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SERVICE DATE
NOV 24 1993

NOTE: An important notice to parties about administrative review appears at the end of this order.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LYNDEN, WASHINGTON,)	
)	
Petitioner,)	DOCKET NO. TR-921181
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
BURLINGTON NORTHERN)	AND INITIAL ORDER
RAILROAD COMPANY,)	GRANTING PETITION
)	
Respondent.)	
.....)	

This matter came on for hearing on due and proper notice to all interested parties on August 31 and September 13, 1993, at Lynden, Washington, before Administrative Law Judge Rosemary Foster of the Office of Administrative Hearings. Post hearing memoranda were submitted by the parties by September 27, 1993.

The parties were represented as follows:

PETITIONER: CITY OF LYNDEN
By Peter Jay Visser
Attorney at Law
P. O. Box 631
Lynden, Washington 98264-0631

RESPONDENT: BURLINGTON NORTHERN RAILROAD COMPANY
By Rexanne Gibson
Attorney at Law
110 110th Avenue NE, Suite 607
Bellevue, Washington 98004

COMMISSION: WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION
By Jeffrey D. Goltz
Assistant Attorney General
1400 South Evergreen Park Drive SW
Olympia, Washington 98504-0128

NATURE OF PROCEEDING

This case involves a petition by the city of Lynden for an order from the commission pursuant to RCW 81.53 authorizing

installation of a railroad crossing at the intersection of Alder Street and the tracks of the Burlington Northern Railroad, hereafter referred to as "the railroad" or Burlington Northern. This initial order grants the petition.

MEMORANDUM

On October 15, 1992, the city of Lynden filed with the Commission a petition for an order directing the construction of a railroad grade crossing at the intersection of Alder Street and the Burlington Northern railroad right of way in the city of Lynden. On October 13, 1992, Burlington Northern railroad waived a hearing and approved the request. On January 18, 1993, the railroad sent a letter to the Commission attempting to reverse its earlier waiver and requesting a hearing on the city's petition. The railroad did not communicate this reversal of position to Lynden. Lynden's first notice of the railroad's changed position came with the notice of hearing on this matter issued by the Commission. In the meantime, Lynden expended funds preparing the site for a crossing.

Lynden is a community with a population of 6,450 located east of Bellingham in Whatcom County. During recent years, Lynden has experienced considerable population growth. The Homestead development in the northern section of Lynden is an example of such growth.¹ During the next ten years, Lynden expects to have other residential developments in the vicinity of the Homestead including Horizon Estates, a 100 lot development and two multi family unit developments with a total of 915 units.

This growth has impacted street usage and traffic patterns in Lynden. For example, Lynden expects that traffic will increase 87 percent in the next ten years along Bender Road, a north south arterial on the east side of Lynden which will carry a considerable amount of the traffic generated by growth in the northern and eastern portions of Lynden.

Because of increased population and changes in traffic patterns, the city has proposed the creation of a new railroad crossing at Alder Street, a residential street. See Appendix A for a map of the area. If the proposed crossing is installed, traffic from Bender Road would be diverted away from several public and private schools and a ballfield where congestion is and will

¹The Homestead residential development covers 258 acres in the northern part of Lynden. When completed, it will include a 18 hole golf course, a 40 room hotel, an R V park with 35 hook ups, a 7,000 square foot athletic club, a 2,000 square foot convenience store, 179 single family houses and 424 multi family dwellings. Construction began in 1992 and is scheduled to continue over 5 to 15 years depending on the demand for housing. (Exhibit 9)

continue to be a problem. Traffic would then flow from Bender Road, across the Alder Street crossing, to Grover Street, a major east west arterial in Lynden thus avoiding congested traffic near the schools and the ballpark. Without the crossing, congestion will continue and will grow along Bender Road as there is presently no good access from Bender Road to Grover Street. There is also not another available alternative to the proposed crossing which will reduce the present and future congestion problem.

Currently there is only a single set of tracks at Alder Street and no expansions are planned. Alder Street is located in a residential area with a 25 mile per hour speed limit. The approaches to the proposed crossing are flat and the alignment of the track is straight. The proposed crossing would cross the track at a 90 degree angle. There is some brush and a pile of dirt near the crossing which partially obstructs the view of the tracks.

There are six other railroad crossings in use in Lynden. They are within a very short distance of each other. They include the First Street crossing, the Second Street crossing, the Nooksack crossing, the Depot Road (Third Street) crossing, the Grover Street crossing and the Hawley Street crossing. The proposed Alder Street crossing would be located three blocks from the Nooksack crossing. The Nooksack and the First Street crossings are located in Lynden's commercial area. The existing crossings are unprotected other than with cross buck signs.

There is a maximum of one train per day using the track at the proposed crossing site. The train operates Monday through Friday. There is a single engine with several cars which comes into Lynden around 4:30-4:45 p.m., conducts switching activities related to commercial loading of freight, and then leaves Lynden between 5:15 and 5:30 p.m. These switching activities usually do not impact the proposed crossing site. The usual speed of this train is less than 10 miles per hour.

ISSUES

1. Should the crossing be authorized?
2. If the crossing is authorized, what type of signalization is required and how should costs be apportioned?
3. If the crossing is authorized, which entity is responsible for removal of brush in the vicinity of the crossing?
4. If the crossing is authorized, should other crossings in Lynden be closed?
5. Has the railroad waived its right to a hearing in this case?

POSITIONS OF THE PARTIES

CITY OF LYNDEN

The city of Lynden proposes the crossing for the following reasons:

- 1. To provide a connected street system which will directly link important arterials;
- 2. To better accommodate traffic generated by development proposed along Bender Road;
- 3. To mitigate impacts of traffic growth on the three Lynden Christian Schools;
- 4. To provide a crossing which is not adversely affected by train activities such as switching;
- 5. To eliminate the need for other costly road changes or improvements by providing a direct arterial connection between Bender Road and Grover Street.

According to the city, installation of the proposed crossing would improve traffic flows along Bender Road and allow traffic to be diverted to Grover Street, a main arterial passing through Lynden. This diversion would improve traffic flows and allow traffic to be directed away from several schools in the area. The proposed crossing would also have the effect of decreasing emergency vehicle response time, reducing the need for traffic signals, and reducing requirements for future road improvements. Installation of the crossing would reduce overall traffic volumes on all routes and would reduce traffic congestion now and in the future.

The city claims that the proposed crossing would not be adversely affected by train activities, i.e. switching which would block the crossing, and, when compared with other crossings, it would be safer than most crossings and would not generate a significant increase in the potential for train/motor vehicle accidents. In fact, the city claims that without this crossing, the likelihood of accidents at Lynden's other crossings would be significantly greater.

The city's brief proposes granting the petition with the following conditions:

- 1. That shoulder mounted gates and signals be purchased by the city and installed by the railroad;

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2. That the city be required to pay the cost of the material used for the installation of the crossing. The city has agreed to pay its share of the costs of signalization; and

3. That the city install stop signs on both sides of the tracks at the existing Hawley Street crossing; and

4. That the city close the Second Street crossing to all traffic except the traffic of the businesses with property adjoining Second Street, between Main and Drayton Streets.

The city takes the position that items #3 and #4 cannot be imposed but the city agrees to these conditions to address concerns raised by Commission Staff and the Railroad as crossings the city could get along without using. If these changes are made, the city asserts that railroad crossing traffic in total will be considerably safer in Lynden.

The city also raises three legal issues in connection with the proposed crossing. First, the city reargues its challenge to the Commission's jurisdiction which was previously rejected in a prior interim order.²

Second, the city urges that because there is a franchise between the city and the railroad, the franchise requires the railroad to allow the crossing and that the crossing should be allowed so as not to impair the obligation of the franchise contractual agreement.

Finally, the city raises the issue of waiver by the railroad of its right to a hearing in this case. Essentially, the city claims that the railroad's initial waiver of a hearing in this case is final and that the city was never asked and did not agree to a rescission of that waiver. The city goes on to claim that upon receipt of the waiver, the city went ahead and made expenditures in the form of street repairs in reliance on the waiver which the city otherwise would not have made.

BURLINGTON NORTHERN RAILROAD

The railroad opposes installation of the Alder Street crossing. It maintains that the city has not met its burden of proof as to need for the crossing and that whatever need is demonstrated is outweighed by the safety hazards inherent in any railroad crossing. In the alternative, the railroad requests that if the petition is granted, several conditions should be imposed including requiring the city pay for signals and gates, closure of

²See the Interlocutory Order Denying Motion to Dismiss entered in this docket on June 17, 1993 and attached as Appendix B.

the Second Street crossing to the public, and permanent closure of the Hawley Street crossing.

With regard to signalization, the railroad claims that it should not be required to bear any of the costs associated with signalization. Burlington Northern claims that since it receives no benefit from installation of the crossing, it should not be responsible for costs related to the crossing. It also notes that the statute which concerns signalization, RCW 81.53.271, sets forth a formula which, among other things, apportions none of the costs except maintenance to the railroad.

With regard to clearing of brush, the railroad recommends that the city and the railroad be responsible for the areas which they own near the site of the Alder Street crossing.

With regard to the waiver issue, the railroad concedes that it initially waived hearing in this case and then attempted to rescind it by letter sent to the Commission on January 18, 1993, with no copy to Lynden. The matter was set for hearing by Notice issued by the Commission on April 27, 1993. The hearing notice was sent to all parties. The railroad argues that there is nothing in the statute which precludes the railroad's participation in the hearing notwithstanding an earlier waiver. The railroad claims that it is the Commission that has the authority and responsibility to investigate and note matters related to proposed new crossings for hearing. The railroad further asserts that any actions or costly improvements undertaken by the city of Lynden in reliance on the waiver are irrelevant as only the Commission has the final authority to fully investigate the need for the crossing.

COMMISSION STAFF

Commission Staff supports the petition if conditions are imposed which will reduce the number of crossings in Lynden and insure public safety. Commission Staff asserts that while Lynden growth projections may not be dispositive as to the need for the crossing, there is merit in moving crossings from downtown toward the Alder Street crossing because there may be less switching activity there. Staff recommends that approval of the proposed crossing be conditioned upon signalization and on closure (to the public) of at least two other crossings in downtown Lynden. Staff notes that the closure of other crossings was not specifically addressed on this record and recommends that petitions for closure of the Hawley Street crossing and the Second Street crossing be filed.

Staff also maintains that the question of who pays for signalization is subject to statutory considerations, depending in part on availability of public funds. In addition, payment for signalization was not specifically addressed by the parties on this

record. Under these circumstances, the parties should either work out an agreement regarding signalization costs or petition to reopen this docket to address this issue.

Commission Staff recommends that the approval of the Alder Street crossing be further conditioned on removal of brush and trees, on both railroad and other adjacent property, which would eliminate any sight distance impairment at the crossing. Staff goes on to recommend use of the performance standard for determining necessary sight distance found in FWHA's Railroad Highway Grade Crossing Handbook (U S DOT, 1978).

With regard to the city's waiver issue, Commission Staff urges that whatever was waived upon filing of the petition, there was no waiver by the Commission of its jurisdiction over such crossings. Staff asserts that the Commission should not enter into a dispute between the city and the railroad as to possible damages to the city caused by the railroad's initial agreement to waive its right to a hearing.

DISCUSSION

ISSUE #1 Should the crossing be authorized?

RCW 81.53 requires that the Commission regulate railroads, including establishment of railroad crossings. In considering crossing proposals, the Commission balances the hazards of a grade crossing against the need for the crossing, keeping in mind that the courts in Washington have held that all railroad crossings are inherently dangerous. A party proposing an additional railroad crossing has the substantial burden of establishing that a need for an additional crossing exists, and that such need outweighs the inherent hazards involved. In this case, Lynden has met that burden. If properly signalized with flashing lights and shoulder mounted gates, the proposed site is suitable for a crossing, with adequate sight lines and appropriate topography and in an area of minimal use by slow moving trains. The proposed crossing will not create additional numbers of vehicles crossing the railroad right of way, but will tend to redistribute existing vehicle traffic from crossings equipped only with crossbucks to a crossing fully equipped with flashing lights and gates. At the same time, the proposal will divert traffic from crossings closer to where switching activities occur and will upgrade and make safer two existing crossings, while diverting traffic from schools and a ballpark and improving overall traffic flow. On balance, these considerations outweigh generalized inherent hazards involved in any additional crossing. Lynden's petition should be granted if the conditions discussed in this decision are met.

ISSUE #2 What type of signalization is required and how should costs be apportioned?

All of the parties agreed that if the petition is granted, signalization should consist of shoulder mounted gates and signals. The record fully establishes this type of signalization as the safest and most appropriate for the proposed crossing. Approval of Lynden's petition should be conditioned on installation of shoulder mounted gates and flashing signals.

The question of who should pay for the costs of signalization is the subject of detailed statutory provisions (RCW 82.53), and is to a large extent a question of availability of public funds. The parties did not address this issue at hearing and there is not a record upon which to base a decision. Because the statutory provisions are detailed and self explanatory and leave very little room for discretion, the undersigned is of the opinion that the parties can themselves determine the availability of public funds, apply the statutory formula, and resolve the matter. If not, Lynden can petition to reopen the hearing for the limited purpose of resolving this issue.

ISSUE #3 Who is responsible for clearing brush in the vicinity of the crossing?

The record in this matter establishes that significant amounts of brush and trees obstruct sight on the right of way. Burlington Northern has a statutory responsibility to remove brush, trees or other obstructing material on the railroad right of way. See RCW 47.32. Lynden, as petitioner, has responsibility for removing any obstructing material not located on the railroad right of way.

ISSUE #4 Should other crossings in Lynden be closed?

Commission Staff and Burlington Northern argue that Lynden should be required to close the Hawley Street crossing as a condition precedent to granting Lynden's petition, rather than installing stop signs as Lynden has offered. As a general proposition, if railroad crossings are dangerous, it is safer for the public if crossings are closed, but beyond the general proposition, no justification has been presented for requiring the closing of another unrelated crossing as a condition precedent to granting Lynden's petition. As noted above, Lynden has met its burden regarding the Alder Street crossing and has further offered to make changes which render two other crossings safer. The jurisdictional basis for requiring the closing of additional crossings is unclear, and, in any event, the record does not support such action.

ISSUE #5 Has the railroad waived its right to hearing in this matter?

Lynden takes the position that the railroad has waived its right to hearing, that the waiver is final, and that the waiver cannot be rescinded unless Lynden agrees. Lynden argues that the railroad should not be allowed to contest the requested crossing and any evidence or testimony presented by the railroad should be disregarded. However, Lynden provides no case law or authority to support the proposition that the railroad's waiver is final and cannot be rescinded. The primary responsibility for deciding whether Lynden's proposal should be granted rests with the Commission. The Commission set the matter for hearing, and included the railroad as a necessary party in interest. The railroad has unique expertise in this area, will be required to incur additional maintenance costs if Lynden's request is granted, and may be required to incur additional construction costs. Under these circumstances, the Commission was correct in including the railroad as a necessary party in interest.

ADDITIONAL LEGAL ISSUES CONCERNING LACK OF JURISDICTION AND IMPAIRMENT OF CONTRACT.

Both of these issues were raised earlier by Lynden and disposed of in an interlocutory order. See Appendix B. Lynden reargues the issues in its closing brief. The interlocutory order was correct and should be affirmed, with the clarification that the actions of the Commission in this matter constitute a valid exercise of the police power and are not properly the basis for a Constitutional challenge regarding impairment of contract and the interlocutory order is meant to be a final ruling on that issue for purposes of the initial order.

Based on the entire record and the file in this matter, the undersigned administrative law judge makes the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

- 1. On October 15, 1992, the city of Lynden filed with the Commission a petition for an order directing the construction of a grade crossing at Alder Street in the city of Lynden. On October 13, 1992, the respondent, Burlington Northern Railroad, indicated that the petition should be granted and waived a hearing in this matter. However, by letter dated January 18, 1993 and directed to the Commission with no copy to the city, the railroad indicated that it desired to withdraw the waiver and have the matter set for hearing. It was not until the city received the Commission's Notice of Hearing, dated April 27, 1993, that the city was apprised of the railroad's attempted withdrawal of the waiver.

Six witnesses appeared on behalf of the city of Lynden.

2. Egbert Maas, mayor of Lynden, appeared in support of the petition. He described the growth patterns in Lynden during the past few years. Since 1981, Lynden has grown by 2,000 persons. Its current population is 6,450. In the next 20 years, the city's population is scheduled to double. Most of this development is taking place on the northern and eastern side of Lynden, which directly impacts Bender Road, a major north south arterial. In particular, he outlined development along Bender Road. These developments include the Homestead (see footnote 1, p. 2 above), and two other smaller housing developments. The Bender ballfields also contribute to congestion along Bender Road with fans and players going to and from the park. These ballfields were developed in the 1970's and include spectators and participants in football, soccer and other recreational sports. In 1992, there were 121,000 participants, not counting spectators, in games at Bender Park. The volume of this participation grows each year. A church is also scheduled for construction north of the ballfield. Near Bender Road are Lynden High School and the Lynden Christian School complex, which includes a high school, a middle school and an elementary school. Approximately 1400 students attend school in this complex. Adjacent to the complex is the city park which is Lynden's recreation/swimming pool facility which includes racquetball and tennis courts. There are also three other public schools near Bender Road. There are also plans for an additional school in the Bender Road area during the next 20 years.

The mayor described the increased traffic on Bender Road. If Bender Road were joined by the proposed Alder Street crossing, it would connect to Grover Street, a major east west arterial. This would result in much of the traffic from Bender being diverted away from the ballpark and the schools. The city also claims that installation of the proposed Alder Street crossing would reduce traffic at the other crossings. According to the mayor, there has not been an accident at a railroad crossing in Lynden. T 20. If the crossing is approved, the city proposes to pay for rubberization of the crossing.

3. Jack Louws, a Lynden city councilman, testified in support of the petition. Mr. Louws also owns property adjacent to the proposed crossing. He has no opposition to the proposed crossing due to the slow speed of the train and the fact that it comes in and leaves town once a day five days a week so it does not constitute heavy railroad usage.

He also testified concerning improvements which were made to Alder Street after the railroad had executed a waiver of its right to a hearing on the proposed crossing. These improvements included grading and making Alder a somewhat heavier street in

anticipation of construction of the crossing and of Alder becoming part of an arterial connection between Bender and Grover. The cost of the improvements was between \$55,000 and \$60,000. Some of these improvements would have been required without the proposed crossing. According to witness Kimpel in Finding of Fact 6 below, approximately \$40,000 in costs were associated with preparation for the proposed crossing. In other words, \$20,000 would have been expended if no proposed crossing had been planned.

4. Gary Kamps, superintendent of the Lynden Christian School, Lynden, testified in support of the petition. He also testified on behalf of the Lynden Christian school board. The school is composed of an elementary school, a middle school and a high school. It has a total of 1050 students and 89 teachers and employees. Mr. Kamps described the congestion caused by traffic past the school. This traffic is particularly heavy before and after school when students and parents are traveling to and from the school. Traffic is also heavy when athletic events are scheduled. Football games may mean 2,000-3,000 in attendance on the school grounds. The gym can also hold up to 1500 spectators at high school basketball games. Speaking for himself and the school board, the witness supports the proposed crossing as a means of diverting traffic away from the school and making the streets near the schools safer and less congested.

5. Jack Foster, Lynden police chief, testified in support of the proposed crossing. Chief Foster reviewed records of traffic accidents in Lynden back to 1976 and found none involving motor vehicles and trains. He also indicated that the speed limit for motor vehicles in the vicinity of the proposed crossing would be 25 miles per hour. He also confirmed the congestion in the Lynden Christian school area before and after athletic events. He believes that the addition of the proposed crossing would reduce this congestion.

6. Terry Kimpel, Lynden public works director, testified in support of the application. He testified concerning Lynden street expenditures connected with the proposed crossing. See Finding of Fact 3, above. He also evaluated above or below grade crossings at the site of the proposed Alder Street crossing and determined that above or below grade crossings would not be feasible.

Mr. Kimpel also testified concerning use of the Bender Road ballfield. In 1993, he expects 1,952 games will be played at the field. This is a three fold increase since 1983. Total players and spectators for the first nine months of 1993 numbered 143,513. Of these, one third are players and two thirds are spectators. The ballfield receives its heaviest use from May through mid October.

Finally, the witness testified concerning the scope of the proposed Homestead development as well as other developments which are planned near Bender Road, including a 100 unit mobile home park and a 700 unit residential development. He also indicated that there is no other effective means of avoiding congestion near the schools unless the Alder Street crossing is installed.

7. Michael Riggs, senior traffic engineer, David Evans & Associates, Bellevue, testified as to the need for the proposed crossing. He specializes in transportation and traffic engineering. In preparation for his testimony in this case, he reviewed the Lynden residential development proposals, the current crossing area as well as observing current train operations. He noted that to the east, the Grover crossing is about 900 feet from the proposed Alder crossing; to the west, the Nooksack crossing is about 300 feet from the proposed Alder crossing. The Burlington Northern track goes into Lynden and terminates in an industrial area about 3200 feet west of the proposed Alder Street crossing. Once a day, five days a week in the afternoon between 4:30 and 5:30 p.m., the train comes into the Lynden commercial area, drops off and picks up cars and then leaves Lynden. These switching activities usually do not affect the proposed crossing. The proposed crossing is blocked for a total of about two minutes as the train arrives and departs Lynden. The train operates at less than 10 miles per hour. According to this witness, the slow moving train presents less of a hazard at the proposed crossing than would trains with more speed.

The witness performed July traffic counts adjusted for period when school was in session and projected these counts ten years into the future using estimates of trip generation from differing land uses. His calculations show an 87 percent increase in traffic and an increased likelihood of pedestrian and vehicle accidents. This is true at the existing crossings, near the schools particularly the Lynden Christian schools and along Bender Road. For example, Bender Road is shown to have 4,600 average daily traffic at present based on an actual traffic count done in July, 1993, adjusted for the period when school is in session. If the proposed crossing is installed, it would have the effect of reducing traffic on the street that runs near the schools as traffic would be diverted to the Alder Street crossing and then to Grover Street, a major east-west arterial. There is no other alternative solution to the traffic congestion problem on Bender Road. At present, the First Street crossing is used by an estimated 3,130 vehicles per day while the Nooksack crossing is used by 1,470 vehicles per day. When the train arrives and performs switching activities to pick up and drop off cars, these two crossings can be blocked for as long as 15 minutes at a time. Installation of the Alder Street crossing would reduce the likelihood of car train collisions at the other crossings in Lynden

and would reduce the numbers of cars waiting at the crossings, particularly the First Street and the Nooksack Avenue crossings. According to the witness, fewer cars queued at the crossing means less likelihood that drivers will try to beat the train. The Alder Street crossing would also have the beneficial effect of diverting traffic from the First Street and Nooksack crossings which are more likely to be blocked for a longer time due to switching activities.

The witness also visited the proposed crossing site. The proposed crossing site is not suitable for an above grade or below grade crossing. Mr. Riggs observed brush and a pile of dirt in the sight distance area. This brush and any other obstacles which are in the sight distance area must be removed in order to have the required sight distance at the crossing. The required sight distance also assumes construction of no new structures within the sight distance area. The required distance is that which is required by a vehicle traveling 25 miles per hour to stop when the approaching train is traveling 10 miles per hour.

Four witnesses appeared on behalf of the railroad.

8. Dennis Heatherington, coordinator for the Operation Lifesaver program for Burlington Northern, testified in opposition to the proposed crossing. Mr. Heatherington has worked for the railroad for the past 27 years in a variety of capacities including locomotive fireman and engineer. As coordinator of Operation Lifesaver, he is responsible for educating the public regarding railroad crossing safety. This is done through speaking engagements at public and private schools, clubs and other civic organizations. He also conducts seminars in accident investigation. As part of his job responsibilities, he keeps annual statistics on train and motor vehicle collisions in the 26 states in which Burlington Northern operates. He noted that in the first seven months of 1993, the highest frequency of such accidents is for trains going between one and nine miles per hour and at crossings protected only with crossbucks. According to the witness, collisions are usually caused by driver inattention or trying to beat the train across the crossing to avoid being delayed. Signalization at the crossing increases driver awareness of the presence of a train and promotes public safety. The witness claims that closing crossings has the effect of funneling traffic to other crossings and reducing the overall number of collisions. He recommends that if the Alder Street crossing is opened, between one and three other crossings in Lynden should be closed. The remaining crossings should be upgraded to accommodate additional traffic. As there would be fewer crossings, there would be fewer opportunities for collisions.

9. James Tracy, a retired Burlington Northern engineer, testified in opposition to the proposed crossing. During his employment, he worked on the Lynden portion of the railroad line as

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a switcher. He described the train's switching operations as loaded rail cars were exchanged for empty rail cars in Lynden's commercial area. The train runs during the week and has seven to eight cars.

10. John Michael Cowles, coordinator of public programs for the railroad, testified in opposition to the proposed crossing. He coordinates all public works projects for the railroad in Washington with city and county agencies. His review of documents published by the Federal Railroad Administration show a higher incidence of car-train accidents where the train is traveling between one and nine miles per hour. These figures also show increased risk of collisions as the number of trains using the track increases as well as increases in the number of vehicles crossing the tracks. Mr. Cowles also reviewed statistics kept by Burlington Northern and found that in contrast to the city's claim that there were no accidents involving its crossing, that a vehicle had hit a train at the First Street crossing on September 2, 1989. Mr. Cowles also indicated that it is the policy of the Federal Highway Administration and the Federal Railroad Administration that they will work together to reduce the number of grade crossings by at least 25 percent nationwide. He believes that it is safer to have fewer crossings in Lynden.

Mr. Cowles also testified concerning waiver of hearing in this case. Although he initially waived the railroad's right to hearing in this case, he subsequently learned of additional safety concerns about the proposed crossing and rescinded the waiver. With respect to signalization, Mr. Cowles indicates that if flashing lights and gates are installed at the proposed crossing, it will reduce the likelihood of accidents.

11. Terry Gibson, president, Gibson Traffic Consultants, Everett, testified in opposition to the proposed crossing. The company is a consulting and engineering firm specializing in traffic engineering and transportation planning. Mr. Gibson is traffic engineer for the firm. He has reviewed the proposed Alder Street crossing. He reviewed statistics on train speed and its effect on accident crossings and found that while fatalities are lower at speeds of one to nine miles per hour, there is still a number of accidents which injure the vehicle's occupants when car train accidents occur at these speeds. Installing flashing lights and gates at the crossing would reduce the number of accidents at the crossing by one third.

He also analyzed present and future traffic patterns in Lynden and questioned the need for the Alder Street crossing as a means of addressing traffic congestion. He also indicated that the times when schools would be beginning and ending would not correspond with the peak traffic periods in the morning and evening so there would be less congestion than that described by Mr. Riggs.

He also noted that the approach to the proposed crossing is 40 feet wide north of the crossing and 30 feet wide south of the crossing and that this made the crossing somewhat more difficult to negotiate for drivers.

He also noted that if Alder becomes an arterial, the ability of residents to back out of their driveways onto Alder would be limited and the volume of traffic on Alder would increase substantially with a corresponding reduction in safety and "liveability".³ In essence, the witness asserts that the more traffic Alder Street has, the less pleasant and safe the street will be for residents.

He maintains that increasing the number of crossings will increase the number of accidents and slower trains may increase the number of accidents as the train spends more time in the crossing thus increasing the likelihood of an accident.

He also calculated the sight distances at the proposed crossing site using speeds of 25 to 30 mph and found the sight distances to be inadequate. He recommended advisory speed plates with limits of 15 to 20 miles per hour due to sight distance limitations. He also recommended standard railroad signs, flashing lights, a post mounted flashing signal and automatic gates. These control devices would mitigate the effects of poor sight distances and help to make conditions safer for vehicles crossing the track.

One witness appeared for Commission Staff.

12. Gary Harder, rail specialist for the Commission, testified regarding his inspection of the proposed crossing site. He offered panoramic pictures of the crossing site and recommended that if the crossing is opened, that it be signalized with shoulder mounted, automatic flashing light signals with gates. He also indicated that the Second Street crossing could be closed to all but local usage. He also suggested that consideration be given to closing the Hawley Street crossing.

³The witness discussed the liveability concept or whether a resident in the area can back out of his driveway safely as part of the basis for formulation of his expert opinion that the proposed crossing would increase traffic on Alder Street and make it less liveable for persons residing there. Traffic increases of 900 cars per day would jeopardize liveability in the Alder Street area. The witness acknowledged that liveability was not a professional standard.

Four members of the public appeared as witnesses.

13. Donald Tenkley, a resident of Lynden who lives at the intersection of Grover and Alder, testified in opposition to the proposed crossing. His opposition is based on the anticipated increase in traffic on Alder if the crossing is installed.

14. Ron Wagter, an Alder Street resident, also opposed the proposed crossing due to increased traffic on Alder. He considers the increase in traffic will make the street less safe and will result in property devaluation.

15. Sallysue C. Hawkins, an Alder Street property owner, testified in opposition to the proposed crossing. She believes that the increased traffic if the crossing is installed will make Alder Street less safe.

16. Mary Ann Gross, a Lynden resident who lives north of the proposed crossing, testified in opposition to the petition based upon increased traffic and absence of adequate stop signs and cross walks in the area.

Lynden offered several rebuttal witnesses.

17. Charles Burnham, a civil engineer specializing in railroad engineering from the David Evans and Associates consulting firm, testified concerning the proposed crossing. He has viewed the crossing site and supports the installation of the crossing, with signalization and gates, as beneficial to the safety of the Lynden community as a whole. He makes this recommendation because of reduction in use of other Lynden crossings, the low train usage at the proposed crossing site, and infrequent switching at the proposed crossing. He also observed the proposed site on the morning of the second hearing and after noting that some of the piles of dirt and debris had been cleared, he concurred with Mr. Gibson's view that sight distances would be adequate if there is grade crossing signalization and gates.

18. James Kaemingk, Lynden city council member, testified concerning the history of street width proposals north and south of the proposed Alder Street crossing. He acknowledged that the width of the street at the north part of the proposed site was 40 feet but the width south of the proposed site was reduced to 30 feet at the request of residents on that portion of Alder Street.

19. The proposed crossing site, if properly signalized with shoulder mounted gates and flashing lights, is suitable for a crossing with adequate sight lines and appropriate topography. It is in an area of minimal use by slow moving trains. The proposed

crossing site will not create additional numbers of vehicles crossing the railroad right of way, but will redistribute existing traffic from crossings marked only with crossbucks to a crossing fully equipped with gates and flashing lights. The proposal will divert traffic further away from switching activities, divert traffic from schools and a ballpark and improve overall traffic flow. It will help to alleviate growth related congestion. As a part of the proposal, Lynden will upgrade two existing crossings.

20. Signalization in the form of shoulder mounted gates and flashing lights is required to render the proposed crossing as safe as possible.

21. Brush and trees presently obstructing the sight distance must be removed from the site of the proposed crossing.

22. It is not feasibly to install a grade separated crossing at the site of the proposed crossing.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this petition and the parties thereto. The Commission has not waived its jurisdiction over the petition for an order authorizing installation of the Alder Street crossing.

2. RCW 81.53.030 requires a Commission order to authorize construction of a grade crossing. In this case, the city has met its burden of establishing that such a crossing should be established, subject to certain conditions.

3. The crossing site must be signalized with shoulder mounted gates and flashing lights. The cost of installing signals is to be apportioned between the parties in accordance with RCW 82.53. If the parties cannot agree on how to apportion these costs, Lynden may request that this matter be reopened to resolve the issue.

4. Brush and trees obstructing the crossing sight line must be removed. The railroad is responsible for clearing obstructions on the railroad right of way. Lynden is responsible for clearing all obstructions not located on the railroad right of way.

5. All motions consistent with this initial order are granted; those motions which are not consistent with this order are denied.

Based on the above proposed findings of fact and conclusions of law, the undersigned administrative law judge makes the following initial order.

ORDER

WHEREFORE, IT IS HEREBY ORDERED That the petition of the city of Lynden for authorization to construct the Alder Street crossing is granted upon the conditions set forth in this order; and

IT IS FURTHER ORDERED That all motions consistent with the terms of this initial order are granted; those inconsistent with the initial order are denied.

DATED at Olympia, Washington, and effective this 24th day of November, 1993.

OFFICE OF ADMINISTRATIVE HEARINGS



ROSEMARY FOSTER
Administrative Law Judge

NOTICE TO PARTIES:

This is an initial order only. The action proposed in this order is not effective until a final order of the Utilities and Transportation Commission is entered. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within a time limit as outlined below.

Any party to this proceeding has twenty (20) days after the service date of this initial order to file a Petition for Administrative Review, under WAC 480-09-780(2). Requirements of a Petition are contained in WAC 480-09-780(3). As provided in WAC 480-09-780(4), any party may file an Answer to a Petition for Administrative Review within ten (10) days after service of the Petition. A Petition for Reopening may be filed by any party after the close of the record and before entry of a final order, under WAC 480-09-820(2). One copy of any Petition or Answer must be served on each party of record and each party's attorney or other authorized representative, with proof of service as required by WAC 480-09-120(2).

In accordance with WAC 480-09-100, all documents to be filed must be addressed to: Office of the Secretary, Washington Utilities and Transportation Commission, 1300 South Evergreen Park Drive S.W., PO Box 47250, Olympia, Washington, 98504-7250. After reviewing the Petitions for Administrative Review, Answers, briefs, and oral arguments, if any, the Commission will by final order affirm, reverse, or modify this initial order.