think that, if it does not, relief can undoubtedly be had by a proper petition to the administrative body which is clothed with such

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wide powers over railroad and highway crossings by chapter 22 of the Laws of 1937.

We find nothing in the record inconsistent with the view that the department fully considered the testimony in the case and, under the law, exercised its honest judgment in disposing of it, and we are not inclined to depart from our past decisions, and substitute our own judgment for that of the department.

The judgment appealed from is reversed and set aside, and the order of the department of March 17, 1947, will accordingly be sustained and enforced.

BEALS, MALLERY, SCHWELLENBACH, HILL, GRADY, HAMLEY, and DONWORTH, JJ., concur.

SIMPSON, C. J. (dissenting) - This controversy, in reality, is one between the Great Northern Railway Company and the people of the recently incorporated town of Mukilteo.

At a time prior to the hearing, the Great Northern Railway Company filed with the department its petition which reads as follows:

"I.

"The main line of the Great Northern Railway, doubletracked, extends in a northerly and southerly direction through the community known as Mukilteo in Snohomish County, Washington, and in said community crosses at grade a county road known as Park Avenue, which road is under the jurisdiction of Snohomish County, Washington; the said crossing being further identified as the grade crossing located at Great Northern Railway Survey Station 1617+00.

"II.

"Your petitioner alleges that the afore-described grade crossing is dangerous and unsafe and that public safety requires that the same be closed and permanently discontinued."

Just before the departmental hearing, sixty-six employees at the ammunition dock at Mukilteo, filed a protest against the closing of Park avenue "on the ground and for the reason that said road greatly 'facilitated' their means of passage to and from work, as most of the employees live in Everett or toward Everett." In addition, several property

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owners and individuals doing business in Mukilteo protested and testified.

To better indicate my reasons for dissent, I give the following word picture of the community: The town, inhabited by about fifteen hundred people, is located on Puget Sound, a short distance southwest of the city of Everett. The shore line of the sound at this point extends generally in an easterly-westerly direction. That is, the community faces toward the sound looking toward the north. The town is laid out so that Front street runs parallel and close to the shore line. As the community built up and moved inland, other streets were made at block intervals running parallel to Front street, being designated numerically, one through ten, with First street a block from Front street. The streets which run north and south have been given names. Of those streets, we are here concerned with Park and Lincoln avenues. These two streets are approximately five hundred feet apart, with Park avenue being east of Lincoln. Park avenue approaches the bathing beach, and Lincoln avenue, the ferry slip. Park avenue is sixty feet in width, and is surfaced to the north and south of the railroad crossing. The crossing itself is equipped with a wigwag signal and a gong that sounds as trains approach. The grade of Park avenue north of the tracks is approximately level. South from the tracks the grade is 6.9 per cent, extending for about thirty-five feet, increasing to one of 17.9 per cent for a distance of seventy-five feet.

It is between Park and Lincoln avenues, running north and south, and Front and First streets running east and west, that the main business district of the community is situated. Park avenue between Front and First street, is considered the main street of the town.

The Great Northern Railway tracks come into Mukilteo from Everett about on a line with First street, cross Park avenue just south of First, and then cut diagonally through the community so that the tracks bisect Second street at Washington, which is the second avenue west of Park avenue. The main traveled highway, known as secondary

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highway 1-I, extends parallel to the railroad tracks, from the direction of Everett, a considerable distance before Park avenue is reached, and, as testified to by one of the witnesses, the motorist looks down the tracks before the crossing and buildings are reached. In addition, a sharp turn must be made shortly before reaching the crossing, necessitating the driver to slow down. A traveler approaching from the west must also make a sharp turn before reaching the crossing, and would likewise be traveling at a slow rate of speed.

An additional fact to be considered is that, when approaching from the east, the view is unobstructed, since, as stated, the highway parallels the tracks for some distance and the motorist looks down a considerable way before the crossing and buildings are reached. The testimony of Jack Wilson, assistant fire chief of the Mukilteo fire department, showed that approaching from the north one can see east on the tracks five or six thousand yards.

An individual on the south side of the tracks, desiring to continue on to Seattle, would remain south of the tracks, but those desiring to go to Whidby Island, or into the business district of Mukilteo, would be able, on coming to Park avenue, if it were open, to turn to the right, cross the tracks and proceed to the main business district or go to Front street, turn to the left, continue to Lincoln avenue and to the ferry slip. With Park avenue closed they would be compelled to go to Lincoln avenue, cross the overhead pass, go to Front street, and then turn east to get into the business district, or straight ahead to the ferry slip.

In 1940-41, the state constructed an overhead passage at Lincoln avenue. Section 10 of the contract for the improvement, entered into without the knowledge of the people of Mukilteo, reads as follows:

"Upon the completion of the project the Railway Company will petition the Department of Public Service of the State of Washington for an order closing and discontinuing the existing grade crossing at Railway Station 1617+00 on Park Avenue in said Town of Mukilteo, to which the

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Director of Highways shall lend support. On final entry of said order the Railway Company will at its own cost and expense, remove the planks, signs and signals."

Concerning the project, Mr. Schearer, state highway district engineer testified:

"Q. Do you know whether or not there was a grade separation or grade crossing at the present location of that highway overpass bridge before it was constructed? A. No. There was no open street there at the time it was constructed except that portion right at the ferry dock. A short portion that was constructed on Front Street down to the dock. Q. But there was no crossing there down to the dock? A. No. I believe there was a platted street, but it was not open to the traffic. Q. That bridge is located at what is known as Lincoln Avenue? A. Yes, approximately on Lincoln Avenue. Q. And that is about one block west of Park Avenue, is that correct? A. Yes. Q. And then I understand that there was no public crossing of any type on Lincoln Street prior to the construction of this bridge? A. That is correct. Q. Do you know approximately what the cost of that construction of that highway bridge was? A. Well, the bridge was built as a part of an entire project. That is, some road construction was included with the bridge. And my recollection is the total cost of that project was somewhere around \$100,000. The bridge proper, - I looked it up before coming here, - the final estimate for that structure and that cost

was just under \$26,000 just for the structure itself, not including the approaches."

Although the passage crosses the railroad in line with Lincoln avenue, it is not built as a part of that street, but simply as a portion of the project. The project itself consists of a state highway approach from the direction of Seattle to the ferry slip. This highway, of which the bridge is a part, was built without regard to the platted streets of Mukilteo, but extends from the ferry slip through the community.

Keeping in mind the description of Mukilteo as presented above, I will now analyze the evidence presented by, first, the petitioning railroad and then the respondent community in order to show that the lower court was justified in reversing the order of the department.

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Mr. Burr, a Great Northern Railway division engineer, testified on behalf of the petitioning railroad concerning the dangerous aspect of the crossing. He stated that at the crossing there are two mainline tracks, a passing track, and another leading to a switch going to the government docks. Concerning obstructions to the automobile driver's view, the witness testified that there were many on both sides of the road, and on both sides of the tracks. However, a plat submitted at the hearing, showing visibility distances along the tracks in various locations on Park avenue, indicates conclusively that Mr. Burr was mistaken. This is also shown by testimony of Mr. Christopherson, the station agent, who testified as follows: (In passing, I should call attention to the fact that the depot is on the north side of the railroad, and but a short distance west of Park avenue.)

"Q. From your place of employment and in the station, that is where you work, is right at the station proper? A. Yes. Q. From that location can you see the traffic going over the Park Avenue grade crossing? A. I see most of it. Q. You have a view right out of the station windows? A. Yes, when I am working at the telegraph desk, I see most of Park Avenue cars crossing the grade crossing. Q. What hours do you work there now? A. Now it is from 7:45 a. m. until 4:45 p. m. Q. And have you observed the automobile traffic going over the Park Avenue crossing during your work down there? A. Yes, quite a bit. Q. What would you say generally as to the speed of cars that you have observed going north toward the Bay coming down the hill; what would you say their speed is? A. Well, I find that local people here know the danger here and are very careful. But I have seen strangers that - I figured they were strangers - people I have not seen before sometimes will be in a hurry for catching a ferry and they will go over there pretty fast. Q. From your observation how fast would you say they were going when you say 'pretty fast'? A. Well, over that crossing I have seen them go 30 and 40 miles an hour. Q. As you would estimate it? A. Yes, those few cars. Q. Have you ever had occasion to see cars coming from the ferry and approaching - proceeding south and going over the crossing? A. Yes. Q. About how fast would you say those cars travel, from your estimate? A. Well, most of them were going very cautiously, not very fast. Once in a

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while you will see one that figures the track is clear and he will bounce over there pretty fast. That is just an occasional car. Q. Have you ever seen any cars having difficulty going over the grade? A. Yes. Q. What have you observed? A. Well, especially during the fall and the winter, cars coming over on the ferry, their cars are cold and they come up over that steep grade, that short steep hill, and their motors die and they either slip or roll back to get another start. Q. Do some of them roll back over the grade crossing proper to get another start? A. Yes. Q. And then go back and start over? A. Yes, and, to get a good start.'

Frank Percival, employee of the petitioning railroad company, presented testimony concerning the train schedules and the speed of the trains. He stated that the maximum speed allowed in this area was sixty miles per hour for passenger trains, and fifty miles per hour for freights. At the time of the hearing, there was a schedule which called for twenty-four trains a day to pass over the crossing.

The record also shows that people, local and transients, coming from the east, would, in order to get into the business district, have to cross Park avenue, the main street of the community, south of the tracks, and proceed another block to Lincoln avenue, cross the overhead pass, turn to the right on Front street, and backtrack a block to Park avenue. The evidence shows that the business in this community is greatly enhanced by transients, and that the closing of the crossing would take much of the business away from the people of Mukilteo.

Other factors, perhaps more important than the business aspect mentioned above, were also related by the citizens of Mukilteo. These facts have to do with the traffic problem which is present on Lincoln avenue in relation to the use of the ferry. The undisputed testimony shows that traffic, especially in the summer, on that approach, is very heavy four days a week - Friday through Monday. The overpass is a two-lane highway. On the days mentioned, the cars awaiting the use of the ferry are lined up bumper to bumper back over the overpass for several blocks, at least to Fifth street. The evidence also shows that the ferries haul

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between twenty and forty vehicles, with a total capacity of sixty each trip, and that when the ferries are unloading there is a solid mass of cars on the overpass. It can be seen that this situation would be bad enough if the passage and approach were in conformity with the streets of the community of Mukilteo. At least the people in that town would be able to get into the traffic line. As it is now, it becomes nearly impossible for the people of the community to break into the line of traffic from the side streets.

In conjunction with this traffic snarl on those occasions, and the inconvenience and delay such a situation would cause the citizens of the community in traveling from their homes on the south side of the track to the business district on the north side of the track, if Park avenue is closed, there is the added fact that the community fire station is located on Park avenue south of the track. This station maintains modern equipment, and also a pulmotor. With the closing of the Park avenue crossing, the fire department in going to any part of the business district has to rely on the overpass and, with the traffic situation as it is, the citizens of Mukilteo are exposed to great danger. It should be remembered, also, that the public bathing beach in Mukilteo is at the north end of Park avenue. This beach, during the summer months, is crowded with children. With the Park avenue crossing open, both the fire fighting equipment and the pulmotor could be rushed immediately to any area, as emergencies arose. With it closed, the situation could, and probably will, arise where homes and business houses burn and people die, due entirely to the closing of Park avenue.

The assistant fire chief said that it would be impossible to get a fire truck down the overpass when it was occupied by automobiles waiting to get on the ferry. As another witness said, events such as a fire, or a person drowning, cannot be so regulated as to accommodate the traffic problem now present in the use of the overpass.

The facts, as testified to by the citizens of the community in showing their reasons for maintaining the crossing, are

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supported by one of the petitioner's witnesses, Mr. Schearer, state highway department engineer, who testified:

"Q. Well, Mr. Schearer, don't you feel that in a little town of this kind, of Mukilteo, that there should be more than one approach, more than one road going in, so there is an exit so to speak for these people? A. Well, of course, that is desirable, Mr. Leader. The more entrances to the `business district or any other part of the town, the more stores you have open, the more access you have for your traffic. Q. Yes. And to go in just one way and have to go out the same way is not satisfactory. A. It is not so

satisfactory. Q. And if you have the fire department outside of the main business section and you have that long ferry line to try and get through, you have a very dangerous situation, do you not? A. A dangerous condition, yes. If the road was blocked it would be difficult to get through. Of course, we hope to cure that condition because we know it is indeed a problem. Q. What are you going to do to eliminate that? A. We will just make a study. We don't know what will be the final answer."

Of course, the crossing is dangerous. Every railroad crossing is dangerous. So are street intersections in our cities and towns and so are intersecting highways in rural areas. However, THIS CROSSING HAS EXISTED FOR FORTY-TWO YEARS AND DURING THAT TIME NO ACCIDENT HAS OCCURRED UPON IT. That it is safer than most crossings is demonstrated by the testimony of Mr. Burr, who stated:

"Q. Wouldn't the fact that you had many accidents on one crossing which you considered not a dangerous crossing speaking from an engineering standpoint, and here is another one where you had many accidents and you considered it a safe crossing; wouldn't that indicate you were mistaken in your engineering knowledge as to whether one was more dangerous than the other? A. I am basing my answer on knowledge of grade crossings between Spokane and Seattle. I know that on some crossings with the best grades we have made, that we have some of the most accidents. But I don't call them hazardous crossings. Q. So some of them where you have the best views you have the most accidents? A. Yes, some of them with the best views or grades, it depends on the location a lot. Q. So this one down here, while

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you may have an obstructed view, you may have less accidents than you will on a crossing that has a regular straight of way crossing with good view? A. You may have less accidents on this than another one, yes sir."

As a matter of fact, the order of the department in closing Park avenue has not resulted in reducing a dangerous situation. Its real result has been to create a definite hazard - a real danger - which will without doubt cause loss of business and property and may result in a great loss of life.

I am fully persuaded that the individuals making up the town of Mukilteo have the best interests of themselves and the people who may visit their town at heart, and that they are more able to care for their safety than any governmental department.

The judgment of the trial court should be affirmed.

SERVICE DATE

MAR 3 1 1995

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BURLINGTON NORTHERN)	
RAILROAD COMPANY,)	DOCKET NO. TR-940330
)	
Petitioner,)	
)	COMMISSION DECISION AND ORDER
v.)	DENYING REVIEW; AFFIRMING
)	INITIAL ORDER GRANTING PETITION
CITY OF FERNDALE, WASHINGTON,)	TO CLOSE A RAIL CROSSING
)	
Respondent.)	
.....)	

NATURE OF PROCEEDINGS: This is a request by Burlington Northern Railroad Company for permission to close the Thornton Road railroad crossing in the City of Ferndale. The City opposes the proposed closure.

INITIAL ORDER: An initial order entered on November 18, 1994, by Administrative Law Judge Lisa Anderl would grant the petition. It would conclude that public safety concerns outweigh the public convenience and need for the crossing. It would deny a petition by the City to reopen to examine alternative placement for a siding track.

ADMINISTRATIVE REVIEW: The City seeks administrative review. It contends that a signalized gate and crew member to flag traffic over the crossing while the train is split will alleviate any safety concerns, and that the crossing needs to remain open so that the City may construct a planned Thornton Road connector. The Commission Staff filed, then withdrew, a motion to reopen the docket to allow the Commission to comply with the requirements of the State Environmental Protection Act.

~~COMMISSION: The Commission will not grant review. It affirms the initial order. The hazards at the crossing outweigh any present need for it to remain open.~~

[1]* 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 crossing. RCW 81.53.020.

*Headnotes are provided as a service to the readers and do not constitute an official statement of the Commission. That statement is made in the order itself.

APPEARANCES: Rexanne Gibson, attorney, Bellevue, represents the petitioner, Burlington Northern Railroad Company (Burlington or the railroad). Jeanne A. Cushman, assistant attorney general, Olympia, represents the Washington State Department of Transportation (DOT). Gary Cuillier, attorney, Ferndale, represents the respondent, City of Ferndale (Ferndale or the City). Ann Rendahl, assistant attorney general, Olympia, represents the Washington Utilities and Transportation Commission (Commission Staff).

MEMORANDUM

This is a request by Burlington for permission to close the Thornton Road railroad crossing in the City. Burlington petitioned for closure, stating that the proposed Amtrak (passenger train) service through Ferndale will require an extension to the siding track at Thornton Road. The extended siding would be used to store freight trains while the passenger trains pass on the main track, and the crossing could be closed or blocked for up to an hour during these movements. The petition further stated that the property which is accessed by Thornton Road is being acquired by the State of Washington, and that the crossing will no longer be necessary to serve those properties. The Commission Staff supports closure of the crossing, claiming it is required for public safety.

The closure was protested by the City and the matter was set for hearing. On October 3, 1994, the Commission consolidated this case for hearing with Docket No. TR-940308, the joint petition of Burlington, Amtrak, and the Department of Transportation for an increase in passenger train speed limits through the City. Hearings were held in Ferndale on October 12 and 13, 1994, at which all of the parties and members of the public testified. The matters were not consolidated for decision and order.

The parties filed briefs by November 7, 1994. The petitioner requested that separate orders be entered in these dockets, and that request was granted.

~~The City filed, along with its brief, a petition to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists, and should be considered by the petitioner. The City submitted an affidavit from Stan Strebel, the City Manager, in support of the petition. In general, the affidavit suggests that there is another location to the north of the city which would be suitable for an 8500' siding track, and that this location should be considered.~~

Burlington and the Commission Staff filed answers to the petition on November 10, 1994, opposing the request to reopen. No request to file a reply was made or granted.

An initial order would grant the petition. It would conclude that public safety concerns outweigh the public convenience and need for the crossing. It would deny a petition by the City to reopen to examine alternative placement for a siding track.

The City seeks administrative review. It contends that a signalized gate and crew member to flag traffic over the crossing while the train is split will alleviate any safety concerns, and that the crossing needs to remain open so that the City may construct a planned Thornton Road connector. Alternatively, the City seeks permission to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists and should be considered by the petitioner.

On February 27, 1995, the Commission Staff moved to reopen the docket to allow the Commission to comply with the requirements of the State Environmental Policy Act (SEPA). On March 20, 1995, the DOT and Burlington answered the Commission Staff motion. On March 24, 1995, the Commission Staff and Burlington replied to the answer.

THE MOTIONS TO REOPEN SHOULD BE DENIED

The Commission will not reopen the record to receive new evidence. The motion to reopen by the City repeats a motion it made prior to entry of the initial order. The City sought to reopen the record to permit additional evidence for the purpose of determining whether an alternative location for the proposed siding exists and should be considered by the petitioner.

Reopening is authorized under RCW 81.04.160 and WAC 480-09-820(2). The rule states that reopening may be granted in contested proceedings to permit receipt of evidence which is essential to a decision and which was unavailable and not reasonably discoverable at the time of the hearing, or for any other good and sufficient cause. WAC 480-09-820(2)(b). The Commission agrees with the administrative law judge that the evidence proposed for receipt into the record is neither essential to the decision, nor was it unavailable at the time of hearing. The evidence concerns whether there are other viable sites for a siding/passing track. The Commission does not require such information to decide whether Thornton Road should be closed. Indeed, the City has not presented any argument or citation to establish that this issue is properly within the purview of the Commission in this type of proceeding. ~~As discussed below, the issues in this case concern whether there~~ are alternative means of public access if the crossing is closed, not whether the railroad has alternatives to constructing the siding track in a particular location.

Finally, the City does not offer any reasons why this information, even if it were relevant, was not presented at the hearing. The railroad's decision to site the siding track in Ferndale was discussed extensively on the record. The City had the opportunity to subpoena witnesses. WAC 480-09-475. Burlington presented detailed testimony on the various factors, including environmental and economic considerations, which influenced the choice of location. The evidence proposed by the City in response to the railroad's testimony was both available and discoverable at the time of hearing in this matter and, thus, does not support reopening. The City's motion to reopen is denied.

The Commission Staff motion to reopen the proceedings was premised on a concern that the Commission should have, but had not, complied with the requirements of the State Environmental Policy Act (SEPA) prior to taking action on the petition to close the Thornton Road crossing. In answer, Burlington and the DOT state that the DOT is the lead agency for SEPA compliance, that it conducted a SEPA review, that the City commented on the impact of closing the Thornton Road crossing in that review, and that all of the requirements of SEPA have been met. In reply, the Commission Staff withdrew its motion to reopen. The reply states that the Commission Staff has reviewed the documentation prepared by the DOT pursuant to SEPA, and that the Commission Staff is assured that the DOT has complied with SEPA requirements concerning the closure of the Thornton Road crossing. Burlington also replied, agreeing with its answer. Permission to withdraw the motion is granted.

THE CROSSING SHOULD BE CLOSED

A. The Legal Standard

Chapter 81.53 grants the Commission the authority to regulate the safety of railroad grade crossings. RCW 81.53.020 states a legislative preference for overcrossings and undercrossings where practicable, and prohibits the construction of a crossing at grade without prior Commission approval.

All crossings at grade are dangerous, and the policy of the law is strongly against the allowance of such crossings. Reines v. Chicago, Milwaukee, St. Paul & Pacific R.R., 195 Wash. 146, 80 P.2d 406 (1938); State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County, 5 Wn.2d 95, 104 P.2d 764 (1940).

However, in some cases the public convenience or need for the crossing outweighs the inherent danger, and in that case a crossing may remain open. The test was stated by the court in Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949) as follows:

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.

The Commission follows the same balancing process.

The question, then, is whether the public convenience and need outweighs the danger of the crossing so that it should nonetheless remain open. Factors to consider in this regard include the availability of alternate crossings, the ability of those crossings to handle the additional traffic, and the number of people affected by the closure.

B. The Current Situation

The crossing at Thornton Road is a double set of tracks, protected by stop signs and crossbucks. Thornton Road runs east/west and crosses the north/south tracks at right angles. The tracks run west of and parallel to I-5 through this area of town. Thornton Road currently dead-ends shortly after crossing the tracks, west of I-5. The crossing currently serves two residences. The petitioner proposes to either build an access road for those properties, or to allow access through the crossing only for the property owners. Under this latter situation, Thornton Road would be gated to the west of the tracks and only property owners would have access.

The tracks at Thornton Road are a mainline track and a siding track. Burlington proposes to extend its existing siding track north another 3,631 feet, to a total length of 8,600 feet. This length is necessary for the track to be used as a passing track when passenger trains come through. Burlington will store its freight trains on this siding track to allow the Amtrak to come through on schedule. Freight trains are generally about 7,000 feet long and could not be stored on the existing siding. The extended siding will be long enough that a freight train could be pulled far enough north to be out of the grade crossings in the main part of town -- Washington Street and Second Avenue. A freight train could be on the siding for one hour or more.

If Thornton Road remains open as a public crossing, the railroad would have to split the train while it waits on the siding. This is a time consuming process and presents an additional hazard at the crossing because of train movements across the tracks at grade and because a stopped train can impair sight distance, already limited at this crossing. A vehicle, after stopping, would have to creep out towards the tracks to see if a train was coming. Train speeds, especially with fast trains viewed head on, are extremely difficult to judge and a passenger train approaching at 79 m.p.h could be a significant hazard at an unprotected crossing.

~~Thornton Road is a 25 m.p.h. city street, with one lane of travel in each~~ direction and no curbs or sidewalks. West of the crossing, it is the main east/west street in the north part of the city, and it serves many residents who have settled in the subdivisions which are growing rapidly in the northwest part of the city. Using Thornton, they are able to access Vista Drive or Malloy Drive and travel south into the business district. The portion of Thornton Road which crosses the Burlington tracks is a dead end which only provides access to two residences. The routes south on Vista Drive or Malloy Drive are the main access to I-5, for both north and southbound traffic. Closure of the crossing would not affect the current traffic patterns.

C. Public Need for the Crossing

The City is in the process of planning for growth and development over the next 15-20 years. The City has a draft transportation plan which will likely be submitted to and acted on by the City council this year. The plan contains several options for improving traffic flow through town. One of those options is the construction of an extension to Thornton Road southbound to connect with Portal Way near the southbound ramps to and from I-5. This proposal is illustrated in exhibit #4. This option has been in the City's plans for many years, often as a high priority item. The City has never been able to obtain any funding for this project and does not have good prospects of obtaining such funding in the future. The City would like to see Thornton Road remain open because it believes that this project is the least expensive option and because the project could be completed incrementally, without a large expense all at once.

Members of the public spoke in favor of keeping Thornton Road open as one of the City's main options for improving traffic flow within the city limits. The residents believe that the future proposed use of Thornton Road is critical to draw traffic onto I-5 without first going through the center of town, which is already fairly congested during peak traffic times. Most public witnesses favored a grade crossing at Thornton, but some had no preference between a grade crossing or an over crossing.

The City has other options to developing Thornton Road at grade, including an over-grade crossing which would also cross over I-5 and connect with Newkirk Road to the east of the freeway. The City's transportation consultant recommends the Thornton Road extension as the least expensive option, although perhaps not the best for long term growth and traffic needs. Costs of the various options are uncertain, with an overpass estimated at \$6 million and the extension at \$4 million (\$2 million for construction and \$2 million in mitigation costs). The City has no money for any of the options, but hopes to eventually fund construction with a combination of State/Federal highway funds, and money it is now collecting in growth mitigation fees. Some type of extension of Thornton Road, either to the south or the east, has been in the City's plans since at least 1972.

Much time at the hearing was spent discussing the various options for restructuring traffic flow through the city. In addition, various expert opinions were offered on the Thornton Road extension, including the opinion that the resulting intersection with Portal Way would be unworkable because of the proximity to the freeway ramps. However, this order does not need to decide the best plan for the City to follow -- that is uniquely the domain of the City government. This order considers traffic flow options only to the extent that they are relevant to the public need for the crossing.

D. Policy Considerations

In 1992, the Federal Railway Administration designated a high speed rail corridor between Eugene, Oregon and Vancouver, British Columbia. The petitioners argue that the crossing will become even more dangerous with the operation of a high-speed passenger train service between Seattle and Vancouver, B.C. This service is proposed to start in 1995, and it is because passenger trains will have the right of way on the track that Burlington must use the siding track for its freight trains.

State policy supports the operation of the passenger service. In 1993 the Washington State Legislature enacted Chapter 47.79 RCW which established a high-speed ground transportation program. The program's stated goals include the implementation of high-speed ground transportation service offering top speeds over 150 m.p.h. between Everett and Vancouver, B.C. by 2025. RCW 47.79.020(2). In addition, as discussed above, public policy disfavors crossings at grade.

Finally, petitioners argue that closing the crossing is consistent with the policy contained in the Federal Railroad Administration's Rail-Highway Crossing Safety / Action Plan Support Proposals (Exhibit 12). That document notes that the following criteria have been useful in determining when crossings should be consolidated: consolidate where there are more than four per mile in urban areas and one per mile in rural areas and alternate routes are available; consolidate crossings with fewer than 2000 vehicles per day and more than two trains per day and an alternate route is available; link construction work with eliminations, especially when upgrading rail corridors for high speed trains; when improving one crossing, consider eliminating adjacent crossings and rerouting traffic; eliminate complex crossings where it is difficult to provide adequate warning devices or which have severe operating problems (e.g. multiple tracks, extensive switching operations, long periods blocked, etc.) The Petitioners state that these conditions are all present at the Thornton Road crossing and support an order to close the crossing.

E. Commission Decision

The Commission agrees with the initial order's finding that there is no present public need or convenience which is served by the grade crossing at Thornton Road. At most there is a private need for access to the residences on the east side of the tracks, and Burlington will allow those property owners to continue to use the tracks as a private crossing.¹

¹ Commission Staff supports the railroad's petition, but on brief suggests that a crew member flag traffic at the crossing when a train is split to allow access to the private properties. Since a crew member will have to be at the crossing to split and reconnect the train, this is a reasonable additional safety precaution.

The Commission agrees with the initial order's conclusion that only the present public need should be considered in determining whether to close a crossing. Where the legislature has considered future need to be a relevant consideration, that has been stated. See, for example, RCW 81.80.070 in which the Commission was directed to consider the present or future public convenience and 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.

Finally, even if future need for the crossing were a relevant consideration, the Commission would not be persuaded that the likely future use of the at grade crossing is anything more than speculative and highly uncertain.²

This order carefully considered the testimony presented by the City and by the members of the public in favor of keeping the crossing open. As noted above, the desire of the City to keep its options open for use of the crossing is not a present public need served by the crossing. Other options remain open to Ferndale regarding its traffic flow problems, and no change or disruption to present conditions will result from closure of the Thornton Road crossing.

[1] This Commission concludes that the at-grade crossing at Thornton Road in the City of Ferndale should be closed in the interest of public safety. This conclusion is based on the dangerous nature of grade crossings in general, the fact that this crossing will soon experience increased use as a passing track, the switching activity which will occur over the crossing, and the absence of present public need for the crossing.

Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated herein by this reference.

FINDINGS OF FACT

1. On March 10, 1994, Burlington Northern Railroad Company (Burlington or the railroad) petitioned the Commission for closure of the Thornton Road crossing in the city of Ferndale. The grade crossing has two tracks, a mainline and a siding track. The siding track will be extended to the north and will see increased use as a passing track with the start of passenger train service between Seattle and Vancouver, B.C. in 1995.

² If this order were to consider future use of this crossing, with Thornton Road as a through street, higher traffic volumes would have to be assumed. Higher traffic volumes would increase the danger at Thornton Road, as the crossing has neither lights nor gates and has limited sight distance.

2. The Thornton Road crossing is protected by stop signs and crossbucks. It currently sees freight train use, operating at maximum speeds of 50 m.p.h. By spring of 1995, two passenger trains per day will operate through the crossing at speeds up to 79 m.p.h. Thornton Road is an east/west street. The railroad tracks run north/south, roughly parallel, to and to the west of, I-5. Thornton Road dead-ends between the tracks and I-5. The crossing currently serves two residences. The petitioner will provide access to those residents if the petition is granted.

3. On October 3, 1994, this petition was consolidated for hearing with the joint petition of Burlington, Amtrak and the Washington State Department of Transportation for an increase in passenger train speed limits through Ferndale. The petition to close the crossing is tied to the increased speed limits, as passenger train operations on the Burlington tracks will affect the traffic over and use of the crossing.

4. The Thornton road crossing is hazardous because it is a grade crossing, it will soon experience increased use as a passing track, and switching activity can block the track for an hour or more.

5. There is not present public need or convenience which is served by the grade crossing at Thornton Road. At most there is a private need for access to the residences on the east side of the tracks, and Burlington will allow those property owners to continue to use the tracks as a private crossing. The desire of the City to keep its options open for the use of the crossing is not a present public need served by the crossing.

6. The closure should be conditioned upon the railroad providing access for properties which would be otherwise landlocked, and providing a crew member to flag traffic over the crossing while the train is split.

CONCLUSIONS OF LAW

1. ~~The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this application.~~

2. Pursuant to RCW 81.53.060, a railroad crossing at grade may be closed upon petition of the railroad company if the public safety requires such closure. Only present public need should be considered in determining whether to close a crossing.

3. The grade crossing at Thornton Road in the city of Ferndale is dangerous and is not required by the public convenience and necessity. The petition of Burlington Northern Railroad Company for closure of this crossing should be granted in the interest of public safety, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

ORDER

THE COMMISSION ORDERS That the petition of Burlington Northern Railroad Company for closure of the at-grade crossing at Thornton Road in the City of Ferndale is granted, on condition that the railroad provide access to those properties located to the east of the tracks which would be landlocked by the closure, including the use of a crew member to flag traffic across when a train is split at the crossing.

DATED at Olympia, Washington, and effective this 31st day of March 1995.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

[1]* A highway-railway crossing at grade which is poorly configured, poorly protected, has a small holding capacity for vehicles, and is on a railroad main line, should be closed when a safer crossing is readily available, although somewhat less convenient for some persons. RCW 81.53.060.

[2] That a dangerous crossing at grade allows faster response in the event of fire and other emergency than another route does not require leaving the crossing open when the alternate access is safer and is readily available. RCW 81.53.060.

APPEARANCES: Rexanne Gibson, attorney, Bellevue, represents petitioner Burlington Northern Railroad Co. John R. Moffat, prosecuting attorney, represents Skagit County. Ann Rendahl, assistant attorney general, Olympia, represents the staff of the Washington Utilities and Transportation Commission. Bradford E. Furlong, attorney, Mt. Vernon, appeared at hearing as an intervenor.²

MEMORANDUM

This is a petition by Burlington Northern Railroad Company (BNRR) to close six highway-railway crossings at grade in Skagit County. The six crossings are: Milltown Road; Spruce Street; Green Road; Boe Street; West Johnson Road; and West Stackpole Road. BNRR cites public safety concerns in its petition for closure of the crossings. Skagit County opposed closure of the Milltown Road, Spruce Street, Green Road, and Boe Street crossings, and requested a hearing.

BNRR withdrew West Johnson Road and West Stackpole Road from consideration prior to hearing. The parties stipulated to an indefinite continuance for hearing on the Spruce Street and Milltown Road crossings. BNRR now has requested leave to withdraw its petition as to those four crossings.

Hearing was held on the other two crossings, Boe Street and Green Road. BNRR requested that separate orders be entered for each of the crossings. Skagit County withdrew its opposition to closure of the Bow Street crossing at hearing. The Commission entered an order closing the Boe Street crossing in May 1995.

At the commencement of the hearing in this matter, Commission Staff stated that, through an oversight, it had not complied with the state Environmental Protection Act (SEPA) by doing a threshold determination of whether there is an environmental impact of

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² Mr. Furlong intervened only with respect to the Spruce Street and Milltown Road crossings. He did not participate in the hearing on the Boe Street and Green Road crossings.

closing the Green Road crossing. Evidence was taken on crossing issues. The administrative law judge continued the proceeding as to Green Road until it could be determined whether an additional hearing would be necessary on environmental issues.

In September 1996, the Commission issued a mitigated determination of non-significance with respect to BNRR's proposal to close the Green Road crossing. The determination states that the proposal does not have a probable significant impact on the environment, but lists the following required mitigation: construction of a cul-de-sac on Green Road within the existing railroad/county right-of-way to county standards as approved by the county engineer; necessary grading and filling; and compliance of the project with Skagit County critical area Ordinance 14.36.

On December 2, 1996, Skagit County filed with the Commission an agreement between the county and BNRR providing for the closure of the Green Road crossing and construction of a cul-de-sac at the closure point, and the granting of an easement for the cul-de-sac to the county. In a letter accompanying the agreement, Skagit County waived further hearing on the petition and withdrew its opposition to closure of the Green Road crossing. Skagit County, BNRR, and Commission Staff have waived an initial order.

A. Request for Leave to Withdraw Petition as to Four Crossings

On January 17, 1996, BNRR filed a request for leave to withdraw its petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road crossings. No party responded in opposition. It is consistent with the public interest to grant withdrawal of the petition. The request will be granted.

B. Green Road Crossing

Applicable Standards

Chapter 81.53 grants the Commission the authority to regulate the safety of railroad grade crossings. RCW 81.53.020 states a legislative preference for overcrossings and undercrossings where practicable, prohibits the construction of a new highway crossing at grade without prior Commission approval,³ and sets out factors that the Commission is to take into account in determining whether a grade-separated crossing is practicable.

81.53.060 authorizes a railroad company whose road is crossed by a street or highway to petition the Commission that the public safety requires the establishment of an under-crossing or over-crossing, an alteration in the existing grade crossing, or the closure of the existing crossing.

³ When used in Chapter 81.53, the term "highway" includes all state and county roads, streets, alleys, avenues, boulevards, parkways and other public roadways. RCW 81.53.010.

The statutes are based on the theory that all railway/highway crossings at grade are dangerous, and public policy strongly disfavors them. Reines v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 195 Wash. 148, 80 P.2d 408 (1983); Department of Transportation v. Snohomish County, 35 Wn.2d 247, 257, 212 P.2d 829 (1949); State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County, 5 Wn.2d 95, 104 P.2d 764 (1940).

In addition to the dangers inherent in any crossing at grade, there are factors that may make a particular crossing especially hazardous. These factors include vegetation or other obstacles that limit the motorist's view of the tracks as the motorist approaches the crossing,⁴ an alignment in which the roadway approaches the crossing at an oblique angle,⁵ limited holding capacity on the approaches between the railroad right of way and streets that intersect with the approaches,⁶ more than one mainline track at the crossing,⁷ and the presence of a siding track in addition to a mainline track at the crossing.⁸

In some cases the public convenience or need for a crossing outweighs the danger, and in that case the Commission may allow a crossing at grade to remain open. The balancing test was stated by the court in Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949) as follows:

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.

Factors the Commission considers in determining whether the public convenience and need outweigh the danger of the crossing include the amount and character of travel on the railroad and on the highway, the availability of alternate crossings, whether the alternate crossings are less hazardous, the ability of alternate crossings to handle any additional traffic that would result from the closure, and the effect of closing the crossing on

⁴ See, Whatcom County v. Burlington Northern Railroad Company, Docket Nos. TR-1725 and TR-1726 (January 1985).

⁵ See, Thurston County v. Burlington Northern Railroad, Docket No. TR-1930 (April 1988).

⁶ See, Whatcom County, *supra* note 4.

⁷ See, Department of Transportation v. Snohomish County, 35 Wn.2d 247 (1949).

⁸ See, Spokane County v. Burlington Northern, Inc., Cause No. TR-1148 (September 1985); Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR-940330 (March 1995).

public safety factors such fire and police control. See, Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR-940330 (March 1995).

The Evidence

Witnesses for BNRR, the Washington State Department of Transportation, the National Railroad Passenger Corporation, and the Federal Railroad Administration testified in support of the petition to close the Green Road crossing. Five members of the public and a fire department official testified in opposition to the proposal to close the Green Road crossing. A witness for Skagit County and a Commission Staff witness also testified concerning the crossing.

The Green Road crossing lies on a BNRR main line which is being upgraded so that high-speed rail passenger service can be initiated between Seattle and Vancouver, B.C. The Washington state legislature, in chapter 47.79 RCW, has established as a goal the implementation of such high-speed service. Among the priorities set out in RCW 47.79.030 are improved grade crossing protection or grade crossing elimination.

Federal railroad safety policies, set out in the Federal Railroad Administration's Rail-Highway Safety/Action Plan Support Proposals, favor consolidation of crossings when practical and improvement of the remaining crossings. The FRA, which regulates railroad safety, has the policy and goal of reducing grade crossings by 25% by the year 2000, to reduce the number of collisions that are occurring at grade crossings.

In the vicinity of the crossing, Green Road and old Highway 99 run parallel to one another on opposite sides of the tracks, in an approximately north-south direction, until Green Road crosses the tracks and intersects with old Highway 99. Green Road has low traffic volumes. The Green Road crossing consists of one track protected by stop signs and crossbucks. The crossing is 50 to 65 feet north of the intersection of Green Road with old Highway 99. Approaching the crossing from the north, Green Road curves sharply just before the crossing in order to make a right angle intersection with old Highway 99. Green Road crosses the tracks at an angle of about 60 degrees.

The crossing does not allow good advance sight of approaching trains. The crossing cannot be seen until a person is very close to it. Approaching trains cannot be seen in both directions until a person is stopped in front of the tracks. The skewed angle of the crossing results in drivers stopping at the crossing having a good line of sight of trains coming from one direction, but not from the other.

The proximity of the crossing to the intersection with old Highway 99 creates three hazards. It presents the driver approaching from the north with two stop signs in view at the same time. Some drivers may not see the first sign, which is the one before the tracks. The second hazard is that the intersection is so close to the crossing that a long truck coming from the north that stops at the second (highway intersection) stop sign will cover the

rail. There is moderate, high-speed traffic on the highway, which might prevent a stopped truck from getting out of the way of a train. The third hazard is that vehicles come off the highway at 50 to 60 miles per hour. They may misjudge their speed and slide over the crossing before they can stop.

The lack of controls other than stop signs and crossbucks also makes the crossing hazardous. Stop signs are not a very effective method of controlling traffic at railroad grade crossings. More people violate stop signs at railroad grade crossings than they do at regular highway intersections.

There is an alternate crossing nearby, at Cook Road, which is safer. Approximately 1500 feet to the north of the Green Road crossing, Green Road intersects at right angles with Cook Road. The intersection is a four-way stop intersection. Cook Road crosses the BNRR tracks at a signalized crossing before it intersects with old Highway 99. The signaling devices consist of overhead dual-mounted flashing lights and drop arm gates. People who live or do business on Green Road can use Cook Road.

Six persons testified in opposition to closure. A farmer who lives south of the crossing opposes closure because he uses old Highway 99 and Green Road to access his fields, reaching Green Road via the Green Road crossing. The Cook Road crossing is a more difficult road to cross with farm equipment. A truck operator who has his shop on Green Road opposes closure because it is difficult for him to turn his trucks around at the shop, and therefore convenient to enter Green Road at one end and exit at the other. He acknowledges the danger at the Green Road crossing, and has seen other truck drivers make the mistake of getting stuck at the intersection with their back end still on the track.

An owner of business property along Green Road opposes closure because business and traffic in the area is growing, the intersection of old Highway 99 and Cook Road has become congested, and closing the Green Road crossing would add to the congestion and adversely affect the area's growth. A Green Road resident and business operator opposes closure because there already is too much traffic at the intersection of Green Road and Cook Road, and because the intersection has flooded in the past whereas the south end of Green Road remained open.

A resident of Green Road opposes closure because the crossing provides alternative access in case of emergencies. The witness acknowledges that some cars coming from old Highway 99 do not stop at the crossing. The fire chief of the Burlington Fire Department and Skagit County Fire District 6 also opposes closure, because closure would increase emergency response time by about two minutes.

A witness who is both the county engineer and the public works director for Skagit County expressed concerns about closure of the crossing which the county wished to have addressed as part of the SEPA review. The county subsequently withdrew its opposition to closure of the crossing.

Discussion and Decision

[1] Our analysis starts with the fact that all crossings at grade are dangerous. There are factors peculiar to the Green Road crossing that make it particularly dangerous. The crossing is on a railroad main line which will be used by high-speed passenger trains. The configuration of the crossing results in poor sight distances. The crossing cannot be seen until a driver is almost upon it. The skewed angle of the crossing prevents a driver from having a good line of sight of trains coming from one direction. The proximity of the crossing to the intersection with old Highway 99 creates three hazards, described above: drivers may be confused by the presence of two stop signs; the crossing has a limited holding capacity for vehicles; and vehicles exiting old Highway 99 may misjudge their speed and slide over the crossing before they can stop. The crossing is not protected by electronic signals or gates.

The crossing is a convenience to residents and business people in the vicinity, but is not shown to be a necessity. The crossing is not heavily used. Closure of the crossing would not cut off any residences or businesses. There is another crossing nearby which is equipped with electronic signal devices. Electronic signals make a crossing much safer than do crossbucks and stop signs.⁹ Consolidation of crossings necessarily inconveniences those whose crossing is eliminated in favor of adjacent crossings.

The argument that the Cook Road crossing is busy does not justify leaving the Green Road crossing open. See, Whatcom County, supra; Spokane County v. Burlington Northern, Inc., Cause No. TR-1148 (September 1985), at page 7. Consolidating crossings when practical and improving the remaining crossings promotes the public safety.

[2] The argument that the Green Road crossing should remain open because it allows faster response in the event of fire and other emergency does not justify leaving the crossing open. Access via a safer route is readily available, and the need for additional access does not outweigh the dangers posed by the crossing. See, Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996), at pages 7-8.

After considering the convenience of the crossing, hazards inherent in all crossings at grade, the hazards that are particular to this crossing, the fact that it is lightly used, and the accessibility of a safer alternate crossing, the Commission concludes that the need for the crossing is not so great that it must be kept open despite its dangerous condition.

The mitigated determination of non-significance requires as mitigation the construction of a cul-de-sac at the point of closure of Green Road. Consistent with that determination, the Commission will condition closure of the crossing on construction of a cul-

⁹ See, Whatcom County v. Burlington Northern Railroad Company, Cause Nos. TR-1725 and TR-1726 (January 1985), at page 5.

de-sac, such as that described in the agreement between BNRR and Skagit County dated October 27, 1996.

Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated herein by this reference.

FINDINGS OF FACT

1. On January 24, 1995, the Burlington Northern Railroad Company ("BNRR") petitioned the Commission for closure of four highway-railway crossings at grade in Skagit County: Milltown Road near Conway, at railroad milepost 60.28; Spruce Street in Conway, at railroad milepost 62.50; Green Road near Burlington, at railroad milepost 73.88, located in the SE¼ of the SE¼, Sec. 19, Twp. 35N, Range 4 E.W.M., Burlington, Skagit County; and Boe Street near Bow, located at railroad milepost 79.20.

2. With respect to the Green Road crossing, the petition states that the crossing is .45 mile to the south of the Cook Road grade crossing; that the Cook Road crossing is signalized with cantilevers and gates while the Green Road crossing has passive warning devices (cross bucks); that Cook Road can serve the homeowners and businesses that reside on Green Road; and that closing the Green Road crossing will improve the safety of the motoring public.

3. In March 1994, Skagit County filed an objection to the petition and requested a hearing.

4. In October 1994, BNRR and Skagit County jointly submitted two additional grade crossings as part of the petition: West Johnson Road near Conway, at railroad milepost 64.58; and West Stackpole Road near Conway, at railroad milepost 65.58.

5. On February 21, 1995, BNRR and Skagit County requested that the request for closure of the West Johnson Road and West Stackpole Road crossings be withdrawn from the petition and that no evidence be taken with respect to those crossings at the hearing.

6. Bradford M. Furlong was granted leave to intervene with respect to two crossings, Spruce Street and Milltown Road.

7. A hearing was held on February 23, 1995, in Mount Vernon, before Administrative Law Judge Lisa A. Anderl. At the commencement of the hearing, BNRR requested and was granted an indefinite continuance of the hearing with respect to the Milltown Road and Spruce Street crossings. Mr. Furlong expressed no interest in the Bow Street and Green Road crossings, and was excused from the remainder of the hearing.

8. Kenneth E. Cottingham testified for BNRR in support of the petition. Mr. Cottingham is a consulting transportation engineer, licensed in Washington as a mechanical engineer. He has worked on rail grade crossing design, operations, and safety since 1956. He performed an on-site inspection of the Green Road crossing in January 1995.

9. Green Road is the original paved north-south highway in the area. It is 15½ feet wide, and has no pavement markings. The Green Road crossing is 50 to 65 feet north of an intersection of Green Road with old Highway 99. Green Road and old Highway 99 both run in a north-south direction on opposite sides of the tracks. Approaching the crossing from the north, Green Road curves sharply just before the crossing in order to make a right angle intersection with old Highway 99. Green Road crosses the tracks at an angle of about 60 degrees. The crossing consists of one track protected by stop signs and crossbucks. The track is a main line of BNRR, and the high-speed rail corridor of Amtrak.

10. The crossing is hazardous in several respects. It does not meet accepted standards of sight distance. The crossing cannot be seen until a person is very close to it. Approaching trains cannot be seen in both directions until a person is stopped in front of the tracks. The angle of the crossing makes it hazardous. Vehicles stopping at the crossing have a good line of sight of trains coming from one direction, but not from the other.

The proximity of the crossing to the intersection with old Highway 99 creates three hazards. First, it presents the driver approaching from the north with two stop signs in view at the same time. Some drivers may not see the first sign, which is the one before the tracks. The second hazard is that the intersection is so close to the crossing that a long truck coming from the north that stops at the second (highway intersection) stop sign will cover the rail. Eighty-two foot truck-trailer rigs are common. There is moderate, high-speed traffic on the highway, which might prevent a stopped truck from getting out of the way of a train. The third hazard is that vehicles come off the highway at 50 to 60 miles per hour and the drivers may misjudge their speed and slide over the crossing before they can stop.

The lack of controls other than stop signs and crossbucks makes the crossing hazardous. Stop signs are not an effective method of controlling traffic at railroad grade crossings. More people violate stop signs at grade crossings than at highway intersections.

11. There is an alternate crossing nearby, at Cook Road, which is safer. Approximately 1500 feet to the north of the Green Road crossing, Green Road intersects at right angles with Cook Road. The intersection is a four-way stop. Cook Road crosses the BNRR tracks at a signalized crossing before it intersects with old Highway 99. The signaling devices consist of overhead dual-mounted flashing lights and drop arm gates. Cook Road also is the interchange of I-5, which lies to the west of old Highway 99.

12. The nature of the area along Green Road between the Green Road crossing and Cook Road is primarily residential. People who live or do business on Green Road can use Cook Road. Green Road has light traffic.

13. Edward Leon Quicksall testified for the National Railroad Passenger Corporation in support of the petition to close the Green Road crossing. Mr. Quicksall is transportation manager in charge of field operations. He is responsible for anything to do with Amtrak trains in and out of Seattle. New Amtrak service is planned between Seattle and Vancouver, B.C. Amtrak plans to operate its equipment initially at 79 miles per hour.

14. Jeff Schultz testified for the Washington State Department of Transportation in support of the petition to close the Green Road crossing. He is a rail passenger analyst. He is involved in the passenger rail project going from Seattle to Vancouver, B.C. The Washington state legislature directed the department to reestablish service between the two cities several years ago as part of the high speed ground transportation legislation, chapter 47.79 RCW. RCW 47.79.030 states that the department shall work on improved grade crossing protection or grade crossing elimination as part of this project. The department's goal for service is 3 hours and 30 minutes, with an interim goal of 3 hours and 55 minutes. There was passenger service on the corridor prior to 1981, and it took 4 hours and 30 minutes. In order to perform the new goal, it will be necessary for Amtrak to operate over the Green Road crossing at 79 miles per hour. The legislature has set a future goal of 150 miles per hour. Grade crossing consolidation will be necessary to accomplish the faster speeds. Consolidation enhances safety by eliminating the potential for conflicts between automobiles and trains.

15. Ronald Ries testified for the Federal Railroad Administration in support of the petition to close the Green Road crossing. He is Crossing and Trespasser Regional Manager for the FRA, which regulates railroad safety in interstate commerce. His duties are to help coordinate grade crossing safety initiatives and trespasser prevention programs. It is the policy and goal of the FRA to see a 25 percent reduction in public highway rail grade crossings by the year 2000. In 1994, the FRA, together with the Federal Highway Administration, Federal Transit Administration, and National Highway Traffic Safety Administration published the Rail-Highway Crossing Safety Action Plan Support Proposals which address 55 specific proposals to reduce the number of collisions that are occurring at grade crossings and prevent trespassing. Criteria the FRA has determined to be useful in selecting appropriate crossings for closure or consolidation are: to consolidate crossings where there are more than four per mile in urban areas and more than one per mile in rural areas when an alternate route is available; to consolidate crossings which have fewer than 2000 vehicles per day and more than two trains per day and an alternate route is available; and to eliminate crossings where the road crosses the tracks at a skewed angle.

16. The following residents and business owners in the area of the crossing testified in opposition to the petition to close the Green Road crossing.

a. Douwe Dykstra resides on Gear Road, which is just south of the Green Road crossing. He operates a dairy farm there, and also has land on Green Road, north of the crossing. He travels with farm equipment back and forth between the two fields, using old Highway 99 and the Green Road crossing. If the Green Road crossing is closed, he will have to use the Cook Road crossing, which is a difficult road to cross with farm equipment.

b. Harry Smit is a trucker whose shop is on Green between the crossing and Cook Road. It is difficult and dangerous to turn trucks around at his shop, so he enters Green Road at one end and exits at the other. He is aware of two accidents at the crossing. Approaches at the crossing are not long enough for an 80-foot truck. He recommends that the Green Road crossing be kept open and improved with flashing lights and drop arm gates.

c. Robert Farrell, Sedro Woolley, owns business and residential property on Green Road which he leases. The area is part of the I-5 corridor. Traffic flow in the corridor is tremendous, and business has recognized this and is developing the area. The intersection of Cook Road and old 99 is congested already, and the Green Road-Cook Road intersection is becoming more difficult to use. Keeping the Green Road crossing open would relieve congestion on Cook Road. Closing it might choke off further growth in the area.

d. Randy Rockafellow has a farm equipment maintenance business at his residence on Green Road. The Green Road-Cook Road intersection has flooded in the past, while the Green Road crossing remained above water, providing safe access. There is a lot of traffic on Cook Road, making it difficult to enter from Green Road.

e. Kenneth Thomas resides on Green Road. Cars sometimes do not stop at the crossing when exiting old highway 99, and rip through his yard. Nonetheless, he favors keeping the crossing open because if it were closed, it would take additional time for emergency vehicles to reach his home. He also is concerned about access in the event trains block Cook Road.

17. John A. Pauls testified in opposition to the petition. Mr. Pauls is the chief of the Burlington Fire Department and the chief of the Skagit County Fire District 6. The fire department opposes closure of the Green Road crossing because emergency response to the southern end of Green Road would be increased. The additional response time at emergency speed would be two minutes. Two minutes makes a significant amount of difference, increasing response time to that area by one-third.

18. Janette Keiser testified for Skagit County. She is the public works director, Skagit County Public Works Department, and is the county engineer. The county's preliminary investigation identified concerns that it wanted addressed as part of the SEPA documentation. Although Green Road is a low-volume road, closure of the crossing might have an adverse impact on the businesses and property owners on Green Road. Several large agricultural enterprises rely on Green Road for ingress and egress. If closure would deny adequate ingress and egress, it would deny the policies of the county's Growth Management Act. The county was concerned that the impact on congestion, emergency response, and business viability be considered as part of the SEPA process. As stated in Finding No. 24, the county withdrew its opposition to closure subsequent to the hearing.

19. Gary Harder testified for the staff of the Washington Utilities and Transportation Commission. He has provided technical assistance to the rail section for the

last 21 years. The Commission's records do not show any accidents at the Green Road crossing in the last ten years.

20. At the conclusion of testimony, the administrative law judge continued the hearing on the petition to close the Green Street crossing pending completion by Commission Staff of a determination of whether there is an environmental impact of closing the crossing.

21. The Commission entered an order closing the Boe Street crossing on May 26, 1995.

22. On January 17, 1996, BNRR requested leave to withdraw its petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings. No party has responded in opposition to the request.

23. Commission Staff has made a determination of non-significance for closure of the Green Road crossing under the State Environmental Protection Act. The determination states the following required mitigation: a proposed cul-de-sac on Green Road will be constructed within the existing railroad/county right-of-way to county standards as approved by the county engineer; grading and filling will be performed as determined during the design stage; and the project will comply with the county's critical area Ordinance 14.36.

24. On October 27, 1996, BNRR and Skagit County entered into an agreement: to waive the hearing currently pending; to eliminate the Green Road crossing by the county abandoning the roadway right-of-way across the railroad right-of-way and constructing a cul-de-sac upon the railroad's right-of-way; for BNRR to pay the county \$6,190 for eliminating the crossing and closing the road; and for BNRR to grant the county an easement for the construction of the cul-de-sac. The county withdraws its objection to the closure of the Green Road crossing on condition as described in the agreement.

25. BNRR, Skagit County, and Commission Staff have waived entry of an initial order in this proceeding.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this petition.

2. Granting the unopposed request to withdraw the petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings is consistent with the public interest.

3. The grade crossing at Green Road and mile post 73.88 of the BNRR tracks in Skagit County is dangerous and is not required by the public convenience and safety. The petition to close the crossing should be granted subject to construction of a cul-de-sac on

Green Road at the point of closure, such as that described in the agreement between BNRR and Skagit County dated October 27, 1996.

4. The petition of BNRR to close the Green Road crossing should be granted, conditioned upon construction of the cul-de-sac referred to above.

5. An initial order may properly be omitted in this matter.

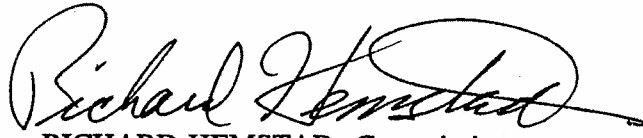
ORDER

THE COMMISSION ORDERS That the request of Burlington Northern Railroad Company for leave to withdraw the petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings is granted.

THE COMMISSION FURTHER ORDERS That the petition of Burlington Northern Railroad Company for closure of the Green Road crossing at mile post 73.88 in Skagit County is granted, conditioned upon construction of a cul-de-sac on Green Road at the point of closure, such as that described in the agreement between Burlington Northern Railroad Company and Skagit County dated October 27, 1996.

DATED at Olympia, Washington, and effective this ^{13th} day of December 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


RICHARD HEMSTAD, Commissioner


WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

[1]* A highway-railway crossing at grade which is poorly configured, poorly protected, has a small holding capacity for vehicles, and is on a railroad main line, should be closed when a safer crossing is readily available, although somewhat less convenient for some persons. RCW 81.53.060.

[2] That a dangerous crossing at grade allows faster response in the event of fire and other emergency than another route does not require leaving the crossing open when the alternate access is safer and is readily available. RCW 81.53.060.

APPEARANCES: Rexanne Gibson, attorney, Bellevue, represents petitioner Burlington Northern Railroad Co. John R. Moffat, prosecuting attorney, represents Skagit County. Ann Rendahl, assistant attorney general, Olympia, represents the staff of the Washington Utilities and Transportation Commission. Bradford E. Furlong, attorney, Mt. Vernon, appeared at hearing as an intervenor.²

MEMORANDUM

This is a petition by Burlington Northern Railroad Company (BNRR) to close six highway-railway crossings at grade in Skagit County. The six crossings are: Milltown Road; Spruce Street; Green Road; Boe Street; West Johnson Road; and West Stackpole Road. BNRR cites public safety concerns in its petition for closure of the crossings. Skagit County opposed closure of the Milltown Road, Spruce Street, Green Road, and Boe Street crossings, and requested a hearing.

BNRR withdrew West Johnson Road and West Stackpole Road from consideration prior to hearing. The parties stipulated to an indefinite continuance for hearing on the Spruce Street and Milltown Road crossings. BNRR now has requested leave to withdraw its petition as to those four crossings.

Hearing was held on the other two crossings, Boe Street and Green Road. BNRR requested that separate orders be entered for each of the crossings. Skagit County withdrew its opposition to closure of the Bow Street crossing at hearing. The Commission entered an order closing the Boe Street crossing in May 1995.

At the commencement of the hearing in this matter, Commission Staff stated that, through an oversight, it had not complied with the state Environmental Protection Act (SEPA) by doing a threshold determination of whether there is an environmental impact of

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On December 2, 1996, Skagit County filed with the Commission an agreement between the county and BNRR providing for the closure of the Green Road crossing and construction of a cul-de-sac at the closure point, and the granting of an easement for the cul-de-sac to the county. In a letter accompanying the agreement, Skagit County waived further hearing on the petition and withdrew its opposition to closure of the Green Road crossing. Skagit County, BNRR, and Commission Staff have waived an initial order.

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On January 17, 1996, BNRR filed a request for leave to withdraw its petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road crossings. No party responded in opposition. It is consistent with the public interest to grant withdrawal of the petition. The request will be granted.

B. Green Road Crossing

Applicable Standards

Chapter 81.53 grants the Commission the authority to regulate the safety of railroad grade crossings. RCW 81.53.020 states a legislative preference for overcrossings and undercrossings where practicable, prohibits the construction of a new highway crossing at grade without prior Commission approval,³ and sets out factors that the Commission is to take into account in determining whether a grade-separated crossing is practicable.

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The statutes are based on the theory that all railway/highway crossings at grade are dangerous, and public policy strongly disfavors them. Reines v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 195 Wash. 148, 80 P.2d 408 (1983); Department of Transportation v. Snohomish County, 35 Wn.2d 247, 257, 212 P.2d 829 (1949); State ex rel. Oregon-Washington Railroad & Navigation Co. v. Walla Walla County, 5 Wn.2d 95, 104 P.2d 764 (1940).

In addition to the dangers inherent in any crossing at grade, there are factors that may make a particular crossing especially hazardous. These factors include vegetation or other obstacles that limit the motorist's view of the tracks as the motorist approaches the crossing,⁴ an alignment in which the roadway approaches the crossing at an oblique angle,⁵ limited holding capacity on the approaches between the railroad right of way and streets that intersect with the approaches,⁶ more than one mainline track at the crossing,⁷ and the presence of a siding track in addition to a mainline track at the crossing.⁸

In some cases the public convenience or need for a crossing outweighs the danger, and in that case the Commission may allow a crossing at grade to remain open. The balancing test was stated by the court in Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949) as follows:

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.

Factors the Commission considers in determining whether the public convenience and need outweigh the danger of the crossing include the amount and character of travel on the railroad and on the highway, the availability of alternate crossings, whether the alternate crossings are less hazardous, the ability of alternate crossings to handle any additional traffic that would result from the closure, and the effect of closing the crossing on

⁴ See, Whatcom County v. Burlington Northern Railroad Company, Docket Nos. TR-1725 and TR-1726 (January 1985).

⁵ See, Thurston County v. Burlington Northern Railroad, Docket No. TR-1930 (April 1988).

⁶ See, Whatcom County, *supra* note 4.

⁷ See, Department of Transportation v. Snohomish County, 35 Wn.2d 247 (1949).

⁸ See, Spokane County v. Burlington Northern, Inc., Cause No. TR-1148 (September 1985); Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR-940330 (March 1995).

public safety factors such fire and police control. See, Burlington Northern Railroad Company v. City of Ferndale, Docket No. TR-940330 (March 1995).

The Evidence

Witnesses for BNRR, the Washington State Department of Transportation, the National Railroad Passenger Corporation, and the Federal Railroad Administration testified in support of the petition to close the Green Road crossing. Five members of the public and a fire department official testified in opposition to the proposal to close the Green Road crossing. A witness for Skagit County and a Commission Staff witness also testified concerning the crossing.

The Green Road crossing lies on a BNRR main line which is being upgraded so that high-speed rail passenger service can be initiated between Seattle and Vancouver, B.C. The Washington state legislature, in chapter 47.79 RCW, has established as a goal the implementation of such high-speed service. Among the priorities set out in RCW 47.79.030 are improved grade crossing protection or grade crossing elimination.

Federal railroad safety policies, set out in the Federal Railroad Administration's Rail-Highway Safety/Action Plan Support Proposals, favor consolidation of crossings when practical and improvement of the remaining crossings. The FRA, which regulates railroad safety, has the policy and goal of reducing grade crossings by 25% by the year 2000, to reduce the number of collisions that are occurring at grade crossings.

In the vicinity of the crossing, Green Road and old Highway 99 run parallel to one another on opposite sides of the tracks, in an approximately north-south direction, until Green Road crosses the tracks and intersects with old Highway 99. Green Road has low traffic volumes. The Green Road crossing consists of one track protected by stop signs and crossbucks. The crossing is 50 to 65 feet north of the intersection of Green Road with old Highway 99. Approaching the crossing from the north, Green Road curves sharply just before the crossing in order to make a right angle intersection with old Highway 99. Green Road crosses the tracks at an angle of about 60 degrees.

The crossing does not allow good advance sight of approaching trains. The crossing cannot be seen until a person is very close to it. Approaching trains cannot be seen in both directions until a person is stopped in front of the tracks. The skewed angle of the crossing results in drivers stopping at the crossing having a good line of sight of trains coming from one direction, but not from the other.

The proximity of the crossing to the intersection with old Highway 99 creates three hazards. It presents the driver approaching from the north with two stop signs in view at the same time. Some drivers may not see the first sign, which is the one before the tracks. The second hazard is that the intersection is so close to the crossing that a long truck coming from the north that stops at the second (highway intersection) stop sign will cover the

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rail. There is moderate, high-speed traffic on the highway, which might prevent a stopped truck from getting out of the way of a train. The third hazard is that vehicles come off the highway at 50 to 60 miles per hour. They may misjudge their speed and slide over the crossing before they can stop.

The lack of controls other than stop signs and crossbucks also makes the crossing hazardous. Stop signs are not a very effective method of controlling traffic at railroad grade crossings. More people violate stop signs at railroad grade crossings than they do at regular highway intersections.

There is an alternate crossing nearby, at Cook Road, which is safer. Approximately 1500 feet to the north of the Green Road crossing, Green Road intersects at right angles with Cook Road. The intersection is a four-way stop intersection. Cook Road crosses the BNRR tracks at a signalized crossing before it intersects with old Highway 99. The signaling devices consist of overhead dual-mounted flashing lights and drop arm gates. People who live or do business on Green Road can use Cook Road.

Six persons testified in opposition to closure. A farmer who lives south of the crossing opposes closure because he uses old Highway 99 and Green Road to access his fields, reaching Green Road via the Green Road crossing. The Cook Road crossing is a more difficult road to cross with farm equipment. A truck operator who has his shop on Green Road opposes closure because it is difficult for him to turn his trucks around at the shop, and therefore convenient to enter Green Road at one end and exit at the other. He acknowledges the danger at the Green Road crossing, and has seen other truck drivers make the mistake of getting stuck at the intersection with their back end still on the track.

An owner of business property along Green Road opposes closure because business and traffic in the area is growing, the intersection of old Highway 99 and Cook Road has become congested, and closing the Green Road crossing would add to the congestion and adversely affect the area's growth. A Green Road resident and business operator opposes closure because there already is too much traffic at the intersection of Green Road and Cook Road, and because the intersection has flooded in the past whereas the south end of Green Road remained open.

A resident of Green Road opposes closure because the crossing provides alternative access in case of emergencies. The witness acknowledges that some cars coming from old Highway 99 do not stop at the crossing. The fire chief of the Burlington Fire Department and Skagit County Fire District 6 also opposes closure, because closure would increase emergency response time by about two minutes.

A witness who is both the county engineer and the public works director for Skagit County expressed concerns about closure of the crossing which the county wished to have addressed as part of the SEPA review. The county subsequently withdrew its opposition to closure of the crossing.

Discussion and Decision

[1] Our analysis starts with the fact that all crossings at grade are dangerous. There are factors peculiar to the Green Road crossing that make it particularly dangerous. The crossing is on a railroad main line which will be used by high-speed passenger trains. The configuration of the crossing results in poor sight distances. The crossing cannot be seen until a driver is almost upon it. The skewed angle of the crossing prevents a driver from having a good line of sight of trains coming from one direction. The proximity of the crossing to the intersection with old Highway 99 creates three hazards, described above: drivers may be confused by the presence of two stop signs; the crossing has a limited holding capacity for vehicles; and vehicles exiting old Highway 99 may misjudge their speed and slide over the crossing before they can stop. The crossing is not protected by electronic signals or gates.

The crossing is a convenience to residents and business people in the vicinity, but is not shown to be a necessity. The crossing is not heavily used. Closure of the crossing would not cut off any residences or businesses. There is another crossing nearby which is equipped with electronic signal devices. Electronic signals make a crossing much safer than do crossbucks and stop signs.⁹ Consolidation of crossings necessarily inconveniences those whose crossing is eliminated in favor of adjacent crossings.

The argument that the Cook Road crossing is busy does not justify leaving the Green Road crossing open. See, Whatcom County, supra; Spokane County v. Burlington Northern, Inc., Cause No. TR-1148 (September 1985), at page 7. Consolidating crossings when practical and improving the remaining crossings promotes the public safety.

[2] The argument that the Green Road crossing should remain open because it allows faster response in the event of fire and other emergency does not justify leaving the crossing open. Access via a safer route is readily available, and the need for additional access does not outweigh the dangers posed by the crossing. See, Union Pacific Railroad Company v. Spokane County, Docket No. TR-950177 (July 1996), at pages 7-8.

After considering the convenience of the crossing, hazards inherent in all crossings at grade, the hazards that are particular to this crossing, the fact that it is lightly used, and the accessibility of a safer alternate crossing, the Commission concludes that the need for the crossing is not so great that it must be kept open despite its dangerous condition.

The mitigated determination of non-significance requires as mitigation the construction of a cul-de-sac at the point of closure of Green Road. Consistent with that determination, the Commission will condition closure of the crossing on construction of a cul-

⁹ See, Whatcom County v. Burlington Northern Railroad Company, Cause Nos. TR-1725 and TR-1726 (January 1985), at page 5.

de-sac, such as that described in the agreement between BNRR and Skagit County dated October 27, 1996.

Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings are incorporated herein by this reference.

FINDINGS OF FACT

1. On January 24, 1995, the Burlington Northern Railroad Company ("BNRR") petitioned the Commission for closure of four highway-railway crossings at grade in Skagit County: Milltown Road near Conway, at railroad milepost 60.28; Spruce Street in Conway, at railroad milepost 62.50; Green Road near Burlington, at railroad milepost 73.88, located in the SE¼ of the SE¼, Sec. 19, Twp. 35N, Range 4 E.W.M., Burlington, Skagit County; and Boe Street near Bow, located at railroad milepost 79.20.
2. With respect to the Green Road crossing, the petition states that the crossing is .45 mile to the south of the Cook Road grade crossing; that the Cook Road crossing is signalized with cantilevers and gates while the Green Road crossing has passive warning devices (cross bucks); that Cook Road can serve the homeowners and businesses that reside on Green Road; and that closing the Green Road crossing will improve the safety of the motoring public.
3. In March 1994, Skagit County filed an objection to the petition and requested a hearing.
4. In October 1994, BNRR and Skagit County jointly submitted two additional grade crossings as part of the petition: West Johnson Road near Conway, at railroad milepost 64.58; and West Stackpole Road near Conway, at railroad milepost 65.58.
5. On February 21, 1995, BNRR and Skagit County requested that the request for closure of the West Johnson Road and West Stackpole Road crossings be withdrawn from the petition and that no evidence be taken with respect to those crossings at the hearing.
6. Bradford M. Furlong was granted leave to intervene with respect to two crossings, Spruce Street and Milltown Road.
7. A hearing was held on February 23, 1995, in Mount Vernon, before Administrative Law Judge Lisa A. Anderl. At the commencement of the hearing, BNRR requested and was granted an indefinite continuance of the hearing with respect to the Milltown Road and Spruce Street crossings. Mr. Furlong expressed no interest in the Bow Street and Green Road crossings, and was excused from the remainder of the hearing.

8. Kenneth E. Cottingham testified for BNRR in support of the petition. Mr. Cottingham is a consulting transportation engineer, licensed in Washington as a mechanical engineer. He has worked on rail grade crossing design, operations, and safety since 1956. He performed an on-site inspection of the Green Road crossing in January 1995.

9. Green Road is the original paved north-south highway in the area. It is 15½ feet wide, and has no pavement markings. The Green Road crossing is 50 to 65 feet north of an intersection of Green Road with old Highway 99. Green Road and old Highway 99 both run in a north-south direction on opposite sides of the tracks. Approaching the crossing from the north, Green Road curves sharply just before the crossing in order to make a right angle intersection with old Highway 99. Green Road crosses the tracks at an angle of about 60 degrees. The crossing consists of one track protected by stop signs and crossbucks. The track is a main line of BNRR, and the high-speed rail corridor of Amtrak.

10. The crossing is hazardous in several respects. It does not meet accepted standards of sight distance. The crossing cannot be seen until a person is very close to it. Approaching trains cannot be seen in both directions until a person is stopped in front of the tracks. The angle of the crossing makes it hazardous. Vehicles stopping at the crossing have a good line of sight of trains coming from one direction, but not from the other.

The proximity of the crossing to the intersection with old Highway 99 creates three hazards. First, it presents the driver approaching from the north with two stop signs in view at the same time. Some drivers may not see the first sign, which is the one before the tracks. The second hazard is that the intersection is so close to the crossing that a long truck coming from the north that stops at the second (highway intersection) stop sign will cover the rail. Eighty-two foot truck-trailer rigs are common. There is moderate, high-speed traffic on the highway, which might prevent a stopped truck from getting out of the way of a train. The third hazard is that vehicles come off the highway at 50 to 60 miles per hour and the drivers may misjudge their speed and slide over the crossing before they can stop.

The lack of controls other than stop signs and crossbucks makes the crossing hazardous. Stop signs are not an effective method of controlling traffic at railroad grade crossings. More people violate stop signs at grade crossings than at highway intersections.

11. There is an alternate crossing nearby, at Cook Road, which is safer. Approximately 1500 feet to the north of the Green Road crossing, Green Road intersects at right angles with Cook Road. The intersection is a four-way stop. Cook Road crosses the BNRR tracks at a signalized crossing before it intersects with old Highway 99. The signaling devices consist of overhead dual-mounted flashing lights and drop arm gates. Cook Road also is the interchange of I-5, which lies to the west of old Highway 99.

12. The nature of the area along Green Road between the Green Road crossing and Cook Road is primarily residential. People who live or do business on Green Road can use Cook Road. Green Road has light traffic.

13. Edward Leon Quicksall testified for the National Railroad Passenger Corporation in support of the petition to close the Green Road crossing. Mr. Quicksall is transportation manager in charge of field operations. He is responsible for anything to do with Amtrak trains in and out of Seattle. New Amtrak service is planned between Seattle and Vancouver, B.C. Amtrak plans to operate its equipment initially at 79 miles per hour.

14. Jeff Schultz testified for the Washington State Department of Transportation in support of the petition to close the Green Road crossing. He is a rail passenger analyst. He is involved in the passenger rail project going from Seattle to Vancouver, B.C. The Washington state legislature directed the department to reestablish service between the two cities several years ago as part of the high speed ground transportation legislation, chapter 47.79 RCW. RCW 47.79.030 states that the department shall work on improved grade crossing protection or grade crossing elimination as part of this project. The department's goal for service is 3 hours and 30 minutes, with an interim goal of 3 hours and 55 minutes. There was passenger service on the corridor prior to 1981, and it took 4 hours and 30 minutes. In order to perform the new goal, it will be necessary for Amtrak to operate over the Green Road crossing at 79 miles per hour. The legislature has set a future goal of 150 miles per hour. Grade crossing consolidation will be necessary to accomplish the faster speeds. Consolidation enhances safety by eliminating the potential for conflicts between automobiles and trains.

15. Ronald Ries testified for the Federal Railroad Administration in support of the petition to close the Green Road crossing. He is Crossing and Trespasser Regional Manager for the FRA, which regulates railroad safety in interstate commerce. His duties are to help coordinate grade crossing safety initiatives and trespasser prevention programs. It is the policy and goal of the FRA to see a 25 percent reduction in public highway rail grade crossings by the year 2000. In 1994, the FRA, together with the Federal Highway Administration, Federal Transit Administration, and National Highway Traffic Safety Administration published the Rail-Highway Crossing Safety Action Plan Support Proposals which address 55 specific proposals to reduce the number of collisions that are occurring at grade crossings and prevent trespassing. Criteria the FRA has determined to be useful in selecting appropriate crossings for closure or consolidation are: to consolidate crossings where there are more than four per mile in urban areas and more than one per mile in rural areas when an alternate route is available; to consolidate crossings which have fewer than 2000 vehicles per day and more than two trains per day and an alternate route is available; and to eliminate crossings where the road crosses the tracks at a skewed angle.

16. The following residents and business owners in the area of the crossing testified in opposition to the petition to close the Green Road crossing.

a. Douwe Dykstra resides on Gear Road, which is just south of the Green Road crossing. He operates a dairy farm there, and also has land on Green Road, north of the crossing. He travels with farm equipment back and forth between the two fields, using old Highway 99 and the Green Road crossing. If the Green Road crossing is closed, he will have to use the Cook Road crossing, which is a difficult road to cross with farm equipment.

b. Harry Smit is a trucker whose shop is on Green between the crossing and Cook Road. It is difficult and dangerous to turn trucks around at his shop, so he enters Green Road at one end and exits at the other. He is aware of two accidents at the crossing. Approaches at the crossing are not long enough for an 80-foot truck. He recommends that the Green Road crossing be kept open and improved with flashing lights and drop arm gates.

c. Robert Farrell, Sedro Woolley, owns business and residential property on Green Road which he leases. The area is part of the I-5 corridor. Traffic flow in the corridor is tremendous, and business has recognized this and is developing the area. The intersection of Cook Road and old 99 is congested already, and the Green Road-Cook Road intersection is becoming more difficult to use. Keeping the Green Road crossing open would relieve congestion on Cook Road. Closing it might choke off further growth in the area.

d. Randy Rockafellow has a farm equipment maintenance business at his residence on Green Road. The Green Road-Cook Road intersection has flooded in the past, while the Green Road crossing remained above water, providing safe access. There is a lot of traffic on Cook Road, making it difficult to enter from Green Road.

e. Kenneth Thomas resides on Green Road. Cars sometimes do not stop at the crossing when exiting old highway 99, and rip through his yard. Nonetheless, he favors keeping the crossing open because if it were closed, it would take additional time for emergency vehicles to reach his home. He also is concerned about access in the event trains block Cook Road.

17. John A. Pauls testified in opposition to the petition. Mr. Pauls is the chief of the Burlington Fire Department and the chief of the Skagit County Fire District 6. The fire department opposes closure of the Green Road crossing because emergency response to the southern end of Green Road would be increased. The additional response time at emergency speed would be two minutes. Two minutes makes a significant amount of difference, increasing response time to that area by one-third.

18. Janette Keiser testified for Skagit County. She is the public works director, Skagit County Public Works Department, and is the county engineer. The county's preliminary investigation identified concerns that it wanted addressed as part of the SEPA documentation. Although Green Road is a low-volume road, closure of the crossing might have an adverse impact on the businesses and property owners on Green Road. Several large agricultural enterprises rely on Green Road for ingress and egress. If closure would deny adequate ingress and egress, it would deny the policies of the county's Growth Management Act. The county was concerned that the impact on congestion, emergency response, and business viability be considered as part of the SEPA process. As stated in Finding No. 24, the county withdrew its opposition to closure subsequent to the hearing.

19. Gary Harder testified for the staff of the Washington Utilities and Transportation Commission. He has provided technical assistance to the rail section for the

last 21 years. The Commission's records do not show any accidents at the Green Road crossing in the last ten years.

20. At the conclusion of testimony, the administrative law judge continued the hearing on the petition to close the Green Street crossing pending completion by Commission Staff of a determination of whether there is an environmental impact of closing the crossing.

21. The Commission entered an order closing the Boe Street crossing on May 26, 1995.

22. On January 17, 1996, BNRR requested leave to withdraw its petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings. No party has responded in opposition to the request.

23. Commission Staff has made a determination of non-significance for closure of the Green Road crossing under the State Environmental Protection Act. The determination states the following required mitigation: a proposed cul-de-sac on Green Road will be constructed within the existing railroad/county right-of-way to county standards as approved by the county engineer; grading and filling will be performed as determined during the design stage; and the project will comply with the county's critical area Ordinance 14.36.

24. On October 27, 1996, BNRR and Skagit County entered into an agreement: to waive the hearing currently pending; to eliminate the Green Road crossing by the county abandoning the roadway right-of-way across the railroad right-of-way and constructing a cul-de-sac upon the railroad's right-of-way; for BNRR to pay the county \$6,190 for eliminating the crossing and closing the road; and for BNRR to grant the county an easement for the construction of the cul-de-sac. The county withdraws its objection to the closure of the Green Road crossing on condition as described in the agreement.

25. BNRR, Skagit County, and Commission Staff have waived entry of an initial order in this proceeding.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to this petition.

2. Granting the unopposed request to withdraw the petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings is consistent with the public interest.

3. The grade crossing at Green Road and mile post 73.88 of the BNRR tracks in Skagit County is dangerous and is not required by the public convenience and safety. The petition to close the crossing should be granted subject to construction of a cul-de-sac on

Green Road at the point of closure, such as that described in the agreement between BNRR and Skagit County dated October 27, 1996.

- 4. The petition of BNRR to close the Green Road crossing should be granted, conditioned upon construction of the cul-de-sac referred to above.
- 5. An initial order may properly be omitted in this matter.


ORDER

THE COMMISSION ORDERS That the request of Burlington Northern Railroad Company for leave to withdraw the petition to close the Milltown Road, Spruce Street, West Johnson Road, and West Stackpole Road grade crossings is granted.

THE COMMISSION FURTHER ORDERS That the petition of Burlington Northern Railroad Company for closure of the Green Road crossing at mile post 73.88 in Skagit County is granted, conditioned upon construction of a cul-de-sac on Green Road at the point of closure, such as that described in the agreement between Burlington Northern Railroad Company and Skagit County dated October 27, 1996.

DATED at Olympia, Washington, and effective this ^{13th} day of December 1996.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION


 RICHARD HEMSTAD, Commissioner


 WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

RCW 43.21C.030

Guidelines for state agencies, local governments — Statements — Reports — Advice — Information.

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

[1971 ex.s. c 109 § 3.]

RCW 36.70A.020

Planning goals.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
- (5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.
- (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.
- (7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
- (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
- (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.
- (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.
- (11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.
- (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.
- (13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.

[2002 c 154 § 1; 1990 1st ex.s. c 17 § 2.]

RCW 36.70A.060

Natural resource lands and critical areas — Development regulations.

(1)(a) Except as provided in *RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

(b) Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights.

[2005 c 423 § 3; 1998 c 286 § 5; 1991 sp.s. c 32 § 21; 1990 1st ex.s. c 17 § 6.]

Notes:

*Reviser's note: RCW 36.70A.1701 expired June 30, 2006.

Intent -- Effective date -- 2005 c 423: See notes following RCW 36.70A.030.

197-11-335 << 197-11-340 >> 197-11-350

WAC 197-11-340

Determination of nonsignificance (DNS).

(1) If the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS) substantially in the form provided in WAC 197-11-970. If an agency adopts another environmental document in support of a threshold determination (Part Six), the notice of adoption (WAC 197-11-965) and the DNS shall be combined or attached to each other.

(2) When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection shall be met. The requirements of this subsection do not apply to a DNS issued when the optional DNS process in WAC 197-11-355 is used.

(a) An agency shall not act upon a proposal for fourteen days after the date of issuance of a DNS if the proposal involves:

- (i) Another agency with jurisdiction;
- (ii) Demolition of any structure or facility not exempted by WAC 197-11-800 (2)(f) or 197-11-880;
- (iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules;
- (iv) A DNS under WAC 197-11-350 (2), (3) or 197-11-360(4); or
- (v) A GMA action.

(b) The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under WAC 197-11-510.

(c) Any person, affected tribe, or agency may submit comments to the lead agency within fourteen days of the date of issuance of the DNS.

(d) The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available.

(e) An agency with jurisdiction may assume lead agency status only within this fourteen-day period (WAC 197-11-948).

(f) The responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or supporting documents. When a DNS is modified, the lead agency shall send the modified DNS to agencies with jurisdiction.

(3)(a) The lead agency shall withdraw a DNS if:

- (i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;
- (ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or
- (iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

(b) Subsection (3)(a)(ii) shall not apply when a nonexempt license has been issued on a private project.

(c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also WAC 197-11-070).

[Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. 97-21-030 (Order 95-16), § 197-11-340, filed 10/10/97, effective 11/10/97.
Statutory Authority: RCW 43.21C.110. 95-07-023 (Order 94-22), § 197-11-340, filed 3/6/95, effective 4/6/95; 84-05-020 (Order DE 83-39), § 197-11-340, filed 2/10/84, effective 4/4/84.]

197-11-443 << 197-11-444 >> 197-11-448

WAC 197-11-444

Elements of the environment.

(1) Natural environment

(a) Earth

(i) Geology

(ii) Soils

(iii) Topography

(iv) Unique physical features

(v) Erosion/enlargement of land area (accretion)

(b) Air

(i) Air quality

(ii) Odor

(iii) Climate

(c) Water

(i) Surface water movement/quantity/quality

(ii) Runoff/absorption

(iii) Floods

(iv) Ground water movement/quantity/quality

(v) Public water supplies

(d) Plants and animals

(i) Habitat for and numbers or diversity of species of plants, fish, or other wildlife

(ii) Unique species

(iii) Fish or wildlife migration routes

(e) Energy and natural resources

(i) Amount required/rate of use/efficiency

(ii) Source/availability

(iii) Nonrenewable resources

(iv) Conservation and renewable resources

(v) Scenic resources

(2) Built environment

(a) Environmental health

(i) Noise

- (ii) Risk of explosion
- (iii) Releases or potential releases to the environment affecting public health, such as toxic or hazardous materials
- (b) Land and shoreline use
 - (i) Relationship to existing land use plans and to estimated population
 - (ii) Housing
 - (iii) Light and glare
 - (iv) Aesthetics
 - (v) Recreation
 - (vi) Historic and cultural preservation
 - (vii) Agricultural crops
- (c) Transportation
 - (i) Transportation systems
 - (ii) Vehicular traffic
 - (iii) Waterborne, rail, and air traffic
 - (iv) Parking
 - (v) Movement/circulation of people or goods
 - (vi) Traffic hazards
- (d) Public services and utilities
 - (i) Fire
 - (ii) Police
 - (iii) Schools
 - (iv) Parks or other recreational facilities
 - (v) Maintenance
 - (vi) Communications
 - (vii) Water/storm water
 - (viii) Sewer/solid waste
 - (ix) Other governmental services or utilities

(3) To simplify the EIS format, reduce paperwork and duplication, improve readability, and focus on the significant issues, some or all of the elements of the environment in WAC 197-11-444 may be combined.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-444, filed 2/10/84, effective 4/4/84.]

197-11-508 << 197-11-510 >> 197-11-535

WAC 197-11-510
Public notice.

(1) When these rules require notice to be given under this section, the lead agency must use reasonable methods to inform the public and other agencies that an environmental document is being prepared or is available and that public hearing(s), if any, will be held. The agency may use its existing notice procedures.

Examples of reasonable methods to inform the public are:

- (a) Posting the property, for site-specific proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located;
- (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- (d) Notifying the news media;
- (e) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and/or
- (f) Publishing notice in agency newsletters and/or sending notice to agency mailing lists (either general lists or lists for specific proposals or subject areas).

(2) Each agency shall specify its method of public notice in its SEPA procedures, WAC 197-11-904 and 197-11-906. If an agency does not specify its method of public notice or does not adopt SEPA procedures, the agency shall use methods (a) and (b) in subsection (1).

(3) Documents which are required to be sent to the department of ecology under these rules will be published in the SEPA register, which will also constitute a form of public notice. However, publication in the SEPA register shall not, in itself, meet compliance with this section.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-510, filed 2/10/84, effective 4/4/84.]

197-11-570 << 197-11-600 >> 197-11-610

WAC 197-11-600

When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

(2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

(a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340 (2)(e) and 197-11-948).

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

(c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

(4) Existing documents may be used for a proposal by employing one or more of the following methods:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

(c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.

(d) Preparation of a SEIS if there are:

(i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

(e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

[Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. 97-21-030 (Order 95-16), § 197-11-600, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-600, filed 2/10/84, effective 4/4/84.]

197-11-860 << 197-11-865 >> 197-11-870

WAC 197-11-865

Utilities and transportation commission.

All actions of the utilities and transportation commission under statutes administered as of December 12, 1975, are exempted, except the following:

(1) Issuance of common carrier motor freight authority under chapter 81.80 RCW that would authorize a new service, or extend an existing transportation service in the fields of petroleum and petroleum products in bulk in tank type vehicles, radioactive substances, explosives, or corrosives;

(2) Authorization of the openings or closing of any highway/railroad grade crossing, or the direction of physical connection of the line of one railroad with that of another;

(3) Regulation of oil and gas pipelines under chapter 81.88 RCW; and

(4) The approval of utility and transportation rates where the funds realized as a result of such approved rates will or are intended to finance construction of a project, approval of which would not be otherwise exempt under WAC 197-11-800, and where at the time of such rate approval no responsible official of any state or federal agency has conducted the environmental analysis prescribed by this chapter or the appropriate provisions of NEPA, whichever is applicable.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-865, filed 2/10/84, effective 4/4/84.]