Johan Hellman
Executive Director
State Government Affairs

BNSF Railway Company
2454 Occidental Ave. South, Bldg. 1A
Seattle, WA 98134
tel 206.625.6135
fax 206.625.6125
johan.hellman@bnsf.com

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Mr. Steven King
Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, WA 98504-7250

RE: Docket TR-151079, Rulemaking to Consider Adoption of Rules Relating to Rail Safety

Dear Mr. King:

Thank you for this opportunity to provide written comments relating to the Washington Utilities and Transportation Commission's (the "Commission") inquiry to update railroad annual reporting requirements regarding financial responsibility and safety standards for private crossings. The rulemaking was initiated as a result of the Washington State Legislature's (the "Legislature") recent passage of ESHB 1449, which Governor Jay Inslee signed into law May 14, 2015. This letter will individually address the issues of financial responsibility requirements and safety standards for private crossings, and end with some brief concluding remarks.

A. Financial Responsibility

Section 10(1) of ESHB 1449 calls on the Commission to "require a railroad company that transports crude oil in Washington to submit information to the commission relating to the railroad company's ability to pay damages in the event of a spill or accident involving the transport of crude oil by the railroad company in Washington." The new law stipulates in Sections 10(2) and 10(3) respectively that the commission may not use the information submitted by a railroad company as a basis for "engaging in economic regulation of a railroad company" or as a basis for "penalizing a railroad company."

These stipulations were an appropriate recognition by the Legislature of the state's limitations in regulating railroads. As common carriers, railroads are legally obligated to accept hazardous material (including oil) as cargo, and to deliver these cargo wherever their tracks run, including Washington. The corollary of that obligation is a longstanding Congressional mandate that the safety of railroad operations remain substantially free of state-specific legal duties. The Interstate Commerce Commission Termination Act (the "ICCTA") categorically preempts state efforts to regulate the financial fitness of rail carriers and broadly preempts any preclearance requirements that might prohibit rail operations through a state until or unless those operations meet certain state mandates.

Economic regulation of railroads is the exclusive jurisdiction of the Surface Transportation Board (the "STB"). Federal courts have repeatedly recognized this broad preemptive authority to such an extent that the STB has observed that "every court that has examined the statutory language has concluded that the preemptive effect… is broad and sweeping and that it blocks actions by states or localities that would impinge on… a railroad's ability to conduct its operations."[1]

Given the broad preemptive authority the federal government exercises over state governments with respect to railroad operations, and given the role of the STB in overseeing this authority (specifically with regard to the financial fitness railroads), it seems the Commission has limited options in terms of the financial reporting requirements it may impose on railroads. Even so, every Class I railroad operating in the United States is required to provide the STB with an annual report (popularly referred to as an "R-1"). This report includes information about earnings, operating expenses, and other financial data, and is made available to the public. For the purposes of meeting the legislative mandate that railroads report financial information to the Commission, submittal of this report along with the annual report currently provided to the Commission seems a reasonable approach.

However, the legislative mandate extends beyond simply providing financial information to the Commission. Section 10(1) also requires railroads to provide "a statement of whether the railroad has the ability to pay for damages resulting from a reasonable worst case spill of oil, as calculated by multiplying the reasonable per barrel cleanup and damage cost of spilled oil times the reasonable worst

[1] CSX Transp., Inc. – Petition for Declaratory Order, 2005 WL 584026, at *6 (STB served March 14, 2005).

case spill volume as measured in barrels." We predict that meeting the requirement of this provision through rulemaking will prove challenging for the Commission.

While the railroad does not have a suggestion at this time of what the appropriate thresholds might be, we simply caution that whatever threshold is reached may be seen as arbitrary and, therefore, vulnerable to challenge. Further, it seems that determining these thresholds individually at the state level could run afoul of the kind of patchwork of state regulations that federal statute and oversight of the railroads was initiated to protect against. To this point, work at the federal level to define these thresholds would preempt definitions at the state level, so careful observation of any federal activity will be important as this rulemaking proceeds.

Finally, we would simply note that the issue of financial responsibility is also addressed in Sec. 4(2)(a) of ESHB 1449, which requires that the "owner or operator of each onshore and offshore facility shall… establish compliance with… financial responsibility requirements under federal and state law." However, subsection 3 of this section specifically exempts railroads from this condition, as follows: "Plan requirements in subsection (2) of this section are not applicable to railroad facility operators while transporting oil over rail lines of this state."

B. <u>Private Rail Crossings</u>

Section 22 of ESHB 1449 directs the Commission to adopt rules governing the safety of private crossings in the state, including the ability to order improvements. While we certainly support the state's efforts to improve safety at private crossings, we respectfully request that the Commission clarify in rule that the Commission cannot modify existing agreements between the railroad company and the landowner governing cost allocation for upgrades to private crossings.

We understand that current law[2] provides the Commission the authority to assign costs for upgrades to *public* crossings, but there is no corresponding provision for private crossings, and that ESHB 1449 does not provide one. Further, we understand that the Commission has no authority to impair contracts between railroads and private crossing owners. The Commission has been clear that

[2] See RCW 81.53.130.

while it may direct a railroad to make improvements at a private crossing, the allocation of costs for such upgrades is a matter left to private contracts.

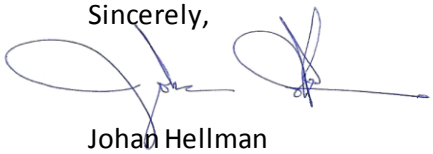
Regardless, we believe it is important to avoid any potential for confusion by being absolutely clear of these restrictions in the rule. For this reason, we respectfully request that the Commission include language with the following effect: "Nothing in this section modifies existing agreements between the railroad company and the landowner governing cost allocation for upgrades to private crossings."

C. Conclusions

In conclusion, I would simply reiterate that BNSF appreciates this opportunity to work with the Commission to advance our mutual interest in increasing and enhancing railroad safety in Washington. As previously stated, regulation of railway companies poses special challenges at the state level given the federal government's extensive and overarching regime. That said, we look forward to working with you in order to navigate these complexities.

Thank you for your consideration.

Sincerely,



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