

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

BNSF RAILWAY COMPANY,)	
)	DOCKET TR-070696
)	
Petitioner,)	
)	
v.)	SKAGIT COUNTY’S REPLY
)	BRIEF TO PETITIONER BNSF’S
CITY OF MOUNT VERNON)	MOTION TO LIMIT THE SCOPE
)	OF THE SUBJECT MATTER
Respondent.)	BEFORE THE COMMISSION
And)	
)	
SKAGIT COUNTY, WASHINGTON)	
STATE DEPARTMENT OF)	
TRANSPORTATION, and WEST)	
VALLEY FARMS, LLC,)	
)	
Intervenors)	
)	
.....)	

1 Skagit County, by and through its attorney(s) of record, Stephen R. Fallquist, Deputy Prosecuting Attorney for Skagit County, does hereby submit the following Reply Brief in response and opposition to Petitioner BNSF’s Motion to Limit the Scope of the Subject Matter Before the Commission. In particular, this Reply Brief will iterate why Petitioner’s argument to limit the scope of the subject matter is partially flawed.

2 **I. STATEMENT OF FACTS AND EVIDENCE RELIED UPON.**

3 This Reply Brief is based upon the pleadings and materials on file herein.

4 **II. ISSUE PRESENTED.**

5 Why the scope of this WUTC hearing should not be solely limited to the issue of
6 “public safety” as defined and argued in Petitioner’s motion.

6 **III. ARGUMENT.**

7 Petitioner is correct in asserting that RCW 81.53.060 directs the Commission to
8 determine whether “public safety requires” the closure of the crossing (and to
9 consider whether other alternatives to closure of the crossing are practicable).¹

10 However, Petitioner’s argument (regarding the balancing analysis required for a
11 requisite public need determination by the Commission) is otherwise logically flawed
12 and deliberately convoluted. Simply put (and as even conceded and cited within
13 Petitioner’s Motion), any determination of whether public safety requires the closure

¹ The mayor and city council, or other governing body of any city or town, or the legislative authority of any county within which there exists any under-crossing, over-crossing, or grade crossing, or where any street or highway is proposed to be located or established across any railroad, or any railroad company whose road is crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires the establishment of an under-crossing or over-crossing, or an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing over-crossing, under-crossing, or grade crossing, or a change in the location of an existing highway or crossing, the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable, to change the crossing from grade or to close and discontinue the crossing, the opening of an additional crossing for the partial diversion of travel, and praying that this relief may be ordered. . . RCW 81.53.060

of a crossing inherently necessitates an analysis that includes a balance of the public's need for and use of the crossing. The WUTC must balance the convenience and necessity of those using the crossing and determine whether this need outweighs any inherently dangerous condition of the crossing. *See, Washington State Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949).*² The WUTC has developed factors that may be used to assist the Commission in making such a determination. A crossing is not especially hazardous when it satisfies certain criteria. Other criteria may be used to assist in determining whether the public need (and convenience) outweigh any inherent danger created by the crossing. This balancing analysis (between any inherent danger of the crossing itself against the convenience and need of the public use) does include "the effect on public safety factors such as fire and police control."³ *See, Burlington Northern Railroad Company v. Skagit County, WUTC Docket TR-940282 (1986).* In addition to fire and police, another "public safety" use to be balanced includes flood control (i.e., flood fighting by the County and flood evacuation by the public). However, public safety is clearly not the only factor, and these criteria are not exclusive.

² "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. [emphasis added]. Washington State Department of Transportation v. Snohomish County, 35 Wn.2d 247, 254 (1949).

³ 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 other alternate crossings are less hazardous, the ability of other crossings to handle any additional traffic that would result from the closure, and the effect of the crossing on public safety factors such as fire and police control. Burlington Northern Railroad Company v. Skagit County, WUTC Docket TR-940282 (1986).

9 Importantly, it must be noted that the Petitioner attempts to confuse this issue by arguing that the forgoing (above-cited) balancing criteria are to be interpreted in the “present tense”, and mistakenly mischaracterizes and asserts that certain uses of (and the public need for) the crossing merely constitute “abstract policy considerations” involving “hypothetical and speculative changes.” This is not only a strained interpretation, it is also inconsistent with reality.

10 The current reality is that the crossing is not rural. The crossing is located within the city limits and Urban Growth Area of the City of Mount Vernon. It is not hypothetical or speculative that growth in the vicinity of the crossing and increased use of the crossing is presently occurring. The fact that flooding does occur in the immediate vicinity of the crossing, and that the County uses the crossing for flood fighting and flood evacuation purposes is not hypothetical or speculative.⁴ These are current and actual public uses and needs.

11 The present public use and need requires that the crossing remain open. Such a determination is an essential component of the public necessity balancing analysis before the Commission, and requires a full examination based upon direct testimony. Public safety is an important component of this analysis, but it is not the only factor. Petitioner’s argument in this regard is logically flawed.

⁴ While the fact of flooding in the vicinity of the crossing does directly go to the issue of public safety (insofar that public safety requires that the crossing should remain open to allow for flood evacuation, and also to allow for necessary County access for flood-fighting efforts in the area), it is also relates to the analysis of current public use by Skagit County for flood control purposes.

12 While this Reply Brief does not directly address the scope of the WUTC's review authority, Skagit County supports the argument of the City of Mount Vernon in this regard, and respectfully submits that the WUTC does have the authority to make determinations as to the adequacy of environmental review (and address other issues).
Petitioner's motion should fail.

13 **IV. CONCLUSION.**

14 In light of the forgoing, Skagit County respectfully requests an order denying Petitioner's Motion to Limit the Scope of the Subject Matter Before the Commission.

DATED this 12th day of September, 2007

Stephen R. Fallquist, WSBA # 31678
Deputy Prosecuting Attorney, Civil Division
Skagit County
605 South Third Street
Mount Vernon, WA 98273
Ph: (360) 336-9460
Fax: (360) 336-9497
e-mail: stephenf@co.skagit.wa.us

CERTIFICATE OF SERVICE

Judy L. Kiesser states and declares as follows:

I am a citizen of the United States of America, over 18 years of age and competent to testify to the matters set forth herein. On _____, 2007, I caused to be served by first class mail, postage prepaid, a true and correct copy of the foregoing document entitled PRELIMINARY WITNESS LIST OF SKAGIT COUNTY on the following:

JOHN LI, MANAGER
PUBLIC PROJECTS
BNSF RAILWAY COMPANY
2454 OCCIDENTAL AVE S, STE 1A
SEATTLE WA 98134-1451

BRADLEY P. SCARP, ESQ.
1218 THIRD AVENUE, 27TH FLOOR
SEATTLE, WA 98101

JONATHAN THOMPSON, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40128
OLYMPIA, WA 98504-0128

GARY T. JONES
JONES & SMITH
PO BOX 1245
MOUNT VERNON, WA 98273

BRIAN K. SNURE
SNURE LAW OFFICE
612 S 227TH STREET
DES MOINES WA 98198

ADAM E. TOREM
1300 S. EVERGREEN PARK DR. S.W.
P.O. BOX 47250
OLYMPIA, WA 98504-7250

L. SCOTT LOCKWOOD, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40113
OLYMPIA, WA 98504-0113

KEVIN ROGERSON
CITY ATTORNEY
CITY OF MOUNT VERNON
910 CLEVELAND AVE.,
MOUNT VERNON, WA 98273

DATED this _____ day of September, 2007.

JUDY KIESSER, Legal Assistant